MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

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CLERK OF THE SUPREME COURT

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COURT OF APPEALS CASES

DANCEY v TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

Docket No. 288615. Submitted November 10, 2009, at Lansing. Decided April 6, 2010, at 9:00 a.m.

Luann M. Dancey brought an action in the Oakland Circuit Court, John J. McDonald, J., against Travelers Property Casualty Company of America, seeking, under a commercial automobile insurance policy issued to Maryland Electric Company, Inc., the employer of plaintiff's former husband, uninsured motorist (UIM) benefits for injuries sustained in a single-vehicle accident that occurred when the vehicle driven by plaintiff struck a ladder lying in the roadway of I-696 at the interchange of I-696 and I-75 in Royal Oak. Defendant sought summary disposition on the grounds that plaintiff was not an "insured" as that term is defined in the policy for purposes of UIM coverage and that there was no evidence that the accident was caused by the driver of an uninsured motor vehicle. The trial court denied the motion, ruling that the vehicle driven by plaintiff was covered by the policy and there was a genuine issue of material fact whether the driver of an uninsured vehicle caused the accident. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. The trial court erred by concluding that the vehicle driven by plaintiff was a covered automobile, thus making plaintiff an insured under the UIM endorsement. However, there remain questions of fact regarding whether plaintiff is a named insured and whether the policy provided UIM benefits for plaintiff. Therefore, the trial court reached the right result, albeit for the wrong reasons, with regard to its denial of the motion for summary disposition.

2. Defendant's policy provides UIM coverage in two situations: where there is vehicle-to-vehicle contact (direct physical contact) and where an unidentified vehicle causes an object to hit the insured's vehicle (indirect physical contact).

3. Plaintiff presented evidence regarding the location where the accident occurred that supports an inference that the ladder must have fallen off another vehicle. A reasonable juror could

conclude from the evidence that the presence of the ladder in the roadway, under the circumstances of this case and in the absence of any other reasonable explanation for the ladder's presence, established a substantial physical nexus between a hit-and-run vehicle and the ladder. The evidence regarding the accident's location created a question of fact with regard to whether a substantial physical nexus exists between the ladder and an unidentified hit-and-run vehicle. This case does not require the Court of Appeals to establish an affirmative link between a particular hit-and-run vehicle and the ladder. Although some degree of speculation is necessary to determine exactly how the ladder arrived at its location, under the unique set of facts in this case, such speculation is permissible.

Affirmed and remanded.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Erlich, Rosen & Bartnick, P.C.* (by *Jeffrey S. Cook*), for plaintiff.

Plunkett Cooney (by *Robert G. Kamenec* and *Stanley A. Prokop*) for defendant.

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

O'CONNELL, J. Defendant, Travelers Property Casualty Company of America (Travelers), appeals by leave granted an August 27, 2008, order of the Oakland Circuit Court denying its motion for summary disposition. For reasons slightly different from those articulated by the trial court, we affirm the denial of the motion for summary disposition and remand this case back to the trial court for further proceedings consistent with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. OVERVIEW

On November 2, 2004, plaintiff, Luann M. Dancey, was involved in a single-vehicle accident after hitting a

ladder lying in the roadway. In November 2007, plaintiff filed a complaint seeking uninsured motorist (UIM) benefits from defendant under a policy issued to Maryland Electric Company, Inc. (Maryland Electric). Defendant moved for summary disposition on two grounds: (1) plaintiff was not an "insured" as that term is defined by the policy for purposes of UIM coverage, and (2) there was no evidence that the accident in question was caused by the driver of an "uninsured motor vehicle." The trial court denied defendant's motion, ruling that the vehicle that plaintiff was driving at the time of the accident, a 2004 GMC Envoy, was covered by the policy and that there was at least a genuine issue of fact whether the driver of an uninsured vehicle caused the accident.

On appeal, defendant argues that an "insured" for purposes of UIM coverage is limited to anyone occupying a vehicle owned by Maryland Electric. Because Maryland Electric did not own or lease the Envoy, plaintiff was not entitled to coverage. Defendant also argues that based upon caselaw and the lower court record, no evidence exists that this accident was caused by the driver of an "uninsured motor vehicle."

We agree with the trial court that there exists a question of fact regarding whether this accident was caused by the driver of an "uninsured motor vehicle." However, while we disagree with the trial court that plaintiff has "conclusively" established that plaintiff is a named insured, we conclude that there exists a question of fact whether plaintiff is a named insured as that term is defined in defendant's policy. Therefore, for slightly different reasons, we affirm the decision of the trial court. We remand this case back to the trial court for further proceedings consistent with this opinion.

II. FACTS

A. THE INSURANCE POLICY

Plaintiff is the former wife of David Dancey; the couple divorced in August 2007. David was employed by Maryland Electric, a company that was owned by his parents and a third person. Defendant had issued a commercial automobile policy to Maryland Electric covering the 2004 calendar year.

The policy at issue covers eight private passenger vehicles and 48 trucks, but they are not individually identified by year, make, or model. Rather, covered vehicles are identified by a symbol corresponding to the type of coverage available. Specifically, "[t]he symbols entered next to a coverage on the Declarations designate the only 'autos' that are covered 'autos.' " The policy also contains a UIM endorsement, which provides, in part:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle".

Plaintiff had previously owned a GMC Yukon. In January 2004, David leased a 2004 GMC Envoy from the Pat Moran Oldsmobile dealership (the dealership) as a replacement vehicle for the Yukon. Plaintiff notified her insurance agent that the Yukon was being replaced with the Envoy. The lease that David signed with the dealership indicates that the Envoy was covered under defendant's policy. Plaintiff testified that Maryland Electric indirectly purchased vehicles for certain employees by giving them a monthly car allowance and that the employees, as well as their spouses, were covered under the

company's insurance policy with defendant. She further testified that she was required to sign a written lease agreement with Maryland Electric under which the Envoy, which was titled in plaintiff's name, was leased to Maryland Electric, thereby bringing the car and herself under the umbrella of defendant's insurance policy. Plaintiff also produced a certificate of insurance that named both herself and Maryland Electric as insured parties under the policy issued by defendant. Plaintiff testified that "she was actually a named insured" because the certificate of insurance for the Envoy identified plaintiff as an insured.

After the trial court denied defendant's motion for summary disposition, and before this Court granted leave to appeal, the trial court allowed the parties to reopen discovery. The parties took the deposition of plaintiff's insurance agent, Rodney Grawel, who is the general manager of Valenti Trobec Chandler, the insurance agency that sold the policy to Maryland Electric. Grawel testified that Maryland Electric had insured plaintiff's Envoy under a policy that it had with Travelers. Grawel testified that in January 2004, he processed a change request with Travelers to remove the Yukon from the policy, add the Envoy to the policy, and add plaintiff as a named insured to the policy. He also testified that as part of the process of incorporating the Envoy into the insurance policy, Maryland Electric would have to acquire an insurable interest in the vehicle, which would be accomplished when plaintiff signed a leaseback agreement for the Envoy with Maryland Electric. No leaseback agreement between Maryland Electric and plaintiff was produced at the hearing on the motion for summary disposition.[1]

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[1] We make no determination whether such a leaseback agreement exists and leave that decision to the fact-finder.

B. THE ACCIDENT

On November 2, 2004, plaintiff was driving the Envoy when she was involved in an accident at the interchange of I-696 and I-75 in Royal Oak. She entered eastbound I-696 at or near I-75 and gradually moved toward the far left of the four lanes. In this area I-696 rises far above I-75, and noise mitigation and retaining walls line the roadway on either side of the interchange. It is not an area that pedestrians or other nonvehicular traffic can enter. Access to the overpass, in essence, is limited to motor vehicles.

When plaintiff was in the center left lane or the far left lane, she noticed a "huge steel construction ladder partially opened" angled across the entire lane. Plaintiff had not seen it earlier because her view was obstructed by another vehicle. Plaintiff "had a split second to make a decision do I try to run over or do I swerve." She opted to try to avoid the ladder and pulled sharply to the right, but was unable to avoid the ladder completely. Plaintiff lost control of the car, the "front left tire blew," and the car rolled over. The area where the accident occurred was not under construction and none of the evidence presented suggests how long the ladder had been in the road, how it came to be there, or who was responsible for leaving it there.

Plaintiff argues that because she is a named insured under defendant's policy and her vehicle is leased to Maryland Electric, both the vehicle and plaintiff are covered under the policy. Furthermore, she contends, because the ladder fell from another vehicle that could not be identified, this accident is covered under the UIM endorsement to the policy.

III. ANALYSIS

As we have previously stated, defendant moved for summary disposition on two grounds: (1) plaintiff was

not an "insured" as that term is defined by the policy for purposes of UIM coverage,[2] and (2) there was no evidence that the accident was caused by the driver of an "uninsured motor vehicle." The trial court denied defendant's motion on both grounds, ruling that the Envoy was covered by the policy and that there was at least a genuine issue of fact concerning whether the accident was caused by the driver of an uninsured vehicle.

A. STANDARDS OF REVIEW AND BASIC PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION

We review the trial court's ruling on a motion for summary disposition de novo. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). The construction and interpretation of an insurance policy and whether the policy language is ambiguous are questions of law, which we also review de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

"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). When reviewing a motion under MCR 2.116(C)(10), we consider the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

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[2] In particular, defendant argued that an "insured," for purposes of UIM coverage, was limited to anyone occupying a vehicle owned by Maryland Electric. Because Maryland Electric did not own or lease the Envoy, plaintiff was not entitled to coverage.

"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*, 469 Mich at 183.

"An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). "The policy application, declarations page of [the] policy, and the policy itself construed together constitute the contract." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). An insurance contract should be read as a whole, with meaning given to all terms. *Id*. A clear and unambiguous contractual provision is to be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). "Clear and unambiguous language may not be rewritten under the guise of interpretation," *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997), and "[c]ourts must be careful not to read an ambiguity into a policy where none exists," *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), or "when [a term] is *equally* susceptible to more than a single meaning," *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (emphasis in original). "However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear." *Mich Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).

B. WHETHER PLAINTIFF IS AN INSURED

The UIM endorsement obligates defendant to pay those sums that an "insured" is entitled to recover from the owner or driver of an uninsured vehicle. Although the Business Auto Coverage Form defines the term "insured," that definition is modified for purposes of the UIM endorsement. If the named insured identified in the declarations is a company or some other organization, i.e., not an individual, an "insured" is defined, in pertinent part, as follows:

> Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

For purposes of UIM coverage, a covered "auto"[3] is identified by the symbol "2," which is described in the Business Auto Coverage Form as follows:

> OWNED "AUTOS" ONLY. Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.

The term "you," as defined in the policy, refers to "the Named Insured shown in the Declarations." Thus, an "insured" for purposes of UIM coverage is a person who is occupying an auto owed by the named insured, i.e., Maryland Electric.

Defendant claims that because the Envoy occupied by plaintiff was owned by the dealership and leased to plaintiff's then-husband David, it was not owned by the named insured and was not covered by the UIM en-

[3] The term "auto" refers to a motor vehicle. There is no dispute that the Envoy is an "auto."

dorsement. Because plaintiff was not occupying a covered auto, she was not an insured for purposes of receiving UIM benefits.

Plaintiff did not specifically dispute defendant's reading of the relevant policy terms. Rather, she noted that the policy included an endorsement for leased vehicles, that there existed a leaseback agreement, a certificate of insurance naming her as a named insured, and a policy change request that added the Envoy to the policy and named her as an additional insured. Therefore, plaintiff claimed, she qualified as an insured for the purpose of entitlement to UIM benefits. The crux of plaintiff's argument was that despite what the policy said, "she was actually a named insured" on the policy because her insurance agent had added both her and the Envoy to the policy.

At oral argument on the motion for summary disposition, defendant asserted that there was caselaw indicating that the insurance certificate was not controlling and submitted copies of the relevant cases to the court. Plaintiff responded that defendant had already paid her benefits under the policy and if defendant paid benefits, she must be an insured. The trial court ruled, in pertinent part, as follows:

> The Court finds that the Envoy is a covered vehicle under the policy. Under the policy, Maryland Electric is listed as the insured and the vehicle listed is the Envoy at issue, Plaintiff's Exhibit D.[4] Under section B-2 of the policy, an insured includes anyone occupying a covered auto.
>
> Here, Plaintiff was occupying a covered auto. Further, on the certificate of insurance issued by the State of

[4] The exhibit referenced consisted of various pages of the policy. As previously noted, the policy did not describe any of the covered vehicles by year, make, or model, and the pages submitted by plaintiff do not do so either. They certainly do not refer specifically to the Envoy. In this regard, we find that a question of fact exists regarding whether the Envoy is listed as one of the eight private passenger vehicles covered by the policy.

> Michigan for the Envoy at issue, the insureds are listed as Maryland Electric Company and Luann Dancey, Plaintiff.
>
> Now, counsel, you did provide me with two cases that say that an insurance certificate is not an insurance policy, but then you also bring up the fact that they're covering her now under no fault.
>
> [*Defense counsel*]: Your Honor, I don't admit that. I don't admit that. He brought that up today, and there's no — I just — I can't admit it on the record. I —
>
> *The Court*: (Interposing) Okay. All right.

We conclude that the trial court erred by conclusively finding that the Envoy was a covered auto, thus making plaintiff an insured under the UIM endorsement. However, we also conclude that the trial court reached the right result with regard to its denial of summary disposition on this point, albeit for the wrong reasons. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001). On the basis of the facts of this case as set forth in the lower court record, there remain questions of fact regarding whether plaintiff is a named insured and whether this policy provides UIM benefits for plaintiff.

C. WHETHER THE ACCIDENT WAS CAUSED BY THE DRIVER OF AN "UNINSURED MOTOR VEHICLE"

UIM benefits are only available if plaintiff was injured in an accident with the driver of an "uninsured motor vehicle" and that driver's liability results from the ownership, maintenance, or use of the "uninsured motor vehicle." An "uninsured motor vehicle" is defined, in part, to include any land motor vehicle, i.e., "auto,"

> [t]hat is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle an

> "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident".

Defendant claims that in order for the hit-and-run vehicle to "cause an object to hit" plaintiff's vehicle, there must be a physical nexus between the hit-and-run vehicle and the object. Defendant argues that because no one could affirmatively state that the ladder fell off another vehicle, only speculation would permit a jury to conclude that there was any nexus between the ladder and the hit-and-run vehicle, and speculation is insufficient to establish a genuine issue of fact. Plaintiff argues that there was no other logical explanation for how the ladder came to be in the roadway, given that the area was not under construction, was not open to pedestrian traffic, and was not beneath an overpass from which a ladder could have fallen. Further, the language used in defendant's policy differs from that involved in the various cases cited by defendant. The trial court ruled, in pertinent part, as follows:

> Now, as to the uninsured motorist claim, the Court finds that to recover under this endorsement there must be a causal connection, a substantial physical nexus between the hit and run vehicle and Plaintiff's vehicle for Plaintiff to recover.
>
> And proof of a substantial connection with a disappearing vehicle, and in this case Plaintiff alleged that the ladder she hit must have dropped off another vehicle, is required for recovery under the uninsured motorist endorsement.
>
> If there's no direct physical contact with a hit and run vehicle, as in this case, the Plaintiff is required to show a connection between the ladder, the alleged disappearing vehicle, which must be corroborated by competent evidence.

> Here, the Plaintiff has provided evidence whereby a jury could find it more likely than not that the ladder came from a disappearing vehicle, which is sufficient for Plaintiff to maintain her claim for uninsured motorist benefits under her policy.

In several cases, this Court has addressed issues regarding coverage of accidents in which an object was alleged to have come from an unidentified vehicle. In *Kersten v Detroit Auto Inter-Ins Exch*, 82 Mich App 459; 267 NW2d 425 (1978),[5] the plaintiff was driving when she struck "an unidentified truck tire spinning in front of her on the passing lane of the highway . . . ." *Id*. at 463. The policy at issue required that the plaintiff's injuries be caused by the ownership, maintenance, or use of an uninsured motor vehicle and defined an uninsured motor vehicle to include a "hit-run" motor vehicle. *Id.* A "hit-run" vehicle was, in turn, defined as " 'a motor vehicle which causes bodily injury to an insured *arising out of physical contact* of such vehicle with the insured or with a vehicle' " occupied by the insured. *Id.* (emphasis in original). Given that the tire was mounted on a rim, that the tire was spinning, and that "the accident occurred on a limited access highway which was completely fenced on both sides and where pedestrians or nonmotorized vehicles are rarely found," the Court determined that it was not clear error for the trial court to conclude that the tire had recently fallen from a passing vehicle. *Id*. at 467-468. The Court further noted that despite the requirement that there be physical contact between the two vehicles, courts from other jurisdictions had held that indirect contact is sufficient in certain circumstances:

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[5] Because *Kersten* was issued before November 1, 1990, it is not binding on this Court. MCR 7.215(J)(1).

> Recovery is permitted where the evidence discloses a direct causal connection between the hit-and-run vehicle and plaintiff's vehicle and which connection carries through to the plaintiff's vehicle by a continuous and contemporaneously transmitted force from the hit-and-run vehicle. For example, the intermediate vehicle cases [in which the hit-and-run driver strikes a vehicle, which is then propelled into the insured vehicle] are explained because there is evidence of a simultaneous causal connection. Similarly, in the propelled object cases . . . , there is a direct causal connection by means of a continuous and contemporaneously transmitted force. Further, in such cases there is convincing evidence of a hit-and-run vehicle. But where a tire or a trunk or other piece of cargo lying on the highway is struck and, unlike the propelled stone cases, there is no clear testimony but only an inference of a contemporaneous and continuing propulsion of the object from a disappearing hit-and-run vehicle, recovery is denied. The chain of causation is stretched too thin and is too speculative. [*Id.* at 471-472.]

Given that, the Court held that the plaintiff was not entitled to UIM coverage because even though the facts permitted an inference that the tire came from a passing vehicle, they

> [did] not show a clearly definable beginning and ending of a contemporaneously occurring chain of events. Nothing links the tire and rim with the hit-and-run vehicle except an inference drawn from the presence of a spinning tire and rim on the road. Both the intermediate vehicle cases and the propelled object cases require clearly definable or objective evidence (rather than inferential evidence) of a link between a disappearing vehicle and plaintiff's vehicle. [*Id.* at 472 (emphasis omitted).]

In *Adams v Zajac*, 110 Mich App 522; 313 NW2d 347 (1981),[6] a truck tire and rim assembly were lying in the

[6] Because *Adams* was issued before November 1, 1990, it is also not binding on this Court. MCR 7.215(J)(1).

middle of an expressway. *Id.* at 525. The plaintiff's decedent either struck the tire or swerved to avoid it, lost control of his vehicle, and crashed. *Id.* A motorist driving in front of the decedent, who had successfully swerved to avoid the tire, stated that before coming upon the tire, he saw a flatbed tractor-trailer parked along the freeway where he first observed the tire. *Id.* at 525-526. The tractor-trailer was observed pulling away from the scene where the accident occurred. *Id.* at 526. The plaintiff sought recovery under MCL 257.1112,[7] which requires "physical contact between the unidentified vehicle and a vehicle occupied by the claimant [as] a condition precedent to such action." *Adams*, 110 Mich App at 526. The *Adams* Court distinguished *Kersten* on the ground that MCL 257.1112 did not specifically require "a continuous and contemporaneously transmitted force from the hit-and-run vehicle." *Adams*, 110 Mich App at 528. It then held "that the 'physical contact' takes place when a vehicle or an integral part of it comes into physical contact with another vehicle." *Id.* It did not matter whether the part was "still attached or comes to rest after being detached from the vehicle . . . ," although the Court also admitted that "in the latter case it might present some difficulties . . . in carrying the burden of proof." *Id.* at 528. The Court concluded, "[i]nferential evidence rather than objective evidence is enough to establish a link between a disappearing vehicle and plaintiff's vehicle." *Id.* at 529.

In *Hill v Citizens Ins Co of America*, 157 Mich App 383; 403 NW2d 147 (1987),[8] the plaintiff's decedent was driving on a state highway when a large camper-truck

[7] MCL 257.1112 is designed "to provide a remedy to the victim of an unidentified hit-and-run driver." *Adams*, 110 Mich App at 526. Because it is remedial in nature, it is liberally construed. *Id.*

[8] Because *Hill* was issued before November 1, 1990, it is not binding on us. MCR 7.215(J)(1).

passed him going in the opposite direction. *Id.* at 384-385. A rock " 'came through the windshield just as [the] camper passed' " the decedent's vehicle. *Id.* at 384. Plaintiff, the decedent's wife, was also in the car and claimed that the camper had caused the rock to become airborne. *Id.* at 385, The defendant had no evidence to refute this claim. *Id.* The policy in question provided UIM benefits in accidents involving hit-and-run vehicles and included the same physical contact requirement as in *Kersten*. *Id.* The *Hill* Court held that an object propelled by the unidentified vehicle into the insured vehicle is sufficient to satisfy the "physical contact" requirement as long as there is "a substantial physical nexus between the disappearing vehicle and the object cast off or struck." *Id.* at 394. The fact that the rock came through the windshield just as the camper went by was sufficient to establish such a nexus. *Id.*

In *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340; 556 NW2d 207 (1996), the plaintiff drove over an object that was lying in the road in front of her, causing her to lose control of her vehicle. *Id.* at 343. She had been unable to swerve to avoid the object because a car was passing by in the opposite direction. *Id.* She had not seen any traffic ahead of her. *Id.* However, shortly before the accident, a witness had seen a truck, which was hauling a trailer filled with scrap metal, stopped on the side of the road approximately half a mile from the accident site. *Id.* The trailer was uncovered, with two- to three-foot sides, and a man was standing by the trailer looking at the load. *Id.* The witness then saw a piece of metal in the road at the accident site, which had not been there when the witness had passed by 10 or 15 minutes earlier. *Id.* at 343-344. The accident occurred approximately ten minutes later. *Id.* at 344. The policy in question provided UIM benefits involving hit-and-

run vehicles and required that the hit-and-run vehicle strike the insured or a vehicle occupied by the insured. *Id.* at 342.

The *Berry* Court held that the presence of scrap metal in the trailer "at a time and location that was temporally and spatially proximate to plaintiff's striking a piece of metal in the road" was sufficient to establish "a substantial physical nexus between the hit-and-run vehicle and the object struck by plaintiff . . . ." *Id.* at 350. Further, given the conflict between *Kersten* and *Adams* regarding the necessity of " 'a continuous and contemporaneously transmitted force from the hit-and-run vehicle' " to the insured vehicle, the *Berry* Court held that "the presence of a 'continuous and contemporaneously transmitted force' is a significant, but not dispositive, factor to be considered in indirect contact cases in determining whether the requisite substantial physical nexus has been established." *Id.* at 350-351 (citation omitted). Although there was no such evidence in the *Berry* case, there was testimony providing the "convincing and objective evidence of a hit-and-run vehicle in the absence of a continuous and contemporaneously transmitted force." *Id.* at 351. The witness's testimony "establishe[d] a continuous sequence of events with a clearly definable beginning and ending, resulting in plaintiff's coming into contact with the piece of metal." *Id.*

The distinguishing feature between our case and cases like *Berry*, *Hill*, and *Adams* is that in those cases, there was objective and convincing evidence of another unidentified vehicle that could have been the source of the object that made contact with the insured vehicle. In *Adams*, there was a truck stopped in the same area of the road where the truck tire was located. In *Hill*, there

was a camper-truck passing by at the same moment the rock was sent flying. In *Berry*, the only case that is binding on this Court, there was a truck hauling scrap metal just down the road from the accident site and a piece of scrap metal in the road at the accident site. This case is more like *Kersten*, in that there was an object in the road and circumstantial evidence that it could have come from a vehicle, but no objective evidence of any vehicle in the area that could have been the source of the object.

Plaintiff testified that she did not see the ladder fall off a vehicle. She testified that she saw a vehicle in front of her in the center left lane just before she came upon the ladder, but this vehicle blocked her view of the ladder and thus was not the source of the ladder. Plaintiff also stated that there might have been another vehicle in front of her that changed lanes just before she noticed the ladder. That vehicle did not drop the ladder but successfully avoided it. She recalled someone at the scene mentioning a truck, but she could not say if that person "said that they saw it fall or if it was a truck. I remember everyone said it was a truck but I don't know if anyone specifically saw the truck or not." In other words, people were speculating that the ladder must have come from a truck. None of the witnesses could connect the ladder to any passing vehicle.[9]

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[9] Panels of this Court have held, in unpublished cases, that absent evidence of an actual vehicle that is the source of the object in the road, a "substantial physical nexus" between the unidentified vehicle and the object struck is not established. See, e.g., *Kerr v Citizens Ins Co of America*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2008 (Docket No. 273319) (bale of hay in the road, no evidence of any vehicle seen in the area from which it could have fallen); *Girodat v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 1997 (Docket No. 194688) (tire lying in

Defendant's policy is somewhat different from those at issue in *Kersten* and *Hill* and from the statute at issue in *Adams*, because rather than requiring direct physical contact between an unidentified vehicle and the insured's vehicle, it provides that coverage is available in two situations: (1) where there is vehicle-to-vehicle contact (direct physical contact); and (2) where the unidentified vehicle causes an object to hit the insured's vehicle (indirect physical contact). It is undisputed that plaintiff's car was not hit by another car. Further, there was no evidence that another vehicle caused the ladder to hit plaintiff's car. Even if the phrase "cause an object to hit" was not limited to instances of a direct and immediate connection between the unidentified vehicle and the object, as in *Hill*, but could be interpreted to include instances of an indirect and intermediate connection between the unidentified vehicle and the object, as in *Berry*, there was still no evidence of another vehicle in the area that was carrying a ladder at or near the time of the accident.

If this were the only evidence presented below, we would reverse the order of the trial court. However, this case is factually distinguishable from the cases cited above. Plaintiff presented evidence of the location of the accident, which supports an inference that the ladder in question must have fallen off another vehicle. This accident occurred at the intersection of I-696 and I-75 in Royal Oak. In the location where the accident occurred, the freeway on which plaintiff was operating her vehicle, I-696, rises high above another freeway, I-75. Exhibit 1 of plaintiff's brief, which we reproduce here, depicts the area as follows:

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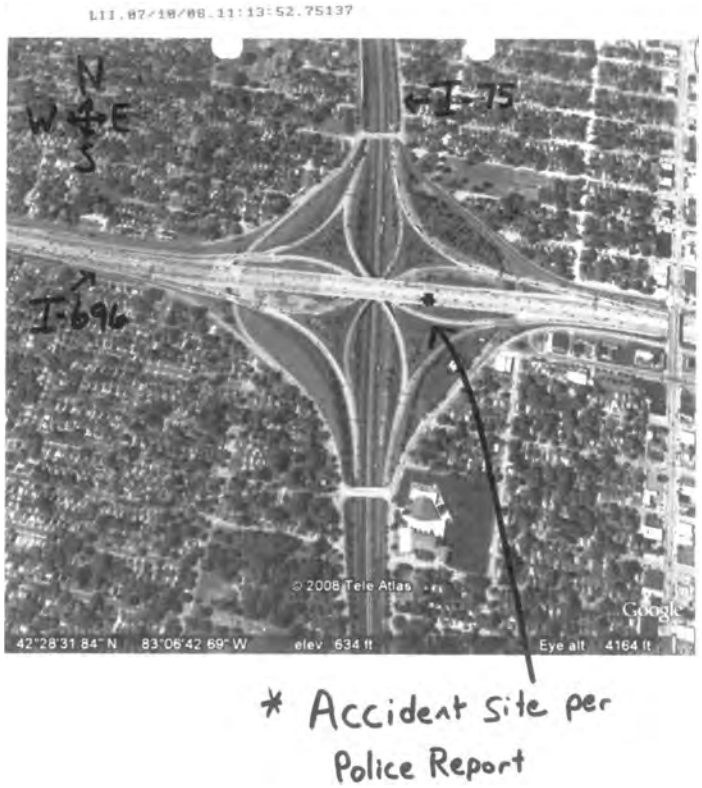
the road, no evidence of any vehicle seen in the area from which it could have fallen). Because these cases are unpublished, they are not binding on us.



The accident site is inaccessible to pedestrians and nonvehicular traffic. Other witnesses testified that no construction was taking place in the area at the time of the accident. The trial court concluded that "someone just didn't walk down the expressway . . . carrying a ladder and drop it off," and noted, "I don't think it dropped from an airplane." Upon viewing the aerial photograph of the crash site, it is obvious that this accident occurred on a raised highway in an area that is only accessible to motor vehicles. A reasonable juror could conclude that there is no reasonable explanation for the presence of a ladder in the middle of an overpass

soaring high above Royal Oak and inaccessible to non-vehicular traffic except that the ladder must have fallen off a vehicle. Accordingly, a reasonable juror could conclude that the presence of a ladder in the roadway, under these circumstances and in the absence of any other reasonable explanation for the ladder's presence, established a "substantial physical nexus" between a hit-and-run vehicle and the ladder struck by plaintiff.

Further, *Berry*, which is the only case that is binding on us, does not preclude us from considering the unique location of this accident in determining that a question of fact exists in this case. The *Berry* holding simply discussed a situation in which the Court determined that a "substantial physical nexus" was established by the proofs. See *Berry*, 219 Mich App at 350. This case does not require us to establish an affirmative link between a particular hit-and-run vehicle and the ladder lying in the roadway. And although the evidence does not establish an identifiable vehicle from which the ladder might have fallen, the evidence also permits a reasonable person to eliminate all reasonable sources for the presence of the ladder except one: the ladder fell off a vehicle (such as a work truck). *Berry* does not preclude us from considering whether evidence of an accident's location creates a question of fact with regard to whether a substantial physical nexus exists between the ladder and an unidentified hit-and-run vehicle. Although we find *Kersten*, *Adams*, and *Hill* useful to reflect on when considering the circumstances under which a "substantial physical nexus" can exist, these cases are not binding on us and do not require us to adopt a different outcome.

Although some degree of speculation is necessary to determine exactly how this ladder arrived at its location, we conclude that, under the unique set of facts in

this case, such speculation is permissible. In fact, we believe that such speculation does not surpass the level of speculation permitted by the *Berry* Court when finding that a reasonable juror could conclude that the metal found in the roadway had fallen from a truck that a witness saw in the vicinity of the accident approximately 15 minutes before the accident.

We affirm the denial of the motion for summary disposition and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

MATTHEWS v DEPARTMENT OF NATURAL RESOURCES

Docket No. 288040. Submitted January 12, 2010, at Grand Rapids. Decided April 6, 2010, at 9:05 a.m.

Glen J. and Carol J. Matthews and others brought an action in the Mecosta Circuit Court against the Department of Natural Resources, alleging that they have a prescriptive easement to access their landlocked property through certain state-owned land and to maintain a pathway of several hundred wooden pallets laid end-to-end across the wetland area of the state land for such purposes. The trial court, Scott Hill-Kennedy, J., held that plaintiffs proved a prescriptive easement across the state-owned land and could continue to use the pallet pathway without obtaining a statutorily required permit to place fill material or maintain a use in a wetland. Defendant appealed.

The Court of Appeals *held*:

1. Before March 1, 1988, claims of adverse possession or prescriptive easement were allowed against the state. Effective March 1, 1988, the Legislature amended the relevant statute, MCL 600.5821(1), to provide that a person may not acquire title to state-owned property through adverse possession or prescriptive easement. The statute, however, does not operate to extinguish rights that vested before March 1, 1988.

2. Assuming all other elements have been established, one gains title by adverse possession when the period of limitations expires, not when an action regarding the title to the property is brought.

3. A prescriptive easement results from open, notorious, adverse, and continuous use of another's property for 15 years and requires elements similar to adverse possession, except exclusivity. Plaintiffs must demonstrate an entitlement to a prescriptive easement by clear and cogent evidence.

4. Defendant did not dispute that plaintiffs' use was open, notorious, and adverse, but disputed whether their use had been continuous for a 15-year period. Because none of the plaintiffs had any ownership interest in the landlocked property until at least 1984, they must show privity of estate by tacking on the possessory

periods of their predecessors-in-interest to achieve the necessary 15-year period. Privity may be shown in one of two ways: including a description of the disputed acreage in the deed or by an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance. Plaintiffs' deeds did not convey an easement across the state land. The facts of this case show that plaintiffs, who were well acquainted with their predecessors-in-interest, must have understood that an easement was appurtenant to the land. It was undoubtedly the original owners' intent to transfer their rights to the easement to plaintiffs. The parol transfer requirement can also be satisfied in the limited circumstances where the tacking property owners are well acquainted with the predecessors-in-interest and there is clear and cogent evidence that the predecessors-in-interest undoubtedly intended to transfer their rights to their successors-in-interest, for example, by showing that the successors had visited and remained on the property and had used it for many years before their acquisition of title. When, as in this case, predecessors and successors are so intimately acquainted, it would not be reasonably expected for the predecessors to expressly articulate to the successors a right that all parties already believed they possessed. The trial court correctly held that plaintiffs could tack their prescriptive use with that of their predecessors-in-interest because under the circumstances they were able to show privity through their continual, prior use of the easement.

5. The trial court did not violate the provisions of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., or the separation of powers doctrine when it recognized that plaintiffs had established the existence of a prescriptive easement, however, the court was not permitted to disregard the statutory requirements when determining the scope of the easement. Plaintiffs have a duty to follow the applicable laws and regulations affecting the land over which their easement extends. The trial court erred by judicially creating an additional exception to the statutory permit requirements by holding that plaintiffs could be exempted from the permit requirement as long as they took efforts to minimize their intrusive activities. The trial court erred by holding that plaintiffs were allowed to continue maintaining the pallet pathway without obtaining a permit.

Affirmed in part and reversed in part.

1. EASEMENTS — PRESCRIPTIVE EASEMENTS — PRIVITY OF ESTATE — TACKING.

Privity of estate, for purposes of tacking on the possessory periods of predecessors-in-interest and successors-in-interest to determine if the period of limitations for a prescriptive easement has been

satisfied, may be shown in one of two ways: by including a description of the disputed acreage in the deed or by an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of the conveyance; the parol transfer requirement can also be satisfied in the limited circumstances where the successors-in-interest are well acquainted with the predecessors-in-interest and there is clear and cogent evidence that the predecessors-in-interest undoubtedly intended to transfer their rights to the successors-in-interest, for example, by showing that the successors-in-interest had visited and remained on the property and had used it for many years before acquiring title to the property and, therefore, it would not be reasonably expected for the predecessors to expressly articulate to the successors a right that all parties already believed they possessed.

2. EASEMENTS — PRESCRIPTIVE EASEMENTS — STATUTES — REGULATIONS.

A property owner with a prescriptive easement has a duty to follow any applicable laws and regulations affecting the land over which the easement extends.

Lynch, Gallagher, Lynch, Martineau & Hackett, P.L.L.C. (by *Mary Ann J. O'Neil* and *Jennifer M. Galloway*), for plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Marie Shamraj* and *Daniel P. Bock*, Assistant Attorneys General, for defendant.

Before: K. F. KELLY, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM. This case arises out of the alleged right of certain landlocked property owners to maintain and use a crude pathway (several hundred wooden pallets laid end-to-end) across a state-owned and -regulated wetland. Defendant, Department of Natural Resources[1] (the Department), appeals as of right the trial court's

[1] The Department of Natural Resources was abolished and replaced by the Department of Natural Resources and Environment, MCL 324.99919, effective January 17, 2010.

order entering judgment in favor of plaintiffs, Glen Matthews, Carol Matthews, Kevin Matthews, Stephanie Matthews, Martin Schaeffer, and Ann Schaeffer[2] (collectively, the landlocked property owners). The Department argues that the trial court erred by finding that privity existed between the landlocked property owners and their predecessors-in-interest when there was no mention of an easement in the deeds and it was undisputed that the issue of an easement was never discussed with the previous owners. The Department also contends that the trial court erred by allowing the landlocked property owners to place fill material in a regulated wetland without obtaining a permit.[3] The landlocked property owners respond that the trial court properly found that they had established privity between them and their predecessors-in-interest on the basis of their prior use of the landlocked parcel. The landlocked property owners also contend that the trial court properly balanced common-law provisions against statutory provisions and held that the various rights sought to be protected by those laws weighed in favor of the landlocked property owners. We affirm in part and reverse in part.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 1969, Arthur Funnell and his wife, Edna Funnell;

[2] We note that the spelling of the surname "Schaeffer" varies in the record. However, for consistency, we will use this spelling throughout this opinion.

[3] Although the Department is responsible for administration and control of state-owned land, MCL 324.503(1), at the time of the lower court proceedings in this action, the Department of Environmental Quality was vested with authority for regulating uses of wetlands, MCL 324.30301 *et seq*. The Department of Environmental Quality was abolished and replaced by the Department of Natural Resources and Environment, MCL 324.99919, effective January 17, 2010, and the powers and duties of the former department are now assigned to the Department of Natural Resources and Environment.

their son, Melvin Funnell, and his wife, Betty Funnell; and their daughter, Joyce Schaeffer, and her husband, Robert Schaeffer (collectively, the Funnells), purchased the landlocked parcel, which consisted of 40 acres of property in Sheridan Township, Mecosta County, Michigan. Each of the three couples received an undivided 1/3 interest. The prior owners were Albert and Delila Anderson, who purchased the landlocked parcel from the state of Michigan in 1937. Arthur Funnell intended to use the landlocked parcel as a seasonal hunting camp. The landlocked parcel has no direct access to any public road. To the north and west, it is surrounded by state-owned property. And to the east and south, it is surrounded by private property. Plaintiff Glen Matthews testified at trial that his father-in-law, Arthur Funnell, had specifically sought out an inexpensive parcel of land and that he purchased the landlocked parcel with full knowledge that it was landlocked. Glen Matthews also testified that, although the family was not specifically looking for a landlocked parcel, landlocked land is less expensive than properties with road access.

The state-owned land that surrounds the landlocked parcel on two sides is part of the Martiny Lakes State Game Area. The nearest maintained road is Madison Road, located approximately one mile to the north of the landlocked parcel. There is an old two-track logging road that extends from Madison Road through the state land. This two-track road ends approximately 0.22 miles short of the landlocked parcel.

Over time, the Funnells transferred their ownership interests to the landlocked property owners. The landlocked property owners are all members of Arthur Funnell's family, either by blood or affinity. In February 1984, Arthur Funnell's widow, Edna Funnell, deeded her 1/3 interest to their daughter Carol Matthews and

her husband Glen Matthews. In May 1996, Melvin Funnell's widow, Betty Funnell, deeded her 1/3 interest to her nephew, Martin Schaeffer, and his wife, Ann Schaeffer. And in January 1998, Robert Schaeffer's widow, Joyce Schaeffer, deeded her 1/3 interest to her nephew, Kevin Matthews, and his wife, Stephanie Matthews.

The landlocked property owners and their predecessors (the Funnells) visited the property during hunting season in the late 1960s, accessing it by foot. Initially, they would walk across an adjacent parcel of privately owned land. However, shortly thereafter, the owner of that private land asked them to stop crossing that land, so the Funnells began parking at the end of a trail just off Madison Road, and would then walk the rest of the way across the state-owned land. Around 1975, they were able to drive a little further off Madison Road because the two-track road had been created for logging purposes on the state land. They were unable to drive further than the end of the two-track road because the ground was too wet and swampy. In the early 1970s, they began using snowmobiles to traverse the swamp and then later used all-terrain vehicles.

From the time that the Funnells first acquired the landlocked parcel, they would place some dead wood from the surrounding forest in particularly wet areas of the state-owned land to help them traverse it. However, in 1984 or 1985, the landlocked property owners began to place wooden pallets on the ground in the swamp area to make it more passable. This resulted in the construction of a pathway of pallets that stretches 0.22 miles (or 1,200 feet), from the end of the two-track road to the landlocked parcel.

The landlocked property owners testified that in addition to using the land as a hunting camp, they used

the land and the cabin thereon essentially as a family retreat, with couples spending quiet weekends there together or with numerous family members gathering to celebrate holidays together.

Glen Matthews testified that there was no discussion about access or an easement at the time the property was conveyed to him. Carol Matthews explained that there was no need for a specific discussion regarding access because Glen and Carol Matthews took it for granted that the two-track road and the pallet path were the sole means to get to the property. Carol Matthews also explained that the transfer of interest from the Funnells was just a formality because the landlocked property owners "were always involved." Martin and Ann Schaeffer similarly testified that there was no discussion about access or an easement at the time the property was conveyed to them because they had never accessed the property in any manner other than by going across the two-track road and the pallet path. Kevin Matthews, however, testified he and his uncles, Robert Schaeffer and Melvin Funnell, did have specific discussions about how to access the property before he took ownership. Kevin explained that Robert and Melvin told him that they had "pretty much exhausted any other alternatives on how to get in and out" and that the pallet path was the best route.

The Department's wildlife habitat biologist, Jeffrey Greene, was assigned to Mecosta County in 1998. In the course of his duties, he noted that there was evidence of illegal activities on the state land between Madison Road and the landlocked parcel. He noticed dumping of trash, piles of new pallets at the end of the two-track road, and old pallets placed in the swamp south of the end of the two-track road. (Greene, however, did not suspect the landlocked property owners of dumping the

trash, and the Department concedes that there is no reason to believe that they were responsible.) However, Greene testified that pallets harm the wetland by breaking down wetland vegetation and increasing soil erosion and sedimentation. Greene also testified that the pathway of pallets presented not only harm to the wetland, but also a danger to hunters on the state-owned land. According to Greene, the pallets were slippery, with nails protruding from them; thus, he was concerned about the safety of hunters who may walk on them.

Additionally, Greene noted that the illegal use of motorized vehicles[4] has resulted in harm to the wetland and was the very reason why the trail was becoming more difficult to traverse. The motorized vehicle usage had torn up the wetland and created holes, which vehicles could then sink into and get stuck. Because of these activities and the risks of harm to the hunters, wetland, and wildlife, Greene spoke with his supervisor about closing the two-track road. On August 21, 2003, a gate was placed off Madison Road, cutting off vehicular access to the two-track road.

On August 25, 2003, Greene met with three of the landlocked property owners. Greene offered to issue a key to the gate and a use permit, which would allow the landlocked property owners to open the gate and access the two-track road for a period of one year. But the landlocked property owners did not respond. Greene also requested that the landlocked property owners assist him in removing the pallets and proposed that

[4] It is illegal to use an off-road recreation vehicle (including a snowmobile or all-terrain vehicle) in a state game area except on roads, trails, or areas designated for such purpose. MCL 324.81133(e). Additionally, it is illegal to operate an off-road recreation vehicle in a wetland. MCL 324.81133(*o*). It is not illegal to travel by foot through a state game area.

they could replace the pallets with proper walkways over the wetter spots of the trail. But the landlocked property owners declined this suggestion, instead inquiring about the possibility of obtaining an easement across the state-owned land from the Department. Greene provided them with the Department's easement application, but the landlocked property owners never applied because they heard that it was unlikely that the Department would grant their request. The landlocked property owners filed this action, alleging that they had a prescriptive easement to access their landlocked parcel through the state-owned land and to maintain the pathway of pallets through the state-owned wetland area. The landlocked property owners requested a judgment allowing them ingress and egress to the landlocked parcel by vehicle, all-terrain vehicle, and snowmobile. (The landlocked property owners also alleged an implied easement, but that issue has not been raised again on appeal and we will not discuss it further).

On March 13, 2008, at the end of a three-day bench trial, the trial court ruled from the bench that the landlocked property owners had proven a prescriptive easement across the state-owned land to access their property. The trial court held that the landlocked property owners were required to demonstrate that they used state-owned land to access their parcel in a way that was open, notorious, and hostile for a period of 15 years before March 1, 1998 (the date on which a statute barred prescriptive easement actions against the state.) The trial court found that a parol grant of an easement did occur because the landlocked property owners and their predecessors had continually used the pathway and had always assumed that they would be able to cross the state-owned land to access their property. According to the trial court,

> the behavior of the many parties having participated in going back and forth on this property, and clearly understanding that it was accessed by this easement, leaves no doubt that there was privity, leaves no doubt that there was parol indications or information known or made known to these parties at the time the property was conveyed from one family member or a group of family members to another family member or a group of family members. I am not saying there were actual words, but I think the activities of using the property for such a long time left no doubt as to what was understood to be part of the conveyance.

In April 2008, the trial court issued a posttrial written judgment. The trial court confirmed its holding that the landlocked property owners had established a prescriptive easement. However, the trial court requested that the parties submit posttrial briefs on the issue of the scope of the prescriptive easement.

On September 11, 2008, after receiving the posttrial briefs and conducting a telephone conference, the trial court issued a written opinion and order. The trial court first cited caselaw indicating that easement holders are generally allowed to do such acts as are necessary to make effective use and enjoyment of the easement and that the scope of the easement is largely determined by what is reasonable under the circumstances. The trial court then turned to the provisions of the Natural Resources and Environmental Protection Act (NREPA), which prohibits people from placing fill material in the wetlands.[5] The trial court acknowledged that "[a]llowing Plaintiffs to continue to use the easement as they have historically done would appear to violate the above provisions of [the NREPA]" but then qualified that statement by stating that the trial court could "excuse[]" the violation "by [its] decision that a

[5] MCL 324.30304(a).

prescriptive easement has been established." The trial court went on to note that the NREPA did allow for certain easement exceptions for construction of various types of roads and pipelines, and then stated that "[w]hile Plaintiffs' easement does not fit into one of these categories, it is apparent that the Legislature recognized that certain other rights would be balanced against, and in some cases take priority over the protection of wetland areas through elimination of any possibly intrusive activities." The trial court then explained its understanding that the landlocked property owners'

> use of the private property would be materially curtailed if they are not allowed to place something on the path to allow motorized vehicles to travel to and from their private property. Walking or skiing would be the only means of ingress and egress at times when the ground and/or water are not frozen. Based on age and physical limitations, this limits the ability of some of the plaintiffs to visit the property. It also limits hauling of supplies and other items during deer hunting season and again limits participation in this activity by some of the plaintiffs.

The trial court also acknowledged that the state had significant interests in protecting the integrity and value of the wetlands. The trial court then went on to note the difficulty in attempting to strike a balance between the parties' competing interests: "Both interests are significant, and it is well recognized that they are to be protected. So, what is the balance to be struck?"

The trial court "reject[ed]" the Department's recommended solutions:

> Requiring permitting likely means that numerous steps must be taken, which likely would include the installation of a boardwalk, engineered floating pads, or a similar structure by Plaintiffs over the full .22-mile path. Based on

> the limited relevant testimony at trial, a cost of $40,000 or more was suggested for installation of a boardwalk. The Court finds that requiring a boardwalk or engineered floating mat over the full .22 miles [sic] path is unreasonable. It would likely be prohibitively expensive for plaintiffs and also likely would in effect deny Plaintiffs the reasonable enjoyment of their property rights.

The trial court then continued:

> Moreover, adopting Defendant's proposed solution would require Plaintiffs to seek permits and approval for their uses from Defendant, effectively placing the determination of the scope of the easement (or the existence of the easement at all) in the hands of the Defendant and not the Court. Effectively, this would mean the Plaintiffs had achieved nothing in establishing the existence of the easement. Despite the possibility that the Plaintiffs might be able to comply with the permitting process and still enjoy the benefits of their easement, the likely outcome of the process is speculative on this record. Plaintiffs likely would have no greater rights than the general public with respect to their easement.

Although noting the potential harm to the wetland ecosystem by continued use of the pallets, the trial court nevertheless ruled that the landlocked property owners could continue to maintain and use their makeshift pallet pathway to traverse the regulated wetland without applying for or obtaining a statutorily required permit from the Department of Environmental Quality.

The Department now appeals the trial court's rulings that the landlocked property owners demonstrated the requisite privity to allow them to tack their periods of prescriptive use with those of the predecessors-in-interest and that the landlocked property owners could place fill material and maintain a use in a wetland without obtaining a permit from the Department of Environmental Quality.

II. TACKING AND PRIVITY

A. STANDARD OF REVIEW

The Department argues that the trial court erred by finding that privity exists when there was no mention of an easement in the deeds and it was undisputed that the issue of an easement was never discussed with the previous owners at the time of the conveyances.

Actions to quiet title are equitable, and we review the trial court's holdings de novo.[6] However, we review the trial court's findings of fact for clear error.[7]

B. ANALYSIS

Generally, the period of limitations for the recovery or possession of land is 15 years.[8] However, it is well settled that "[t]he statute of limitations for recovering real property does not run against the state or state agencies, . . . unless there is legislation to the contrary."[9] Before March 1, 1988, legislation to the contrary did exist that allowed claims of adverse possession or prescriptive easement against the state.[10] Effective March 1, 1988, however, the Legislature, in 1988 PA 35,

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[6] *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993).

[7] *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003).

[8] MCL 600.5801(4).

[9] *Gorte*, 202 Mich App at 165, citing *Caywood v Dep't of Natural Resources*, 71 Mich App 322; 248 NW2d 253 (1976).

[10] *Gorte*, 202 Mich App at 165. Before March 1, 1988, MCL 600.5821(1) provided:

> No action for the recovery of any land shall be commenced by or on behalf of the people of this state unless it is commenced within 15 years after the right or title of the people of this state in the land first accrued or within 15 years after the people of this state or those from or through whom they claim have been seised

amended MCL 600.5821(1) and reinstated the common-law rule that one cannot acquire title to state-owned property through adverse possession or prescriptive easement.[11] MCL 600.5821(1) now provides:

> Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.

Interpreting the amended MCL 600.5821(1), this Court has held that, because the Legislature removed the prior language that permitted the running of the limitations period, the period of limitations for adverse possession can no longer run against the state.[12] This Court clarified, though, that "§ 5821, as amended, cannot be applied to plaintiffs if it would abrogate or impair a vested right."[13] Therefore, "[t]he statute does not operate to extinguish rights that have vested before the effective date of the statute, March 1, 1988."[14]

"Because the statute cannot be applied if it would abrogate or impair a vested right," it is necessary to determine when the plaintiffs' claim of title to the property vested.[15] The party claiming a prescriptive easement is vested with title to the land upon the expiration of the period of limitations, "and this title is good against the former owner and against third par-

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or possessed of the premises, or have received the rents and profits, or some part of the rents and profits, of the premises.

[11] *Gorte*, 202 Mich App at 166.

[12] *Id.* at 167.

[13] *Id.*

[14] *Higgins Lake*, 255 Mich App at 119.

[15] *Gorte*, 202 Mich App at 168.

ties."[16] In other words, "the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought."[17]

"An easement represents the right to use another's land for a specified purpose."[18] In other words, " '[a]n easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement.' "[19] A prescriptive easement results from open, notorious, adverse, and continuous use of another's property for a period of 15 years.[20] A prescriptive easement requires elements similar to adverse possession, except exclusivity.[21] The plaintiff bears the burden to demonstrate entitlement to a prescriptive easement by clear and cogent evidence.[22]

The Department does not dispute that the landlocked property owners have met the requirements of showing that their use was open, notorious, and adverse. Rather, the Department contends that the landlocked property owners have failed to show continuous use of the property for a period of 15 years.

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[16] *Id.*

[17] *Id.* at 168-169 (citation omitted).

[18] *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 678; 619 NW2d 725 (2000).

[19] *Id.* at 679 n 2, quoting *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997) (alteration added).

[20] *Higgins Lake*, 255 Mich App at 118.

[21] *Id.*

[22] *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001).

As explained above, in order to claim a prescriptive easement against the state, the landlocked property owners have to show that they possessed the easement for a full 15 years before March 1, 1988. In other words, they have to show that they began to use the claimed easement on March 1, 1973, or before. However, none of the current landlocked property owners had any ownership interest in the landlocked parcel until at least 1984. Therefore, in order for their claim to survive, the landlocked property owners have to show privity of estate by "tacking" on the possessory periods of their predecessors-in-interest to achieve the necessary 15-year period.[23] If they are able to show such "tacking," then the Department concedes that the landlocked property owners will satisfy the 15-year period because it is undisputed that the landlocked property owners' immediate predecessors-in-interest bought the property in 1969.

"[P]rivity may be shown in one of two ways, by (1) including a description of the disputed acreage in the deed, or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of conveyance."[24]

There is no dispute that none of the landlocked property owners' deeds conveyed an easement across the state-owned land. And the Department contends that the landlocked property owners cannot show transfer by parol evidence because all the landlocked property owners admitted that no discussions took place regarding an easement or the method of accessing the landlocked parcel at the time of their respective convey-

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[23] *Siegel v Renkiewicz Estate*, 373 Mich 421, 425; 129 NW2d 876 (1964); *Killips*, 244 Mich App at 259.

[24] *Killips*, 244 Mich App at 259 (citation omitted); see also *Siegel*, 373 Mich at 425.

ances. The landlocked property owners respond, however, pointing out that they had been visiting and using the property since the Funnells first purchased it in 1969 and that it was always understood that the only means of access to the landlocked parcel was to travel across the state land.

The Department responds to the landlocked property owners' argument, pointing out that to show privity there must be a "*parol*," or oral,[25] statement made at the time of conveyance. The Department contends then that the landlocked property owners' mere use of the same pathway was insufficient to show privity. However, the landlocked property owners counter that contention, relying on caselaw in which the Michigan Supreme Court held that past use of a property was sufficient to meet the parol statement requirement.

In *von Meding v Strahl*,[26] the plaintiffs sought to quiet title in a 20-foot-wide lane leading to Lake Michigan and to restrain the defendants, neighboring landowners, from using the lane. On appeal, the Court held that some of the defendants, the Flanagans, had established an easement by prescription and tacking.[27] At the time the plaintiffs brought their suit, the Flanagans had owned their property from 1928 to 1941.[28] Because they had only owned their property for 13 years, the Court stated that they could sustain their prescriptive interest only if they could tack their ownership to that of the prior owner, Mrs. Dillenbeck.[29] After noting the parol transfer requirement, the Court held that the

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[25] Black's Law Dictionary (7th ed).

[26] *von Meding v Strahl*, 319 Mich 598, 602; 30 NW2d 363 (1948).

[27] *Id.* at 614-615.

[28] *Id.* at 614.

[29] *Id.*

Flanagans could tack their use to that of their predecessor based on their prior use of the lane.[30] Specifically, the Court explained:

> We are satisfied from the record that the Flanagans, owners of parcel 11, were well acquainted with the Dillenbecks from whom they acquired the title, *that they had visited and remained on the property and had used the strip for many years prior to their acquisition of the title to the property*. The easement was so jointly used by the neighbors, that it was considered as appurtenant to all of the lands. *The conclusion is inescapable that in 1928 when the Flanagans purchased the land, the parties must have understood that an easement was appurtenant to the land, parcel 11. Undoubtedly it was the intention of Dillenbeck to transfer her rights to the easement to the Flanagans.* The record leads us to the conclusion that there was a parol transfer by Mrs. Dillenbeck to the Flanagans of her rights in the easement sufficient to permit the Flanagans to tack the prior adverse user of Mrs. Dillenbeck to their own adverse user to make up the prescriptive period.[31]

The Department attempts to distinguish *von Meding* from this present case by noting that the record in *von Meding* was "meager and complicated,"[32] whereas the record here is "very clear." The Department also argues that reading *von Meding* to allow for privity absent evidence of an express parol grant would contravene the well-established rule requiring that parol statements be made at the time of conveyance. According to the Department, courts should not be permitted to simply look at the totality of circumstances and surmise that a transfer was intended.

However, we conclude that *von Meding* is analogous and supports a ruling in the landlocked property own-

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[30] *Id.* at 614-615.

[31] *Id.* (emphasis added).

[32] *Id.* at 602.

ers' favor. It is important to clarify that this is not a case of an arms-length, third-party transfer. In this case, the landlocked property owners all testified that they and their family members/predecessors-in-interest had "always" used the easement. They collectively testified that they had never used any other way to access their landlocked parcel and, indeed, did not know of any other viable means of access. This is substantially similar to the facts in *von Meding* in that, here, the landlocked property owners were well acquainted with the Funnells and had visited and remained on the property and had used the pathway for many years before their acquisition of the title to the property.[33] Thus, as in *von Meding*, "[t]he conclusion is inescapable" that in 1984 when the first of the landlocked property owners began to purchase the land, the parties must have understood that an easement was appurtenant to the land.[34] As in *von Meding*, undoubtedly it was the Funnells' intention to transfer their rights to the easement to the landlocked property owners.[35]

And, while we appreciate the Department's concerns about interpreting too broadly, or even effectively contravening, the parol statement requirement, a ruling in favor of the landlocked property owners under the circumstances of this case will not operate to deteriorate the parol statement rule. We are following the *von Meding* precedent, which created a reasonable exemption to the common-law rule requiring parol statements, by holding that the parol transfer requirement can be satisfied in the limited circumstances where the tacking property owners are "well acquainted" and

[33] See *id.* at 614-615.

[34] See *id.* at 614.

[35] See *id.* at 614-615.

there is clear and cogent evidence[36] that the predecessors-in-interest "[u]ndoubtedly" intended to transfer their rights to their successors-in-interest, for example, by showing that the successors had "visited and remained on the property and had used [it] for many years prior to their acquisition of the title to the property."[37] Indeed, to hold otherwise would needlessly impose an artificial requirement on parties in similar circumstances and would possibly work to deny parties their otherwise properly vested rights. Where predecessors and successors are so intimately acquainted as under the facts here, it would not be reasonably expected for the predecessors to expressly articulate to the successors a right that all parties already believed they possessed.

The Department additionally argues that the trial court's finding of fact that the landlocked property owners always believed they had an easement was clearly erroneous in light of their testimony that they asked Jeffrey Greene about the possibility of acquiring an easement over the land. The Department posits that the landlocked property owners "would not have asked about acquiring an easement if . . . they already believed they owned one." This argument is without merit. As stated previously, a party claiming a prescriptive easement is vested with title to the land upon the expiration of the period of limitations.[38] Therefore, the fact that the landlocked property owners began to question their right to cross the state land after the Department began blocking their access in 2003 does not negate that their right was already vested.

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[36] *Killips*, 244 Mich App at 260.

[37] *von Meding*, 319 Mich at 614-615.

[38] *Gorte*, 202 Mich App at 168.

Accordingly, we conclude that the trial court correctly held that the landlocked property owners could tack their prescriptive use of the state-owned land with that of their predecessors-in-interest because under the circumstances they were able to show privity through their continual, prior use of the easement.

III. STATUTORY PERMIT REQUIREMENTS

A. STANDARD OF REVIEW

The Department argues that a trial court may not exempt parties from statutory permit requirements simply on the basis of its finding that the parties hold a common-law prescriptive easement across wetlands.

Actions to quiet title are equitable, and we review the trial court's holdings de novo.[39] The proper interpretation of a statute is also a question of law subject to our review de novo.[40] We review the trial court's findings of fact for clear error.[41]

B. ANALYSIS

The Department argues that the landlocked property owners have violated the NREPA both by placing "fill material"—the wooded pallets—in a wetland, and by constructing and maintaining a "use or development"—the pathway of pallets—in a wetland, without obtaining a permit. Specifically, § 30304 of the NREPA provides in pertinent part:

> Except as otherwise provided in this part or by a permit issued by the department under sections 30306 to 30314 and pursuant to part 13, a person shall not do any of the following:

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[39] *Id.* at 165.

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

[41] *Higgins Lake*, 255 Mich App at 117.

(a) Deposit or permit the placing of fill material in a wetland.

* * *

(c) Construct, operate, or maintain any use or development in a wetland.[42]

The Department further contends that the trial court had no authority to excuse the landlocked property owners from adhering to the statutory permit requirement. The landlocked property owners respond, arguing that the trial court was entitled to recognize an exception to the permit requirement on the basis of its perception of the desirability of "balancing" the statute against other "rights" not enumerated in the statute.

We first conclude that the trial court did not violate the NREPA or the separation of powers doctrine when it recognized that the landlocked property owners had established the *existence* of a prescriptive easement. The Michigan Supreme Court has made clear that the NREPA does not grant the Department exclusive jurisdiction to manage the land within its control.[43] Moreover, this Court has stated that the NREPA does not expressly or impliedly supersede common-law principles regarding implied easements.[44] However, we do not agree that the trial court was permitted to disregard the statutory requirements when determining the *scope* of the easement.

Here, the trial court recognized that, under common law, parties that have shown the existence of a prescrip-

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[42] MCL 324.30304.

[43] *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 669-670; 593 NW2d 534 (1999).

[44] *Schumacher v Dep't of Natural Resources*, 256 Mich App 103, 109 n 3; 663 NW2d 921 (2003).

tive easement are "allowed to do such acts as are necessary to make effective the enjoyment of the easement, and the scope of this privilege is determined largely by what is reasonable under the circumstances."[45] The trial court then concluded that it was unreasonable to require the landlocked property owners to obtain a permit. We disagree.

As the Department points out, neither the landlocked property owners nor the trial court offered any evidence or authority to "support the proposition that a right to prescriptive use of another's property may also convey the right to violate a statute." In other words, the fact that the landlocked property owners may have a right to use the easement at issue does not negate their duty to follow the applicable laws and regulations affecting the land over which their easement extends. For example, mere establishment of a right to use of an easement does not permit the easement holder to disregard local zoning ordinances.[46]

The NREPA sets forth a clear mandate that, absent qualification under one of several enumerated exceptions,[47] a person must obtain a permit before placing fill material or maintaining a use in a wetland.[48] And although recognizing that the NREPA expressly provided specific enumerated exceptions, the trial court nevertheless took it upon itself to recognize an additional exception for the landlocked property owners under the circumstances of this case. The trial court

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[45] *Killips*, 244 Mich App at 261.

[46] See *Bevan v Brandon Twp*, 438 Mich 385, 400; 475 NW2d 37 (1991). See also *Burt Twp*, 459 Mich at 661-662 (holding that even the Department of Natural Resources itself is subject to comply with the local zoning ordinances).

[47] MCL 324.30305.

[48] MCL 324.30304.

reasoned that the enumerated exceptions were created to recognize "that certain other rights would be balanced against, and in some cases take priority over the protection of wetland areas through elimination of any possibly intrusive activities." Therefore, the trial court found that the landlocked property owners could likewise be exempted from the permit requirement as long as they took efforts to minimize their intrusive activities. In so holding, the trial court erred.

As the Department points out, it is a well-established rule of statutory construction that when the Legislature enumerates a list of conditions or exceptions in a statute, "[t]heir enumeration eliminates the possibility of their being other exceptions under the legal maxim *expressio unius est exclusio alterius*."[49] As the Department explains, the trial court therefore erred in holding "that the exact opposite is true and that, if the Legislature enumerates a list of statutory exceptions, it . . . must intend to open the door to any other exceptions that a court may deem reasonable." The trial court was not entitled to engage in its own permitting process contrary to the Legislature's express intent and judicially create an additional exception to the permit requirement.

Additionally, we disagree with the trial court that it would be unreasonable to require the landlocked property owners to apply for a proper permit. The trial court's concerns about the additional burdens that may be placed on the landlocked property owners by the permitting process are speculative. And it is the province of the Department,[50] not the court, to assess the

[49] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). See also Black's Law Dictionary (7th ed), p 1635 ("The expression of one thing is the exclusion of another.").

[50] MCL 324.30301(d); MCL 324.30304.

circumstances and devise a plan to allow the landlocked property owners the most reasonable use of their land while still protecting the state's interest in preserving and protecting the character and integrity of the wetlands.[51] Accordingly, we conclude that the trial court erred by holding that the landlocked property owners were allowed to continue maintaining their pallet pathway without obtaining a proper permit.

We affirm the trial court's decision that the landlocked property owners established the existence of a prescriptive easement over state-owned land, but we reverse the trial court's decision that the landlocked property owners need not follow the statutory requirement of obtaining a permit to place fill material in a wetland area.

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[51] On this point, we acknowledge the trial court's concerns that installation of a boardwalk system over the full 0.22-mile path might be cost prohibitive. Thus, we would caution the Department to avoid imposing permit requirements that would rise to the level of effectively denying the landlocked property owners the reasonable enjoyment of their property rights.

ONE'S TRAVEL LTD v DEPARTMENT OF TREASURY
DATA TECH SERVICES, INC v DEPARTMENT OF TREASURY

Docket Nos. 287254 and 287255. Submitted November 9, 2009, at Lansing. Decided April 6, 2010, at 9:10 a.m.

Plaintiffs, ONE's Travel Ltd. and Data Tech Services, Inc., both for-profit Michigan corporations subject to taxation under the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., repealed effective December 31, 2007, and both subsidiaries of Credit Union ONE, a state chartered credit union created pursuant to the Credit Union Act, MCL 490.101 *et seq*., and which is exempt from taxation under the SBTA, claimed small business tax credits under MCL 208.36 for certain tax years. The Department of Treasury denied the credits. ONE's Travel and Data Tech challenged the tax assessments made by the department in the Court of Claims, which consolidated the matters. Plaintiffs moved for summary disposition, arguing that because Credit Union ONE is not a taxpayer under the SBTA and is totally exempt from the single business tax, its tax exempt activities are totally unrelated to plaintiffs' taxable activities and cannot be consolidated with plaintiffs' gross receipts for purposes of determining plaintiffs' eligibility for the small business credit. The department moved for summary disposition arguing that it is irrelevant that Credit Union ONE is exempt from taxation under the SBTA and claiming that plaintiffs and Credit Union ONE formed an "affiliated group" as defined under the act and, therefore, plaintiffs were required to consolidate their business activities with those of Credit Union ONE for purposes of determining plaintiffs' eligibility for the small business credit. The Court of Claims, Joyce A. Draganchuk, J., denied plaintiffs' motion and granted summary disposition in favor of the department. ONE's Travel appealed (Docket No. 287254) and Data Tech appealed (Docket No. 287255). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Entities that are part of a corporate structure in which the parent is a state chartered credit union exempt from taxation under the SBTA must, for purposes of determining their eligibility for the small business tax credit, consolidate their gross receipts

with the business activities of other members of their affiliated group, including the parent credit union. Only when the consolidated number meets the threshold requirements of MCL 208.36(2) for the small business tax credit will the individual entities qualify for the credit.

2. If an entity is part of an affiliated group, a controlled group of corporations, or an entity under common control, it must aggregate the business activities of all the other entities of the group to determine eligibility for the small business tax credit.

3. A "United States corporation," for the limited purpose of determining whether an "affiliated group" exists under MCL 208.3(1), is an association, joint-stock company, or an insurance company that is created or organized in or under the laws of the United States or under the laws of a state. The same definition applies in determining whether an entity is required, under MCL 208.36(7), to consolidate its business activities with other entities in determining eligibility for the small business tax credit.

4. Credit Union ONE is a "United States corporation" within the meaning of § 3(1), because it is an association created or organized under Michigan law. Credit Union ONE and plaintiffs are an affiliated group, as defined in § 3(1), and as incorporated by § 36(7), thus plaintiffs were required to consolidate the business activity of Credit Union ONE with their gross receipts.

5. Section 36(7) requires a member of an affiliated group to consolidate its "business activities" with that of the other members in the group in order to take the credit allowed by § 36(2). Section 36(2) premises an entity's eligibility for the tax credit, in part, on whether its "gross receipts" exceed a certain amount for the tax year at issue. The two provisions require that the "business activities" of the group be consolidated with the "business activity" of the taxpayer entity claiming the credit, and that this consolidated number, or the gross receipts, not exceed the threshold amounts under § 36(2). Therefore, in these cases, it is only relevant whether a nontaxpayer entity that is part of an affiliated group, here Credit Union ONE, has "business activity" within the meaning of the SBTA. It is that business activity that must be consolidated with the business activity of plaintiffs.

6. The definition of "business activity" in MCL 208.3(2) does not require an entity to be a taxpayer in order to have business activity. "Business activity" is, under § 3(2), a transfer of property or the performance of services within this state with the object of gain, benefit, or advantage to the taxpayer or to others. The term "others" encompasses all those "others" than taxpayers. Credit Union ONE has business activity, for purposes of the SBTA,

because it transfers property and performs services within the state to the benefit of others. Although Credit Union ONE has no single business tax liability because it is tax exempt, it still may have business activity for purposes of determining whether its subsidiaries qualify for a tax credit under § 36(2) and § 36(7).

Affirmed.

1. TAXATION — SINGLE BUSINESS TAX ACT — AFFILIATED GROUPS — SMALL BUSINESS TAX CREDIT.

Entities that are part of a corporate structure in which the parent is a state chartered credit union that is exempt from taxation under the Single Business Tax Act must, for purposes of determining their eligibility for the small business tax credit provided by MCL 208.36, consolidate their business activities with the business activities of other members of their affiliated group, including the parent credit union; only when the consolidated number meets the threshold requirements of § 36(2) will the individual entities qualify for the tax credit (MCL 208.1 *et seq*., repealed effective December 31, 2007).

2. TAXATION — SINGLE BUSINESS TAX ACT — WORDS AND PHRASES — AFFILIATED GROUPS — UNITED STATES CORPORATIONS — ASSOCIATIONS.

An "affiliated group" for purposes of MCL 208.36(7) and MCL 208.3(1) of the Single Business Tax Act is two or more United States corporations, one of which owns or controls, directly or indirectly, 80 percent or more of the capital stock with voting rights of the other or others; a United States corporation, for such purposes, is an association, joint-stock company, or an insurance company created or organized in or under the law of the United States or under the laws of a state; an "association" is a gathering of people for a common purpose, the persons so joined, or an unincorporated organization that is not a legal entity separate from the persons who compose it (MCL 208.1 *et seq*., repealed effective December 31, 2007).

3. TAXATION — SINGLE BUSINESS TAX ACT — AFFILIATED GROUPS — SMALL BUSINESS TAX CREDIT — WORDS AND PHRASES — BUSINESS ACTIVITY — OTHERS.

The Single Business Tax Act, in MCL 208.36(7), requires a member of an affiliated group to consolidate its business activities with the business activities of the other members of the group in order to determine its eligibility for the small business tax credit allowed by MCL 208.36(2); "business activity," for such purposes, is a transfer of property or the performance of services within the state with the object of gain, benefit, or advantage to the taxpayer or to

others; the term "others" encompasses all those "others" than taxpayers; the fact that a member of an affiliated group is exempt from taxation under the act does not mean that it does not have business activities (MCL 208.1 *et seq*., repealed effective December 31, 2007).

Varnum LLP (by *Thomas J. Kenny* and *Marla Schwaller Carew*) for plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Bruce C. Johnson*, Assistant Attorney General, for defendant.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM. In these tax disputes, we must decide whether plaintiffs are eligible for the small business tax credit provided by § 36, MCL 208.36, of the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., repealed effective December 31, 2007. The Court of Claims determined that plaintiffs are not eligible for the credit and granted summary disposition in defendant's favor. We agree and hold that entities part of a corporate structure in which the parent is a state chartered credit union exempt from taxation under the SBTA must, for purposes of determining their eligibility for the small business tax credit, consolidate their gross receipts with the business activities of other members in their "affiliated group," including the parent credit union. Accordingly, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs, Data Tech Services, Inc. (Data Tech), and ONE's Travel Ltd., are both for-profit Michigan corporations subject to taxation under the SBTA. Both plaintiffs are also subsidiaries of Credit Union ONE, a state

chartered credit union created pursuant to Michigan's Credit Union Act, MCL 490.101 *et seq.*, that is exempt from taxation under the SBTA.

In Docket No. 287255, Data Tech claimed the small business credit for tax years 2001 through 2004 in its SBT return. Data Tech did not consolidate its business activities with those of Credit Union ONE because it believed that no consolidation of business activity is required under § 36 since Credit Union ONE is exempt from state taxation. The department audited Data Tech's 2001 through 2004 tax returns and determined, however, that the SBTA required Data Tech to consolidate its business activity with Credit Union ONE and that such a consolidation rendered Data Tech ineligible for the small business credit. As a result, the department assessed a tax against Data Tech in the amount of $157,240. Data Tech paid the tax under protest and then challenged the assessment in the Michigan Tax Tribunal. See *Data Tech Services, Inc v Dep't of Treasury*, MTT Docket No. 323084.[1]

Before the matter could be resolved, however, the department audited Data Tech's 2005 SBT return and found that Data Tech had again erroneously claimed the small business credit. In its 2005 SBT return, Data Tech had carried forward a "loss adjustment" from its 2002 tax return as a result of not qualifying for the credit in 2002. It was Data Tech's position that its business loss in 2002 caused the amount distributed to its sole shareholder to fall below $115,000 and, thus, it was entitled to the small business credit in 2005. The department, however, determined that Data Tech could not use its 2002 business loss as a "loss adjustment"

[1] The parties' respective motions for summary disposition in that case are being held in abeyance pending the resolution of the issue in this Court.

because Data Tech never received the small business credit in 2002. Accordingly, the department assessed a tax against Data Tech in the amount of $29,115. Data Tech also paid that amount under protest and then challenged the assessment in the Court of Claims.

In Docket No. 287254, ONE's Travel claimed the small business credit for tax year 2005. Like Data Tech, ONE's Travel did not consolidate its business activities with those of Credit Union ONE because it believed that under § 36 no consolidation of business activity is required since Credit Union ONE is exempt from state taxation. The department audited ONE's Travel's 2005 SBT return and determined that ONE's Travel was not eligible for the credit because another member of the same "control group," Data Tech, did not qualify for the credit. Accordingly, the department assessed a tax against ONE's Travel in the amount of $6,194. ONE's Travel challenged the assessment by filing a complaint in the Court of Claims.

Because the same issue is involved in both cases, the parties stipulated that the matters would be consolidated in the Court of Claims and the issue would be decided on their motions for summary disposition. Plaintiffs jointly moved for summary disposition under MCR 2.116(C)(10), arguing that because Credit Union ONE is not a taxpayer under the SBTA and is totally exempt from the SBT, its tax exempt activities are "totally unrelated" to plaintiffs' taxable activities and cannot be consolidated with plaintiffs' gross receipts for purposes of determining plaintiffs' eligibility for the small business credit. The department countered that summary disposition should be granted in its favor. It argued that it is irrelevant that Credit Union ONE is exempt from taxation under the SBTA and that plaintiffs and Credit Union ONE formed an "affiliated

group" as defined under the act. The Court of Claims ruled in favor of the department, and plaintiffs subsequently filed their claims of appeal with this Court. This Court consolidated the appeals.

II. STANDARDS OF REVIEW

The resolution of these appeals turns on whether plaintiffs are required to consolidate their gross receipts with the business activity of their parent, Credit Union ONE, a cooperative nonprofit entity, for purposes of qualifying for the small business tax credit pursuant to § 36(7) of the SBTA, MCL 208.36(7). Because the matter was decided on the parties' motions for summary disposition under MCR 2.116(C)(10), we review the Court of Claims decision de novo. *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 43; 706 NW2d 460 (2005). Summary disposition under this subrule is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Further, we review questions of law, including the proper interpretation of a statute, de novo. *Ford Credit Int'l, Inc v Dep't of Treasury*, 270 Mich App 530, 534; 716 NW2d 593 (2006). The Court's main goal in interpreting the meaning of a statute is to discern and give effect to the Legislature's intent. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 650; 770 NW2d 915 (2009). The first step in ascertaining the Legislature's intent is to examine the written language. *Id*. If the language is plain and unambiguous, judicial construction is neither necessary nor permitted, and the language must be applied as written. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). Statutory language is ambiguous "only if it 'irreconcilably conflict[s]' with another provision or

when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation omitted; emphasis in original). In conducting this review, we must read words and phases, not discretely, but rather within the context of the whole act. *Green v Ziegelman*, 282 Mich App 292, 301-302; 767 NW2d 660 (2009). "However, tax statutes that grant tax credits or exemptions are to be narrowly construed in favor of the taxing authority because such statutes reduce the amount of tax imposed." *Alliance Obstetrics & Gynecology, PLC v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009).

III. THE SBTA AND THE SMALL BUSINESS CREDIT

As this Court has noted, the SBTA, MCL 208.1 *et seq.*, repealed effective December 31, 2007, is a tax on the privilege of doing business in Michigan. *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167, 173; 775 NW2d 342 (2009); *Manske v Dep't of Treasury*, 265 Mich App 455, 459; 695 NW2d 92 (2005). Any person doing business in the state incurs a SBT liability. MCL 208.31. However, certain entities are exempt from taxation under the SBTA, including this state and other states, the federal government, and their political subdivisions and agencies as well as those persons exempt from federal income tax under the Internal Revenue Code. See MCL 208.35. There is no dispute in the present matter that plaintiffs are subject to taxation under the SBTA, whereas Credit Union ONE is exempt.

Entities that are not exempt under the SBTA, like plaintiffs, calculate their SBT liability by first determining their tax base, which is the taxpayer's total business income. *TMW Enterprises*, 285 Mich App at 173-174; *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271, 273; 639 NW2d 269 (2001). This

number is then apportioned to account for only the activity that took place in Michigan, MCL 208.40; MCL 208.41, and adjusted as necessary, to arrive at the taxpayer's adjusted tax base. MCL 208.31(2). A certain percentage rate, depending on the tax years at issue, is then applied against the taxpayer's adjusted tax base to compute the taxpayer's SBT liability. MCL 208.31(1).

The SBTA also includes a small business tax credit that reduces the single business tax liability of qualifying small businesses. MCL 208.36. The credit is a percentage reduction of the tax liability, computed by dividing the taxpayer's adjusted business income by a percentage of its tax base. Horner, *Michigan Single Business Tax, Small Business Credit*, 57 Mich B J 734, 736 (1978). To qualify, for the tax years relevant to these appeals, § 36(2) of the SBTA, MCL 208.36(2), requires that an entity's "gross receipts" not exceed $10,000,000 and its compensation to officers or shareholders not exceed $115,000 per year. MCL 208.36(2); MCL 208.36(2)(b)(*i*). That provision states, in relevant part:

> The credit provided in this section shall be taken before any other credit under this act, and is available to any person whose gross receipts do not exceed $6,000,000.00 for tax years commencing on or after January 1, 1984 and before January 1, 1989; $7,000,000.00 for tax years commencing in 1989; $7,250,000.00 for tax years commencing in 1990; $7,500,000.00 for tax years commencing in 1991; or $10,000,000.00 for tax years commencing after 1991, and whose adjusted business income minus the loss adjustment does not exceed $475,000.00 for tax years commencing on or after January 1, 1985, subject to the following:
>
> * * *
>
> (b) A corporation other than a subchapter S corporation is disqualified if either of the following occur for the respective tax year:

> (*i*) Compensation and director's fees of a shareholder or officer exceed $95,000.00 for tax years commencing on or after January 1, 1985 and before January 1, 1998 or exceed $115,000.00 for tax years commencing after December 31, 1997. [MCL 208.36(2).]

Section 36(7) specifies further eligibility requirements for entities that make up, or are a part of, larger business structures. It provides:

> An affiliated group *as defined in this act*, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 C.F.R. 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined by the internal revenue code shall not take the credit allowed by this section unless the business activities of the entities are consolidated. [MCL 208.36(7) (emphasis added).]

In other words, if an entity is part of (1) an affiliated group, (2) a controlled group of corporations, or (3) an entity under common control, it must aggregate the "business activities" of all the other entities in the group. Only if the consolidated number meets the threshold requirements of § 36(2) would the individual entities qualify for the credit, i.e., the taxpaying entity's gross receipts fall below the threshold amount despite the consolidation of business activities.

IV. ANALYSIS

Here, there is no dispute that plaintiffs, standing alone, qualify for the small business tax credit; whereas, if their gross receipts are consolidated with Credit Union ONE's business activity, they do not so qualify. Rather, the disagreement lies in whether plaintiffs must consolidate their gross receipts with Credit Union ONE's business activity because they form (1) an affiliated group, (2) a controlled group of corporations, or (3)

an entity under common control. It is plaintiffs' position on appeal that Credit Union ONE and plaintiffs form neither an affiliated group nor a controlled group of corporations because Credit Union ONE is not a "corporation" within the meaning of § 36(7). We disagree with plaintiffs.

A. AFFILIATED GROUP

As noted, § 36(7) states that an "affiliated group," for purposes of that subsection, is defined by the SBTA. And, § 3(1) of the SBTA, MCL 208.3(1), defines an "affiliated group" to mean

> 2 or more *United States corporations*, 1 of which owns or controls, directly or indirectly, 80% or more of the capital stock with voting rights of the other United States corporation or United States corporations. As used in this subsection, *"United States corporation" means a domestic corporation* as those terms are defined in section 7701(a)(3) and (4) of the internal revenue code. [Emphasis added.]

Contrary to plaintiffs' position on appeal, this subsection specifically adopts the definition of "domestic corporation" as defined in the Internal Revenue Code, to mean "United States corporation" for purposes of determining whether an "affiliated group" exists when considering eligibility for the small business credit under § 36(7). Section 7701(a)(3) and (4) of the Internal Revenue Code, as incorporated by § 3(1), provide:

> (3) Corporation. The term "corporation" includes associations, joint-stock companies, and insurance companies.
>
> (4) Domestic. The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations. [26 USC 7701(a)(3) and (4).]

Thus, the meaning of "United States corporation," limited to the purposes of determining whether an affiliated group exists under § 3(1), is an association, joint-stock company, or an insurance company that is created or organized in or under the laws of the United States or under the laws of a state. Because § 36(7) adopts the definition provided for by § 3(1), it obviously follows that the same definition applies in that subsection of the small business credit provision.

Given this definition, it is our view that Credit Union ONE is a "United States corporation" within the meaning of § 3(1). Namely, while Credit Union ONE is not a corporation in a strictly pure sense—it was not formed under the Michigan Business Corporation Act, MCL 450.1101 *et seq*., and is not registered with the Corporations Division of the Michigan Department of Energy, Labor and Economic Growth—it is an "association" created or organized under Michigan law. Neither the SBTA nor the portions of the Internal Revenue Code cited by § 3(1) define the term "association." However, this Court gives undefined terms their plain and ordinary meaning and may rely on dictionary definitions to ascertain the Legislature's plain intent. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 40, 43; 761 NW2d 269 (2008). Black's Law Dictionary (8th ed) defines "association" as "[a] gathering of people for a common purpose; the persons so joined," and also as "[a]n unincorporated organization that is not a legal entity separate from the persons who compose it." Here, Credit Union ONE is plainly a gathering of people for a common purpose and it is also an "unincorporated organization," because the credit union is not incorporated under Michigan law. Further, as plaintiffs correctly note, Credit Union ONE is created or organized in or under the laws of this state. Credit Union ONE, as the parties agree, is a state chartered credit union

created under Michigan's Credit Union Act, MCL 490.101 *et seq.*, and is regulated by the Office of Financial and Insurance Regulation of the Michigan Department of Energy, Labor and Economic Growth. Accordingly, because Credit Union ONE is a "United States corporation," as that term is defined by § 3(1), and as incorporated by § 36(7), and because it "owns or controls, directly or indirectly, 80% or more of the capital stock with voting rights" of Data Tech and ONE's Travel, it is part of an "affiliated group," as that term is defined in § 3(1) of the SBTA.[2] Thus, we conclude that, under § 36(7), plaintiffs were required to consolidate the business activity of their parent, Credit Union ONE, with their gross receipts.

Plaintiffs, however, argue that Credit Union ONE cannot be an "association" because as a domestic credit union formed under the Credit Union Act, it is defined as "a cooperative, non-profit entity organized under this act for the purposes of encouraging thrift among its members . . . to use and control their own money on a democratic basis . . . ." However, given the plain and ordinary meaning of the term "association," we fail to see how a domestic credit union, like Credit Union ONE, is not also an association. The common and ordinary meaning of the term "association," as a gathering of persons for a common purpose, is so broad that it encompasses cooperative nonprofit entities. And, significantly, nothing in the definition of domestic credit union excludes it from fitting within the definition of an association. Accordingly, there is no merit to

[2] It is unclear from the record what percentage Credit Union ONE owns of each plaintiff. However, the parties raise no arguments related to how much Credit Union ONE owns and, thus, we assume that Credit Union ONE meets the additional requirements in the definition of "affiliated group" under § 3(1) and as incorporated by § 36(7).

plaintiffs' argument that Credit Union ONE cannot be an association simply because it is a domestic credit union.

Having concluded that Data Tech and ONE's Travel formed an "affiliated group" with Credit Union ONE, it is not necessary for us to reach the question whether these entities also formed either a "controlled group of corporations" or an "entity under common control . . . ." Because Data Tech and ONE's Travel each formed an affiliated group with Credit Union ONE, both were required to consolidate their business activities and gross receipts with Credit Union ONE's business activity in order to be eligible for the small business credit. See MCL 208.36(2); MCL 208.36(7). However, as the parties agree, once their receipts are consolidated with Credit Union ONE, they are no longer eligible for the small business credit pursuant to § 36(2) of the SBTA, MCL 208.36(2). Accordingly, the trial court did not err by determining that the department properly disallowed plaintiffs to claim the small business credit for the tax years in question.[3]

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[3] The Court of Claims agreed with the department's determination that ONE's Travel had to consolidate its receipts with Credit Union ONE on the basis that another member of the "controlled group of corporations," Data Tech, had been denied the small business credit. We need not determine whether the court's analysis was correct or not, because the result ultimately reached was correct. As already stated, as part of an affiliated group, ONE's Travel was required to consolidate its gross receipts with Credit Union ONE's business activity. And, as plaintiffs concede, ONE's Travel would not be eligible for the small business credit if its gross receipts are to be consolidated with the business activity of Credit Union ONE. Further, it is also unnecessary for us to consider the department's decision disallowing Data Tech to carry forward to 2005 its "loss adjustment" from 2002, because none of the parties raise arguments on appeal relating to the department's decision. Rather, our decision regarding whether plaintiffs must consolidate their gross receipts with Credit Union ONE's business activity is dispositive on the issue whether Data Tech was entitled to the small business credit in 2005.

B. "BUSINESS ACTIVITY"

Plaintiffs also argue that even if Credit Union ONE could be considered part of an affiliated group, its "business activity" cannot be consolidated with plaintiffs' gross receipts because, as a tax-exempt entity it is not a taxpayer under MCL 208.10 of the SBTA, and thus it has neither "business activity" nor "gross receipts." Again, we disagree.

As noted, § 36(7) of the SBTA, MCL 208.36(7), requires a member of an affiliated group to consolidate its "business activities" with that of the other members in the group in order to take the credit allowed by § 36(2). And, § 36(2) of the SBTA, MCL 208.36(2), premises an entity's eligibility for the tax credit, in part, on whether its "gross receipts" exceed $10,000,000 for the tax years at issue. Reading the two provisions together requires that the *business activities* of the group be consolidated with the business activity of the taxpayer entity claiming the credit, and that this consolidated number, or the *gross receipts*,[4] not exceed the threshold amounts under § 36(2). Thus, under the present circumstances, it is only relevant whether a non-taxpayer entity that is part of an affiliated group, here the credit union, has "business activity" within the meaning of the SBTA because it is that business activity that must be consolidated with the business activity of the entity claiming the credit. Section 36(7) makes no mention of members' gross receipts and plaintiff's argument as it relates to "gross receipts" is irrelevant. Thus, we address plaintiffs' argument only as it relates to "business activity."

[4] Section 7(3) of the SBTA, MCL 208.7(3), defines "gross receipts" as: "[T]he entire amount received by the taxpayer from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others . . . ."

Section 3(2) of the SBTA, MCL 208.3(2), defines "business activity" as

> a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in . . . within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer *or to others* . . . . [Emphasis added.]

Under the plain language of this definition, there is no mandate that requires an entity to be a taxpayer in order to have business activity. To the contrary, business activity is simply defined as "a transfer of . . . property . . . or the performance of services . . . within this state . . . with the object of gain, benefit, or advantage . . . to the taxpayer or to others . . . ." Plaintiffs' understanding of this definition effectively omits, and renders nugatory, the phrase "or to others." It is incumbent upon us, however, to give meaning and effect to every word used in a statute and to avoid an interpretation that renders any portion of the statute nugatory. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 50; 703 NW2d 822 (2005); *S Abraham & Sons, Inc v Dep't of Treasury*, 260 Mich App 1, 15; 677 NW2d 31 (2003). Thus, we cannot follow plaintiffs' lead and ignore the phrase "or to others." And, while the credit union is not a taxpayer, its activities clearly fall within the gambit of the phrase, "or to others," because the term "others," giving it its plain and ordinary meaning within the context of the statute, encompasses all those "others" than taxpayers. It follows that, by definition, the credit union has business activity, as that term is defined by the SBTA because it transfers property and performs services within the state to the benefit of others.

Moreover, simply because Credit Union ONE is exempt from taxation does not mean that it does not have business activities, as plaintiff contends. Clearly, the definition of business activity is not applied to Credit Union ONE for purposes of determining its liability under the SBTA—it has no liability. But, it does not logically follow that Credit Union ONE has no business activity or that the definition cannot be applied to the credit union for purposes of determining whether Credit Union ONE's subsidiaries are eligible for the small business tax credit. Nor does consolidating the credit union's business activity with plaintiffs' business activities result in an imposition of a SBT on Credit Union ONE. Rather, it is plaintiffs who are ultimately on the hook for small business taxes with or without the benefit of the small business tax credit; the credit union has no liability in this context.

Finally, plaintiffs analogize this case to the facts in *Alameda Gage Corp v Dep't of Treasury*, 159 Mich App 693; 407 NW2d 61 (1987), where the parent corporation had no SBT liability and its subsidiary would qualify for the small business tax credit if its gross receipts were considered alone. The Court held that when the subsidiary's gross receipts were consolidated with its parent corporation's business activities, the subsidiary qualified for the credit because the parent corporation, by definition, had no business activity. *Id*. at 697. A superficial reading of *Alameda Gage Corp* suggests that this Court should be compelled to reach the same outcome. However, the facts of *Alameda Gage Corp* are clearly distinguishable from the present matter because the parent corporation in *Alameda Gage Corp* had no SBT liability since it had no instate activities whatsoever; all of its business activity occurred out of state. By definition, business activity includes only those activities that occurred in state. Here, Credit Union ONE has no SBT

liability because it is tax exempt as a credit union, not because it has no instate business activity. Rather, all of Credit Union ONE's business activities occur in state. And, as we have already explained, although Credit Union ONE has no SBT liability because it is tax exempt, this does not mean that it cannot have business activity for purposes of determining whether its subsidiaries qualify for a tax credit under § 36(7) and § 36(2). There simply is no such limitation in the plain language that defines "business activity."

C. REVENUE ADMINISTRATIVE BULLETIN 1989-49

Lastly, plaintiffs contend that the department's decision to consolidate plaintiffs' gross receipts with the business activity of its parent was contrary to the department's own published guidance. This argument is unavailing. Revenue Administrative Bulletin (RAB) 1989-49 provides guidelines regarding the circumstances under which a group of corporate taxpayers must file a consolidated SBT return under § 77 of the SBTA, MCL 208.77.[5] It has absolutely no relevance, and is inapplicable, to the circumstances under which an

[5] Section 77 provides, in part:

> (1) The commissioner may require or permit the filing of a consolidated or combined return by an affiliated group of United States corporations if all of the following conditions exist:
>
> (a) All members of the affiliated group are Michigan taxpayers.
>
> (b) Each member of the affiliated group maintains a relationship with 1 or more members of the group which includes intercorporate transactions of a substantial nature . . . .
>
> (c) The business activities of each member of the affiliated group are subject to apportionment by a specific apportionment formula contained in this act which specific formula also is applicable to all other members of the affiliated group . . . . [MCL 208.77.]

entity claiming the small business credit must consolidate business activities because of its business structure. In fact, RAB 1989-49 makes no mention whatsoever of the allowance of the small business credit generally, or of § 36(7) specifically. Moreover, even if RAB 1989-49 were on point, we are not required to follow the department's published guidelines, because such interpretive statements do not carry the force of law and are not otherwise binding on this Court. *Kmart Mich Prop Servs, LLC*, 283 Mich App at 654.

Affirmed.

PEOPLE v WILLIAMS

Docket No. 284585. Submitted August 5, 2009, at Grand Rapids. Decided April 8, 2010, at 9:00 a.m.

Glenn T. Williams was charged in the Muskegon Circuit Court, Timothy G. Hicks, J., with the armed robberies of a Clark gas station and an Admiral tobacco shop. He pleaded nolo contendere with regard to the Clark gas station incident and guilty with regard to the Admiral tobacco shop incident, and was sentenced. He then moved to withdraw his pleas. Defendant alleged that the factual foundation for each plea was not sufficiently established because, with regard to the Admiral incident, there was no evidence that defendant committed a completed larceny, and with regard to the Clark incident, defendant was not adequately identified as the robber. The trial court denied the motion. The Court of Appeals, in an unpublished order, entered June 16, 2008 (Docket No. 284585), granted defendant's delayed application for leave to appeal, but only with regard to the conviction for the Admiral incident and "on the issue of a completed larceny only." The Supreme Court denied defendant's application for leave to appeal. 482 Mich 1035 (2008).

The Court of Appeals *held*:

1. The trial court did not err by accepting defendant's guilty plea in regard to the Admiral incident, although there was no proof or evidence of a completed larceny. MCL 750.529, defining armed robbery, and MCL 750.530, defining robbery, after their amendment by 2004 PA 128, now encompass attempts. As a result, a completed larceny is no longer required for a conviction of armed robbery.

2. The armed robbery statute, MCL 750.529, requires that a defendant be engaged in conduct proscribed under the robbery statute, MCL 750.530. For robbery to rise to the level of an armed robbery, § 529 requires that the individual possess a dangerous weapon or an article used or fashioned in a manner to lead any person to reasonably believe the article is a dangerous weapon, or to represent orally or otherwise that he or she is in possession of a dangerous weapon. Here, defendant admitted acting in a manner to suggest to the Admiral store clerk that he possessed a weapon.

3. The conduct proscribed by § 530 is the use of force or violence while in the course of committing a larceny of any money or other property that may be the subject of larceny. The phrase "in the course of committing a larceny" in § 530 "includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." Therefore, the crime of armed robbery now also encompasses attempts to commit that offense. The statutory language specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed. Acts taken in the process of committing a larceny necessarily include steps or behaviors occurring at any point in the continuum, despite whether they are successfully completed.

4. Defendant admitted representing to the Admiral clerk that he was in possession of a weapon and that he had the intent to take or obtain money from the store's cash register. It was not established that defendant had any intention to harm the clerk. While defendant left the store without any money from the cash register, sufficient elements of the crime were established to sustain his conviction.

Affirmed.

GLEICHER, J., dissenting, stated that the Legislature did not intend by amending MCL 750.529 in 2004 to fundamentally alter the elements of the offense by eliminating the requirement of a completed larceny. Under the common law, the crime of robbery included as an essential element the commission of a larceny. Neither MCL 750.529 nor MCL 750.530 contains definite, clear, or plain language showing the Legislature's intent to fundamentally alter the common law. The plain language of § 530 refutes that the robbery statute, as amended in 2004, permits a conviction without proof of a completed larceny. The Legislature sought to make clear that robbery encompasses acts that occur before, during, and after the larceny, not that the Legislature intended to eliminate larceny as an element of the crime. Here, no evidence exists that defendant committed a larceny during the Admiral incident. Therefore, the trial court abused its discretion by denying defendant's motion to withdraw the plea in the Admiral matter. The conviction and sentence with regard to the Admiral incident should be vacated.

CRIMINAL LAW — ARMED ROBBERY — ROBBERY — ATTEMPTS TO COMMIT LARCENY.

The statutes defining armed robbery and robbery, after their amendment by 2004 PA 128, encompass attempts; a completed larceny is no longer required for a conviction of armed robbery or robbery;

the statutory language specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed; acts taken in the process of committing a larceny necessarily include steps or behaviors occurring at any point in the continuum, despite whether they are successfully completed (MCL 750.529, 750.530).

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

Peter Ellenson for defendant.

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

TALBOT, J. We granted defendant's delayed application for leave to appeal[1] the trial court's denial of his request to withdraw his guilty plea to a charge of armed robbery. MCL 750.529. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 24 to 40 years' imprisonment. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant was initially charged with two separate armed robberies, which occurred on consecutive days at different locations involving a Clark gas station and an Admiral tobacco shop. As part of a "package" deal, defendant pleaded nolo contendere with regard to the Clark gas station charge and guilty with regard to the Admiral tobacco shop charge. Difficulties were encountered when the trial court tried to establish a factual

[1] *People v Williams*, unpublished order of the Michigan Court of Appeals, entered June 16, 2008 (Docket No. 284585). Our Supreme Court denied defendant's subsequent application for leave to appeal. *People v Williams*, 482 Mich 1035 (2008).

basis for defendant's pleas. In this appeal, we are interested solely in defendant's plea in the Admiral tobacco shop case.

With regard to the Admiral tobacco shop, defendant acknowledged that his intent, upon entering the store, was to steal money. Defendant also admitted that he had placed his hand "up under" his coat, suggesting the possession of a weapon, and told the clerk, "[Y]ou know what this is, just give me what I want." The trial court accepted the plea finding it "to be knowing, voluntary, understanding, and accurate." Subsequently, defendant was sentenced to 24 to 40 years' imprisonment for that armed robbery.

Approximately one year after the pleas were accepted and six months after being sentenced, defendant filed a motion seeking to withdraw his pleas. Defendant argued that his plea in the Admiral tobacco shop case was deficient because there was no demonstration or showing that defendant actually took any property from the store. Following the submission of additional briefs, the trial court issued a written opinion and order denying defendant's motion to withdraw his pleas. This appeal ensued.

II. STANDARD OF REVIEW

The issue before this Court can be summarized as whether a completed larceny is necessary to sustain a conviction for armed robbery, pursuant to MCL 750.529. Consequently, the outcome of this appeal is completely dependent on the statutory language comprising MCL 750.529 and MCL 750.530. It is well recognized:

> "[T]he interpretation and application of statutes is a question of law that is reviewed de novo." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The primary goal

> of statutory interpretation is to give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The objective of statutory interpretation is to discern the intent of the Legislature from the plain language of the statute. *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). In doing so, we must be mindful that "[i]t is the role of the judiciary to interpret, not write, the law." *People v Schaefer*, 473 Mich 418, 430-431; 703 NW2d 774 (2005), clarified in part on other grounds *People v Derror*, 475 Mich 316, 320 (2006). [*People v Barrera*, 278 Mich App 730, 735-736; 752 NW2d 485 (2008).]

This Court also reviews de novo as a question of law whether specific conduct falls within the prohibitions of a statute. *People v Adkins*, 272 Mich App 37, 39; 724 NW2d 710 (2006). Relevant to this appeal, we would further note that there exists no absolute right to withdraw a guilty plea, which decision is within the trial court's discretion. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997).

III. ANALYSIS

The four statutes pertaining to robbery are contained within chapter LXXVIII of the Michigan Penal Code.[2] In this appeal, we are concerned with the statutes pertaining to robbery and unarmed robbery following their legislative revision in 2004 PA 128. Specifically, MCL 750.529, defining armed robbery, currently provides:

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[2] Specifically: MCL 750.529 (armed robbery), MCL 750.529a (carjacking), MCL 750.530 (robbery), and MCL 750.531 (bank robbery).

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

Robbery is defined within MCL 750.530, which states:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

It must be determined, on the basis of these recent revisions, whether a perpetrator must actually commit a completed larceny to be convicted of an armed robbery.[3] Specifically, with reference to the issue on appeal, we must address whether the trial court erred by accepting defendant's guilty plea to the offense of armed robbery when there was no proof or evidence of a completed larceny. We find that the statutory lan-

[3] Larceny is defined as: "The unlawful taking and carrying away of someone else's personal property with the intent to deprive the possessor of it permanently." Black's Law Dictionary (8th ed).

guage now encompasses attempts and that, as a result, a completed larceny is no longer required for a conviction of armed robbery.[4]

It is undisputed that MCL 750.529 and MCL 750.530 must be read together because armed robbery requires that a person be "engage[d] in conduct proscribed under [MCL 750.530]." MCL 750.529. In addition, for a robbery to rise to the level of an armed robbery, MCL 750.529 requires that the individual "possess[] a dangerous weapon or an article used or fashioned in a manner to lead any person . . . to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon . . . ." Notably, defendant acknowledged during his plea hearing that he acted in a manner to suggest to the store clerk that he possessed a weapon. Hence, the issue before us is restricted solely to whether a larceny must be completed for defendant's armed robbery conviction to stand.

Clearly, other than separately requiring the existence or representation of the presence of a weapon, the crime of armed robbery is restricted to the "conduct proscribed under section 530 . . . ." MCL 750.529. In turn, MCL 750.530 indicates that the conduct "proscribed" is the use of "force or violence" while "in the course of committing a larceny of any money or other property that may be the subject of larceny . . . ." Our analysis must focus on the definition, contained in MCL 750.530(2), of the phrase "in the course of committing a larceny," which "includes acts that occur *in an attempt to commit the larceny, or* during the commission of the larceny, *or* in flight or attempted flight after the commission of the larceny, *or* in an attempt to retain

[4] In contrast, the dissent finds that the absence of a completed larceny precludes a conviction under the statute.

possession of the property."[5] (Emphasis added.) This Court has no alternative but to strictly adhere to the language used by the Legislature in revising this statute and not seek to attribute either motive or reasoning beyond the plain and ordinary meaning of the wording chosen for use. As such, the crime of armed robbery now also encompasses attempts to commit that offense.

"Where, as here, a statute supplies its own glossary, courts may not import any other interpretation, but must apply the meaning of the terms as expressly defined." *Detroit v Muzzin & Vincenti, Inc*, 74 Mich App 634, 639; 254 NW2d 599 (1977). When dealing with statutory language, it is a well-defined precept that,

> [w]hile courts may decide the validity of statutes and ordinances and construe laws in order to determine the actual legislative intent, the duty of the courts, both with respect to city ordinances and with respect to enactments of the legislature, is merely to interpret and apply the law as it is found to be. They cannot, under the guise of construction, redraft, or change the plain phrasing of the legislative fiat. They may not legislate, nor undertake to compel legislative bodies to do so. [1 Michigan Pleading & Practice (2d ed) § 2:28, pp 125-127.]

In other words,

> when a statute specifically defines a given term, that definition alone controls. Therefore, a statutory definition supersedes a commonly accepted dictionary or judicial definition of a term. [22 Michigan Civil Jurisprudence (2005 revision), § 202, p 731.]

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[5] The dissent elects to interpret this provision to indicate merely the legislative reinstitution of a transactional approach that would allow an armed robbery to be charged if a weapon, or the threat of a weapon, is used at any point in the continuum of the completion of a larceny. Interpreted in this manner, a completed larceny is a necessary component to meet the statutory definition.

The legislative definition of "in the course of committing a larceny" specifically "includes acts that occur in an attempt to commit the larceny . . . ." The term "attempt," which is not defined within the statute, is recognized to mean:

> **1.** The act or an instance of making an effort to accomplish something, esp. without success. **2.** *Criminal law*. An overt act that is done with the intent to commit a crime but that falls short of completing the crime. • Attempt is an inchoate offense distinct from the attempted crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed. [Black's Law Dictionary (8th ed).]

As such, the statutory language specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed. This is consistent with the language of MCL 750.530(2), which distinguishes, by the use of the word "or," acts committed in "an attempt to commit the larceny" from those acts occurring "during the commission of the larceny" or any subsequent acts comprising flight or efforts to retain any property. The term "or" is "used to connect words, phrases, or clauses representing alternatives." *Random House Webster's College Dictionary* (1997). Hence, an attempt to commit a larceny comprises a separate and distinct action and is not merely a component of a completed larceny. In addition, we would note that MCL 750.530(2) defines "in the course of committing *a* larceny" (emphasis added) and not "*the* larceny." The term "a larceny" denotes a more generic, non-specific or generalized act. The fact that the term "the larceny" is subsequently used within this subsection of the statute merely denotes a reference back to the more generalized "a larceny." Logically, acts taken

in the process of committing a larceny necessarily include steps or behaviors occurring at any point in the continuum, despite whether they are successfully completed. This language necessarily demonstrates the Legislature's intent to include attempts to commit a larceny, both by implication and by the specific language contained in this statutory provision.

Consistent with the statutory language, which expands the crime of armed robbery to include attempts, is the recently revised criminal jury instruction relating to this crime.[6] The language of the criminal jury instruction pertaining to armed robbery is clearly consistent with the language of MCL 750.529 and MCL 750.530, providing:

> (1) The defendant is charged with the crime of armed robbery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, the defendant [used force or violence against / assaulted / put in fear] *[state complainant's name]*.
>
> (3) Second, the defendant did so while [he / she] was in the course of committing a larceny. A "larceny" is the taking and movement of someone else's property or money with the intent to take it away from that person permanently.
>
> "In the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property or money.
>
> (4) Third, *[state complainant's name]* was present while defendant was in the course of committing the larceny.
>
> (5) Fourth, that while in the course of committing the larceny, the defendant:

[6] We recognize that use of the standard criminal jury instructions is not mandatory and they are not binding authority. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

[Choose one or more of the following as warranted by the charge and proofs:]

(a) possessed a weapon designed to be dangerous and capable of causing death or serious injury; [or]

(b) possessed any other object capable of causing death or serious injury that the defendant used as a weapon; [or]

(c) Possessed any [other] object used or fashioned in a manner to lead the person who was present to reasonably believe that it was a dangerous weapon; [or]

(d) represented orally or otherwise that [he / she] was in possession of a weapon.

[Add the following paragraph if appropriate:]

(6) Fifth, the defendant inflicted an aggravated assault or serious injury to another while in the course of committing the larceny. [CJI2d 18.1 (footnotes omitted).]

An "attempt" is defined within this section of the criminal jury instructions as having "two elements":

First, the defendant must have intended to commit the crime. Second, the defendant must have taken some action toward committing the alleged crime, but failed to complete the crime. . . . In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it had not been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime the defendant is charged with attempting and not some other goal. [CJI2d 18.7.]

Clearly, the criminal jury instructions have specifically been revised to fully coincide with the statutory language of MCL 750.529 and MCL 750.530[7] and to include a definition of the term "attempt" separate from the more general instruction of a crime comprising an attempt. CJI2d 9.1.

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[7] "This revised instruction is intended to set forth the elements of the armed robbery offense created by 2004 PA 128, effective July 1, 2004, MCL 750.529." Commentary following CJI2d 18.1.

We would note that the immediate prior version of the relevant statute, MCL 750.529, before its amendment by 2004 PA 128, read:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony . . . .

In revising this language, the Legislature not only recognized the actual possession of a weapon or representation by a criminal that he or she is armed, irrespective of the actual presence of a weapon, but also removed the language mandating the actual behavior of to "rob, steal and take . . . ." Had the Legislature not intended a broader revision of the statute, this language could have remained untouched. In addition, the revised language helps to delineate this offense from assault with the intent to rob and steal while armed, MCL 750.89, which statute provides:

> Assault with intent to rob and steal being armed—Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

Hence, MCL 750.89, while similar to MCL 750.529, requires the additional element of an actual "assault."[8]

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[8] MCL 750.529 does include a provision for imposition of a minimum two-year sentence "[i]f an aggravated assault or serious injury is inflicted by any person while violating this section . . . ." This merely provides a prosecutor with a certain degree of latitude in electing to charge a particular offender, based on the circumstances of the case. Notably, both

Clearly, 2004 PA 128 was enacted, at least in part, to legislatively reinstitute a transactional approach to this crime, in response to our Supreme Court's decision in *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). While the Legislature was motivated to enact a provision that would establish a transactional approach to robbery in order to not limit or restrict to a temporal point during the commission of the crime when the threat of violence or use of a weapon had to occur, the statutory language has exceeded this restricted purpose and it is beyond the role of this Court to speculate regarding what the Legislature intended to do. Rather, we can only enforce the language of the statute as it is actually written.

We would assert that the two remaining criminal statutes in this chapter of the Penal Code also reflect this broader perspective. Notably, the carjacking statute, MCL 750.529a, is almost identical to the wording of MCL 750.530. Specifically, MCL 750.529a provides, in relevant part:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an

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statutory provisions, MCL 750.89 and MCL 750.529, indicate that punishment for either offense is imprisonment for life, or for any term of years. A panel of this Court has indicated, in an unpublished opinion, that assault with intent to rob while armed comprises a necessarily included lesser offense of armed robbery but went further to suggest that "[t]he offenses are distinguished only by whether a larceny occurred." *People v Hunt*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2009 (Docket No. 284648), p 2.

> attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

As already noted, 2004 PA 128 also revised this statute. Similar to MCL 750.529, the earlier version of the carjacking statute provided, in relevant part:

> (1) A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in section 412 from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

Once again, the Legislature removed the language "robs, steals, or takes," insinuating that the revised statute was intended to include attempts to commit the designated crime. In contrast, MCL 750.531, which has not been subject to any recent revisions, clearly indicates that it encompasses the "intent" to commit the crime of bank robbery. Specifically, MCL 750.531 states:

> Bank, safe and vault robbery—Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt, or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money, bond or other valuables, or shall by intimidation, fear or threats compel, or attempt to compel any person to disclose or surrender the means of opening any building, bank, safe, vault or other depository of money, bonds, or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or

> felony, be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.

This is important to demonstrate that the concept or legislative act of including language that encompasses an attempt within the statutory definition of a crime is neither unusual nor inconsistent with the most current revisions pursuant to 2004 PA 128. In fact, the revisions to MCL 750.529 through MCL 750.530 now render all of the statutes within this chapter of the Penal Code internally consistent.[9]

A recognized "rule of statutory interpretation provides that well-settled common-law principles are not to be abolished by implication, and when an ambiguous statute contravenes the common law, it must be interpreted so that it makes the least change in the common law." *Heinz v Chicago Rd Investment* Co, 216 Mich App 289, 295; 549 NW2d 47 (1996). However, simultaneously, "this Court is instructed to avoid any construction that would render a statute, or any part of it, surplusage or nugatory." *Id.* at 295-296. First and foremost, concerns regarding the revised statute's alleged abrogation of the common law by no longer requiring a completed larceny are unnecessary. This particular concern pertaining to statutory interpretation pertains to ambiguous statutes and we believe the language of MCL 750.529 and MCL 750.530 to be clear in encompassing attempts within the purview of "in the course of committing a larceny" by definition. Second,

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[9] We would note that other jurisdictions have adopted the approach of including an attempt to commit the offense within the statute defining the crime. " 'Under some of the new penal codes robbery does not require an actual taking of property. If force or intimidation is used in the attempt to commit theft this is sufficient.' " Black's Law Dictionary (8th ed), quoting Perkins & Boyce, Criminal Law (3d ed, 1982), p 343, after defining "robbery." See, also, *Irons v State*, 886 So 2d 726 (Miss App, 2004).

the very fact that the Legislature has elected to use a transactional approach is according to our Supreme Court, in and of itself "contrary to the common law." *Randolph*, 466 Mich at 545. If the Legislature intended this statute to adopt a transactional approach, it is reasonable to assume it was aware of its abrogation of the common law and intended to take it a step further. See 22 Michigan Civil Jurisprudence, Statutes (2009), § 220. In addition, the statute, even before its revision, superseded the common law. Specifically:

> When a statute takes up and completely covers a subject previously governed by the common law, the common law ceases to operate upon it, except where the statute has made no provisions for its punishment. The statute declaring how penalties will be enforced covers the entire ground and leaves nothing to be supplied by the common law. By statute the common law prevails where there is no specific statute determining what constitutes an offense. . . .
>
> The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law; and thus, subject to the provisions of its own constitution, it may avail itself of the wisdom gathered from experience to make such changes as may be deemed necessary. [1 Gillespie, Michigan Criminal Law & Procedure (2d), § 1:5, pp 19-20.]

Finally, as a general observation, in defining a robbery, the "essential elements of unarmed robbery are assault with force and violence while the defendant is not armed, accompanied by the intent to rob and steal." 4 Gillespie, Michigan Criminal Law & Procedure (2d), § 133:2, p 400. Hence, it is the violence or threat of force and the intent that constitute the primary elements rather than the successful completion of a particular act that comprise this offense.

Further, the legislative history pertaining to the statutory revisions supports a holding that the inclu-

sion of attempts within the offense was deliberate. Specifically, in discussing the content of the proposed revisions, it was noted:

> The bill would amend the Michigan Penal Code to specify that certain offenses involving larceny *would include acts that occurred in an attempt to commit the larceny,* during the commission of the larceny, in flight or attempted flight after the larceny was committed, or in an attempt to retain possession of the stolen property. This would apply to armed robbery, unarmed robbery, and carjacking. [Senate Fiscal Agency Analysis, HB 5105, May 17, 2004 (emphasis added).]

Unfortunately, following revision of the statutory language, the application and interpretation of these provisions has not been consistent within caselaw. In *People v Chambers*, 277 Mich App 1, 8 n 7; 742 NW2d 610 (2007), this Court acknowledged the revision of MCL 750.529 and MCL 750.530 and noted the alteration of previously recognized elements defining these crimes. Subsequently, in an unpublished opinion, this Court, citing *Chambers* opined, in pertinent part:

> Under the plain language of the armed robbery statute, the phrase "in the course of committing a larceny" includes acts that occur in an attempt to commit a larceny, during its commission, and ones that occur in flight after the larceny. MCL 750.530. Thus, the armed robbery statute does not require that a felonious taking or completed larceny occur; it requires that the use of force or the placement of a person in fear, occur "in the course of committing a larceny" and with the use of a dangerous weapon, or an object reasonably believed to be a dangerous weapon. [*People v Nelson*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2009 (Docket No. 281662), p 2.]

Other opinions appear to retain the previous requirements of a completed larceny but lack a certain level of clarity in their analysis. By way of example, in *People v Thomas*, unpublished opinion per curiam of the Court

of Appeals, issued October 6, 2009 (Docket No. 287382), the Court distinguished between the revised armed robbery statute and the bank robbery statute. However, in undertaking this analysis the Court did not recognize any significant departure in the elements for armed robbery from caselaw that existed before the revision of MCL 750.529, resulting in the determination by the Court that "[a]rmed robbery continues to require a theft from a person . . . ." *Id.*, unpub op p 2. Notably, in and of itself this is an inaccuracy because the current statute encompasses the use or threat of force (with the presence or representation of a weapon) against a person while "in the course of committing a larceny of any money or other property that may be the subject of larceny . . . ." MCL 750.529; MCL 750.530(1). It does not require a direct "taking" or "theft from a person." Similarly, a statement by this Court in *People v Monk*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2009 (Docket No. 280291), contains an obvious contradiction. On the one hand, the Court states, "Acts included in the phrase 'in the course of committing a larceny' include all acts that occur during a larceny's attempt or commission . . . . An attempted or committed larceny by an armed individual, or by a person the victim reasonably believes is armed, is required under the statute." *Id.*, unpub op p 2. However, this statement is immediately followed by a reference indicating the necessity of a taking despite recognition that the statute encompasses attempts to commit the crime. Specifically, the Court opined, "The statute does not expressly require that any property actually taken must be owned by the victim. Rather, property must just be taken from the victim or his presence in the course of a larceny."[10] *Id.*

[10] This same inconsistency is also present within caselaw involving MCL 750.529a, the carjacking statute. In discussing concerns pertaining

Courts must proceed with greater caution in their use and reliance on prior published opinions delineating the elements of armed robbery, which preceded the revision of MCL 750.529. "[A] change by amendment in the phraseology of a statute is presumed to indicate a legislative purpose to change the meaning." 3A Michigan Pleading & Practice (2d ed, 2007 revised vol), § 36:146, p 251; see, also, *People v Auto Serv Councils of Mich, Inc*, 123 Mich App 774, 787; 333 NW2d 352 (1983) ("It is reasonable to presume some intentionality in the insertion of this additional language."). Clearly, the Legislature has enacted changes affecting the elements comprising this offense and it is our responsibility to correctly apply the revised language of MCL 750.529 to the particular evidence and facts of each individual case.

IV. CONCLUSION

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must

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to double jeopardy considerations involving the carjacking statute and the assault with intent to rob while armed statute, this Court noted: "[T]he assault with the intent to rob while armed statute does not require the larceny of a motor vehicle, as does the carjacking statute," implying the necessity of a completed larceny. *People v McGee*, 280 Mich App 680, 685; 761 NW2d 743 (2008). See, also, *People v Carter*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 268408), p 2, indicating the carjacking statute requires a "taking and asportation"; *People v Richardson*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2007 (Docket No. 270606), p 3, implying the necessity of a completed taking but not retention of a vehicle to be convicted of carjacking. In contrast, in *People v Morgan*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2009 (Docket No. 284986), p 2, this Court recognized the necessity of only an attempt to commit a larceny as meeting the statutory requirements for carjacking. In *People v Dearmin*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2006 (Docket No. 259432), p 3, a panel of this Court clearly recognized the inclusion of an attempt within MCL 750.529a, stating, in relevant part: "While the new statute makes clear that actions taken in an attempt to commit a larceny are included in the ambit of the statute, it also makes clear that the required criminal act or attempt is a larceny."

view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In the factual circumstances of this case, defendant acknowledged that he represented to the store clerk that he was in possession of a weapon at the Admiral tobacco shop. From the colloquy at sentencing, it was also established that defendant had the intent to take or obtain money from the store's cash register. It was not established that defendant had any intention to harm the store's clerk. While defendant was not successful in that he left the store without money from the cash register, sufficient elements of the crime were established to sustain his conviction for armed robbery based on the language of the statute.

Affirmed.

OWENS, P.J., concurred.

GLEICHER, J. (*dissenting*). I respectfully dissent. In my view, the Legislature did not intend that its 2004 amendment of the armed robbery statute would fundamentally alter the elements of that offense by eliminating the requirement of a completed larceny.

I. UNDERLYING FACTS AND PROCEEDINGS

On July 13, 2006, a man matching defendant's description entered a Clark gas station in Norton Shores, declared that he had a gun, and ordered the attendant to give him all the money in the cash register. After the attendant complied, the assailant pushed her into a back room and fled. The next day, defendant entered

the Admiral tobacco shop (Admiral Tobacco) in Roosevelt Park, approached the clerk with his hand in his jacket, and announced, "[Y]ou know what this is, just give me what I want." The clerk did not give defendant any money or property, and defendant fled from the store without having stolen anything. Defendant apparently broke his leg in flight from the store, and the police eventually apprehended him. When the police arrested defendant, they noted that he wore on his body and possessed in his vehicle the same clothing worn by the man who had robbed the Clark station the previous day.

The prosecutor charged defendant with armed robbery of the Clark station (Case No. 06-053668-FC). In a separate complaint arising from the Admiral Tobacco events, the prosecutor charged defendant with assault with intent to rob while armed, MCL 750.89, and armed robbery, MCL 750.529 (Case No. 06-053640-FC). At a January 2007 hearing, the prosecutor informed the circuit court "that [defendant] will be offering . . . pleas of guilty in both files." The prosecutor advised that in the Admiral Tobacco case, the prosecution had elected to dismiss the assault with intent to rob while armed charge and accept defendant's guilty plea to a charge of armed robbery. Defense counsel summarized the parties' agreement that defendant's sentence would "not . . . exceed 24 years on the minimum-maximum at the Michigan Department of Corrections."

After apprising defendant of his constitutional and other rights, the circuit court moved on to establish a factual predicate for defendant's plea to the Clark station robbery. However, defendant denied having represented to the station attendant that he possessed a weapon. When the circuit court offered to allow the parties additional time to further discuss defendant's

guilty plea, the prosecutor suggested that the court instead establish the "factual scenario of the Admiral" Tobacco incident. Under questioning by the prosecutor, defendant admitted that he had entered Admiral Tobacco with the intent to steal money, had his hand "up under" his coat, and told the clerk, "[Y]ou know what this is, just give me what I want." The prosecutor's questioning continued as follows:

> [*Prosecutor*]: Okay. And it was your intent, at that time, for her to give you the money out of the cash register, is that right?
>
> *Defendant*: Yeah.
>
> [*Prosecutor*]: All right.
>
> *The Court*: Great—
>
> [*Prosecutor*]: And I think that satisfies.
>
> *The Court*: Great. I think we're all set on Admiral.

The parties then returned to presenting a factual basis for defendant's plea to the Clark station robbery. Defense counsel averred that defendant was high on cocaine during the Clark station robbery and could not recall the details of the crime. Defense counsel proposed that defendant could enter a no contest plea. The circuit court agreed it would resort to a police report to establish the factual predicate for defendant's no contest plea, summarizing,

> I think we've established here a lack of memory is the reason for the nolo plea about the Clark station, in file number 668. The report established that Mr. Williams, is guilty of the crime, on that file, to which he pleads no contest. The court finds the plea to be knowing, voluntary, understanding, and accurate. On that file, the court will accept the plea.
>
> On the other file, Mr. Williams's testimony does that for me. The court finds his testimony to establish commission

> of that crime and location here in Muskegon County. The court finds that plea as well to be knowing, voluntary, understanding, and accurate. So the court accepts that plea.

On February 9, 2007, the court sentenced defendant to concurrent terms of 24 to 40 years' imprisonment for the Clark station and Admiral Tobacco robberies.

In October 2007, defendant moved to withdraw both his pleas, contending that the circuit court neglected to secure an adequate factual foundation for either plea. According to defendant, the Admiral Tobacco plea discussions revealed no evidence that he had committed a larceny, and the police report used to supply the factual basis of the Clark station plea did not sufficiently identify defendant as the robber. The circuit court denied defendant's motions, ruling (1) with respect to the Admiral Tobacco plea, that the language of the armed robbery statute allows conviction based on an attempted larceny, which the plea discussions substantiated, and (2) concerning the Clark station robbery, that the entirety of the police report and plea proceeding amply established defendant's participation in the Clark station robbery. This Court granted defendant's delayed application for leave to appeal, "limited to case no. 06-053640-FC [Admiral Tobacco] on the issue of a completed larceny only. In all other respects, the delayed application for leave is denied." *People v Williams*, unpublished order of the Court of Appeals, entered June 16, 2008 (Docket No. 284585).

II. ANALYSIS

"There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court." *People v Montrose (After Remand)*, 201 Mich App 378, 380; 506 NW2d 565 (1993). Where, as here, a defendant moves to

withdraw his or her plea after sentencing occurs, "[t]he trial court's decision will not be disturbed on appeal absent a clear abuse of discretion that resulted in a miscarriage of justice." *People v Boatman*, 273 Mich App 405, 406-407; 730 NW2d 251 (2006). "In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996), citing *People v Booth*, 414 Mich 343, 360; 324 NW2d 741 (1982).

Defendant insists that because he "never stole, moved or touched property" during the Admiral Tobacco incident, a fact-finder could not have convicted him of an armed robbery. Defendant emphasizes that larceny constitutes "an integral and necessary element of armed robbery," and absent evidence of a completed larceny, the circuit court erred by accepting his guilty plea to violating MCL 750.529. The majority rejects defendant's argument, holding that the Legislature's 2004 amendment of the robbery statute "specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed." *Ante* at 75. In my estimation, the majority erroneously reaches its holding by reading into the statute language that the Legislature did not incorporate into the statute.

I approach my analysis bearing in mind that "[u]nderlying the criminal statutes of this state is the common law." *People v McDonald*, 409 Mich 110, 117; 293 NW2d 588 (1980). The common-law definition of a crime binds Michigan courts until the Legislature modifies the elements of the crime. *People v Perkins*, 468 Mich 448, 455; 662 NW2d 727 (2003). In *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921), our Supreme Court instructed:

> A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown.

When a statute incorporates general common-law terms to describe an offense, we thus construe the statutory crime through the lens of common-law definitions. *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002). In *Riddle*, our Supreme Court quoted approvingly the following relevant passage from *Morissette v United States*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952):

> [W]here [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Michigan's original robbery statutes derived from the common-law crime of robbery, and fashioned that crime into two grades. *People v Calvin*, 60 Mich 113, 120; 26 NW 851 (1886). In *Calvin*, our Supreme Court distinguished the two grades of robbery as "one in which the robbery is committed by an assault and robbery from the person, the robber being armed with a dangerous weapon, . . . the other in which the offense is perpetrated by force and violence, or by assault or putting in fear, and robbing, stealing, and taking from the person of another, the robber not being armed with a dangerous weapon . . . ." *Id*. at 119. Today, MCL 750.530 delineates the elements of an unarmed robbery, and MCL 750.529 defines armed robbery by adding to

MCL 750.530 the element that the robber possessed a dangerous weapon or "an article used or fashioned in a manner to lead any person present to reasonably believe the article [was] a dangerous weapon, or [the robber] represent[ed] orally or otherwise that he or she [was] in possession of a dangerous weapon . . . ."

Under the common law, the crime of robbery indisputably included as an essential element the commission of a larceny. "Since, by definition, robbery includes larceny, robbery requires a caption and asportation of the property of another." Wharton's Criminal Law (15th ed), § 457, p 13. Wharton further instructs that a defendant accomplishes "a caption when . . . [he] takes possession; he takes possession when he exercises dominion and control over the property." *Id*. Professors Wayne LaFave and Austin Scott also explain, in relevant part:

> Robbery, a common-law felony, and today everywhere a statutory felony regardless of the amount taken, may be thought of as aggravated larceny—misappropriation of property under circumstances involving a danger to the person as well as a danger to property—and thus deserving of a greater punishment than that provided for larceny. [LaFave & Scott, Criminal Law (Hornbook Series, 1972), § 94, p 692.]

Larceny, in turn, "requires that there be a 'trespass in the taking,' i.e., that the thief take the property out of the possession of its possessor. . . ." *Id*., § 85, p 622.

In *Covelesky*, 217 Mich at 96-97, our Supreme Court observed that Michigan's robbery statutes embody the common-law offense of robbery:

> Robbery at common law is defined as the felonious taking of money or goods of value from the person of another or in his presence, against his will, by violence or putting him in fear. This definition has been followed by

> most of the statutes, and even where the language has been varied sufficiently to sustain, by a literal interpretation, a narrower definition of the offense, it has usually been held that it could not be presumed that the legislature intended to change the nature of the crime as understood at common law. [Quotation marks and citation omitted.]

In *Saks v St Paul Mercury Indemnity Co*, 308 Mich 719, 723-724; 14 NW2d 547 (1944), the Supreme Court quoted approvingly the following from a decision of the Washington Supreme Court, *Cartier Drug Co v Maryland Cas Co*, 181 Wash 146, 149; 42 P2d 37 (1935): " 'In the administration of criminal law, two distinct elements are held to be necessary to the crime of robbery: (1) Putting the victim in fear of violence to his person or property; and (2) the taking of money, property, or thing of value from his person or in his presence.' " And in *People v LaTeur*, 39 Mich App 700, 706; 198 NW2d 727 (1972), this Court noted that "[l]arceny is one of the essential elements of an armed robbery charge." More recently, in *People v Jankowski*, 408 Mich 79, 87; 289 NW2d 674 (1980), the Supreme Court reiterated the proposition that "[r]obbery has long been defined in this jurisdiction to be nothing more than a 'larceny committed by assault or putting in fear'." "When the taking is accomplished by force or assault, the offense is aggravated to one of robbery." *Id*. at 88.

With these principles in mind, I conclude that the Legislature did not intend that the armed robbery statute would permit a conviction absent an accomplished larceny. In 2004, the Legislature reworked Michigan's robbery statute, MCL 750.529, to read, in relevant part, as follows:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to

> reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

Concomitantly, the Legislature enacted a revised unarmed robbery statute, MCL 750.530, that described as follows the unlawful "conduct" referenced in § 529:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

The majority holds that when the Legislature amended § 530 in 2004, it intended to eliminate a larcenous taking as a requisite element of a robbery. In the majority's opinion, "[t]he legislative definition of 'in the course of committing a larceny' specifically 'includes acts that occur in an attempt to commit the larceny,' " reflecting the Legislature's intent to punish both complete and incomplete larceny-related actions. *Ante* at 75.

When construing statutory language, which we review de novo, this Court must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002); *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006). "Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the

statute itself." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000); see also *Pasha*, 466 Mich at 382 ("The first step in that determination is to review the language of the statute itself.") (quotation marks and citation omitted). In *Bush v Shabahang*, 484 Mich 156, 167-168; 772 NW2d 272 (2009), our Supreme Court offered this additional guidance regarding statutory interpretation:

> A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute. Finally, an analysis of a statute's legislative history is an important tool in ascertaining legislative intent.

Our Supreme Court has explained that the Legislature enacted the current version of the robbery statute in response to the Supreme Court's decision in *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). In *Randolph*, the Supreme Court considered whether the robbery statute then in effect embraced the "transactional approach" to robbery, under which "a defendant has not completed a robbery until he has escaped with stolen merchandise. Thus, a completed larceny may be elevated to a robbery if the defendant uses force after the taking and before reaching temporary safety." *Id*. at 535. The Supreme Court in *Randolph* rejected the transactional approach, holding that under the common law the force or violence element of robbery "had to be applied before or during the taking." *Id*. at 538. When the Legislature subsequently amended the robbery stat-

utes, it "explicitly stated that unarmed robbery is a transactional offense." *People v Morson*, 471 Mich 248, 265 n 2; 685 NW2d 203 (2004) (CORRIGAN, C.J., concurring).

Distilled to its essence, the majority's position here is that, in addition to legislatively overruling *Randolph*, the Legislature's 2004 amendments to MCL 750.529 and MCL 750.530 also fundamentally altered the common-law underpinnings of the crime of robbery by eliminating the requirement of a completed larceny. But my analysis of the statutory language and the legislative history reveals no support for the majority's conclusion. Although the Legislature has the authority to abrogate the common law, "[w]hen it does so, it should speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Neither § 529 nor § 530 contains definite, clear, or plain language evincing the Legislature's intent to fundamentally alter the understanding of more than a century, that "[l]arceny is one of the essential elements of an armed robbery charge." *LaTeur*, 39 Mich App at 706.

Furthermore, the plain language of MCL 750.530 refutes that the amended robbery statutes permit conviction without proof of a completed larceny. Pursuant to § 530(1), a person who uses force or violence, puts in fear, or assaults another "in the course of committing a larceny" is guilty of a felony. Subsection 530(2) sets forth that the phrase "in the course of committing a larceny" includes "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." Section 530 does not specifically define "in the course of," but accord-

ing to *Webster's New World Dictionary* (2d college ed, 1970), "in the course of" means "in the progress or process of; during." Applying this meaning in the context of § 530, subsection 530(1) signifies that a person who uses force or violence at any point from the inception of the larceny until its conclusion is subject to prosecution for armed robbery. By elucidating in § 530 the "acts" constituting robbery, the Legislature intended to expand the temporal scope of the crime, transforming it into a transactional offense. Reading §§ 530(1) and (2) as a contextual whole, it appears that the Legislature sought to make clear that robbery encompasses acts that occur before, during, and after the larceny, not that the Legislature intended to eliminate larceny as an element of the crime. Nor does the legislative history suggest any purpose other than "to include any crime of larceny that involved the use of force or violence, or fear, at any time during the commission of the crime." House Legislative Analysis, HB 5105, February 12, 2004.

"Before accepting a guilty plea, a trial court must question the defendant to ascertain whether there is support for a finding that the defendant is guilty of the offense to which he is pleading guilty." *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003). When questioning the defendant, the circuit court "must establish support for a finding that the defendant is guilty of the offense charged or to which the defendant is pleading." MCR 6.302(D)(1). Here, no evidence exists that defendant committed a larceny at Admiral Tobacco. Without evidence that defendant's actions at Admiral Tobacco included a larceny, I believe that the circuit court abused its discretion by denying defendant's motion to withdraw his guilty plea. Consequently, I would vacate

defendant's conviction and sentence with regard to the Admiral Tobacco incident.[1]

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[1] Because the length of the sentence imposed by the circuit court in the Clark station robbery (Case No. 06-053668-FC) was directly linked to and packaged with defendant's plea in the Admiral Tobacco case as part of a bargain made pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), I believe that defendant should be permitted to withdraw the nolo contendere plea in Case No. 06-053668-FC.

JONES v DAIMLERCHRYSLER CORPORATION

Docket No. 285099. Submitted December 8, 2009, at Detroit. Decided January 7, 2010. Approved for publication April 8, 2010, at 9:05 a.m.

Timothy and Chrystal Jones brought a negligence action against DaimlerChrysler Corporation in the Macomb Circuit Court for injuries sustained by Timothy Jones when he fell through a trapdoor on the mezzanine of one of defendant's plants while working for a contractor. The trapdoor, which was situated near the top of a staircase, had been opened moments before the accident by one of Timothy Jones's coworkers, who was unaware of his approach. The trial court, Mary A. Chrzanowski, J., granted defendant's motion for summary disposition of plaintiffs' premises-liability claim on the ground that defendant had no knowledge of the dangerous condition on its property and could not have discovered it between its creation and the accident. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court properly granted defendant's motion for summary disposition with respect to the open trapdoor because defendant had no duty to protect plaintiff from a temporary, unexpected hazardous condition of which defendant had no notice and that was created by employees of a contractor to whom defendant had given control over the work site.

2. The trial court erred by granting defendant's motion for summary disposition with respect to plaintiffs' claim that the location and design of the trapdoor made it a dangerous condition, which presented a question of fact. This claim is properly categorized as one alleging premises liability rather than nuisance, and the evidence indicates that the dangers presented by the trapdoor were not open and obvious.

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

1. NEGLIGENCE — PREMISES LIABILITY — DANGEROUS CONDITIONS.

The creation of a temporary, unexpected dangerous condition by employees of a contractor that has control over a work site does

not give rise to premises liability where the owner of the work site had no knowledge or notice of the condition.

2. NEGLIGENCE — PREMISES LIABILITY — DANGEROUS CONDITIONS — LOCATION AND DESIGN OF TRAPDOOR.

A claim that the location and design of a trapdoor makes it a dangerous condition presents a factual question that precludes summary disposition.

Sachs Waldman, Professional Corporation (by *George T. Fishback*), for plaintiffs.

Cardelli, Lanfear & Buikema, P.C. (by *Anthony F. Caffrey III* and *Lisa C. Walinske*), for defendant.

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

PER CURIAM. In this premises liability action, plaintiffs[1] appeal by right following the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10) and dismissal of plaintiffs' complaint with prejudice. We affirm in part, reverse in part, and remand for further proceedings.

I. SUMMARY OF FACTS AND PROCEEDINGS

Plaintiff was injured on May 31, 2006, when he fell through a trapdoor opening[2] in a mezzanine walkway in

[1] Because plaintiff Chrystal Jones brings a derivative loss of consortium claim, references in this opinion to "plaintiff" refer to plaintiff Timothy Jones.

[2] The trapdoor sits to the right of a staircase leading to the mezzanine walkway made of open metal grating. The trapdoor is hinged at the edge of the grating under the railing surrounding the stairwell so that when it is opened, the grating swings up and rests against the railing (where it can be held with a hook), creating an open hole without barriers on the three sides along the walkway. Thus, by coming up the stairs and making two 90-degree turns, a person faces an open edge of the hole with the left and far edges also open, and the lifted grating to the right, leaning against the railing.

defendant's Sterling Heights plant. At the time of the accident, plaintiff was working on a renovation project at the plant and was employed by Durr Systems (Durr) as a millwright. Defendant hired Durr to change over a multitude of conveyor components that are used on the paint line of the assembly plant. Plaintiff testified that he was the supervisor for the millwrights working on the project and had been working on-site for roughly two to three weeks, between six and seven days a week. Before this assignment, plaintiff had been to this plant on five or six occasions to do preliminary work for this job. Defendant's plant was shut down while Durr was completing the work, and plaintiff did not report to an employee of defendant during his time working at the plant.

One of the conveyors that the Durr employees were working on could only be accessed from the mezzanine. Plaintiff indicated that he was familiar with the area within defendant's plant where he was working, including the mezzanine area. Plaintiff testified that during his time on this job, he had been on the mezzanine often, climbing the stairs roughly three or four times a day before the incident in order to check the progress of the work being done. Plaintiff acknowledged that he knew there were grates that could be removed in the mezzanine area because he had seen some removed in other parts of the plant. Plaintiff was also familiar with similar grate systems in other plants he had worked in. Plaintiff knew that the Durr employees would need to lift or hoist some products to the mezzanine, and he stated that occasionally the products are lifted through removed sections of the grating.

On the night of the incident, plaintiff walked up the stairs to the mezzanine in order to distribute paychecks. According to plaintiff, Mike Perry, the iron-

worker foreman, walked up the stairs behind plaintiff. Regarding the fall, plaintiff testified that he "went up the staircase and went to my right as I got to the top of the staircase, and that's all I remember . . . the next thing I know, I was laying on the floor." Plaintiff did not recall seeing anyone on the mezzanine before his fall and he did not recall looking down. Plaintiff was wearing safety glasses and a hard hat at the time he fell. When plaintiff awoke, he was laying on the ground. Plaintiff was told after the fall that the "Perry boys," a group of cousins that worked as ironworkers for Durr, may have moved a section of grating from the floor.

One of the Perry boys, Lonnie Perry, worked as an ironworker at Durr on the date of the incident. Lonnie stated that he heard plaintiff tell his cousin, Mike Perry, that a section of the conveyor would need to be lifted through the grating. Lonnie testified:

> And, Mike told us, me and Randy Perry, to go up the stairwell to see if we could get the grating open so we could shoot a small piece of conveyor end in up though the grating. And I looked and I seen there wasn't . . . no safety tape or anything such as that, so I told the steward that we needed some red tape. And, he said he didn't have any, but he would go look. So, then I and Randy walked up the stairwell, identified the piece of grating where we needed to shoot the rig through with the piece. And, it was all phosphated, all gluey, pretty sticky; didn't believe we could ever get it open. Randy was standing in front of me; I bent over at the—the left edge of it; I put my pry bar in there and I got it to come open, surprisingly, and found out it was, actually, even on hinges. And, just—I no more than opened it, my—I was looking towards my cousin Randy, his eyes got big, I heard the grating rattle; I looked and [plaintiff] had walked right by me, right into the hole and all I could see was his eyes of terror going to the ground. And, it was just that quick. [Plaintiff] had been walking and he had followed me right up the stairwell. I didn't realize it. And, he had a handful of checks in his hand and he was just

> getting ready to go down the conveyor to hand out checks to—to his employees, his millwrights. And, as soon as I heard the rattle, I seen his eyes and I seen checks flying everywhere . . . and I watched him go to the ground and hit the gang box. He bounced off a set of torches and a gang box and laid there unconscious.

Lonnie said that the grating was open "two tenths of a second, possibly" before plaintiff stepped into the hole. Michaeline Cartwright, who worked as a safety coordinator for Durr from 2004 to 2006, documented that the grating had been opened "for less than ten seconds."

Cartwright testified that on the night of the incident, she spoke to one of defendant's employees, Nick Juncaj, who was temporarily working as the UAW safety representative. Juncaj testified that he filled in for the regular safety representative for five weeks, beginning on May 19, 2006. According to Cartwright, Juncaj stated that there had been two other accidents at the same location within the past three years. However, at his deposition, Juncaj denied knowing of any prior accidents and he did not recall telling Cartwright of other injuries in this area. Juncaj testified that he had worked at the Sterling Heights plant since 1991, full time since 1994. Pat Christie, defendant's safety supervisor, testified that the hinged sections on the mezzanine have been used "time and again." Christie also indicated that he had no knowledge of other accidents with people falling through the hinged section of the mezzanine floor.

Plaintiffs originally sought relief asserting claims of both premises liability, based on defendant's ownership of the premises, and contractor liability, under the retained control doctrine, on the theory that defendant had retained control over the renovation project. See *Ormsby v Capital Welding, Inc*, 471 Mich 45, 60; 684 NW2d 320 (2004). However, plaintiffs stipulated to

dismissal of this latter claim, as well as its claim predicated on the inherently dangerous activity doctrine, and proceeded only on the claim predicated on defendant's ownership of the premises.

Defendant filed a motion requesting summary disposition. After considering the evidence, the trial court granted defendant's motion, holding:

> In the instant matter, the dangerous condition was created when plaintiff's co-employees raised a grate on the mezzanine-level walkway, creating an unwarned and unguarded hole through which someone could fall. The record is devoid of any evidence suggesting defendant knew or should have known that plaintiff's co-employees would create such a dangerous condition.
>
> Moreover, the record clearly established the dangerous condition existed for less than ten seconds before plaintiff fell through the opening. There is no evidence suggesting defendant knew of the dangerous condition in the short time of its existence; the short time also precludes a finding that defendant could have discovered the dangerous condition before plaintiff encountered it.
>
> The mere fact that similar accidents may have occurred in the past does not establish defendant had knowledge of [the fact] that an actual dangerous condition, the open grate, existed when plaintiff fell. To the contrary, the grate was obviously kept closed to prevent injuries. While defendant would clearly have had knowledge of the potential for danger from the prior accidents, defendant would not have knowledge that that actual dangerous condition existed or would be permitted to exist without some sort of protection (e.g., warning tape or barricade) when plaintiff fell. Hence, plaintiff has not shown further discovery stands a fair chance of uncovering factual support for his position to avoid summary disposition.

Plaintiffs now appeal, challenging the grant of summary disposition as well as the trial court's subsequent denial of their motion for reconsideration.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). For a motion brought under MCR 2.116(C)(10), we review the pleadings, admissions, and other evidence in the light most favorable to the nonmoving party and, if there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 466-467. A trial court's action on a motion for reconsideration is reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

III. ANALYSIS

As an initial matter, we note that a subcontractor's employee who is injured on a work site may bring claims for both premises liability and contractor liability. See, e.g., *Ghaffari v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005); *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002). Therefore, plaintiffs' concession that they had no contractor liability claim did not automatically preclude a premises liability claim. To the extent that defendant asserted the contrary, we reject its argument.

To establish a premises liability claim, "a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006).

Plaintiffs first argue that the trial court erred by concluding that defendant had not created the danger-

ous condition and could not be held liable for plaintiff's injuries. Plaintiffs argue that defendant created the danger by placing the trapdoor in the mezzanine walkway. Defendant argues that plaintiff's coworkers created the condition when the trapdoor was opened and no barricade was placed around the opening. We conclude that there are two separate potential dangerous conditions on defendant's premises for which it could be held liable. Although the trial court appears to have based its ruling on the conclusion that the dangerous condition was the open trapdoor, at oral argument, counsel for plaintiffs indicated that the dangerous condition was not the open trapdoor, per se, but rather its location in the walkway and where it was hinged. Because these are distinct claims, see *Bluemer v Saginaw Central Oil & Gas Serv, Inc*, 356 Mich 399; 97 NW2d 90 (1959), we address them separately.

A. THE OPEN TRAPDOOR

Looking first at defendant's liability for the open trapdoor as the dangerous condition, we conclude that the trial court properly granted summary disposition on this issue.

"It is a general proposition that liability for an injury due to defective premises ordinarily depends upon power to prevent the injury . . . ." *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942) (quotation marks and citation omitted). In this case, there is undisputed evidence that one of plaintiff's coworkers opened the trapdoor moments before plaintiff fell. Defendant did not open the section and leave it in a dangerous condition. Rather, the open trapdoor was a construction site hazardous condition that was created by one of plaintiff's co-employees. We believe that defendant had

no duty to protect plaintiff from this condition based on *Young v Delcor Assoc*, *Inc*, 477 Mich 931 (2006).

In *Young v Delcor Assoc, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 27, 2006 (Docket No. 266491), rev'd 477 Mich 931 (2006), the plaintiff was a subcontractor's employee who stepped on a wall panel that had been laid down over one-third of a second-floor stairwell opening that was neither covered nor barricaded. The plaintiff knew that there was a stairwell opening under the wall, but thought the wall panel was a solid section. The wall was in two sections that separated when the plaintiff stepped on the panel, and the plaintiff fell more than 20 feet through both the second and first floor stairwell openings into the basement. *Id.* at 2. The trial court concluded that there was an outstanding factual question as to whether the defendant had possession and control over the premises at the time of the plaintiff's injuries, "a necessary element of both claims." *Id.* at 4. However, it concluded that the premises liability claim failed as a matter of law because "either the opening itself or the opening partially covered by the wall panel" was open and obvious or "presented an unexpected hazard for which [defendant] did not have notice as even plaintiff did not realize that the wall panel would not support his weight." *Id.* at 4-5. The plaintiff appealed the summary disposition on both the premises liability and contractor liability claims. The Court of Appeals panel affirmed summary disposition on the contractor liability claim, but reversed on the premises liability claim, concluding:

> [T]he allegedly dangerous condition for which plaintiff was attempting to hold [defendant] liable . . . as the premises possessor, was the stairwell sans stairs. That is the allegedly unreasonable risk of harm that [defendant] should have known existed on its property, not the jointed

> wall panel that plaintiff's coworker placed partially over the opening just before plaintiff fell. And, we agree with the trial court that the open, unbarricaded stairwell was an open and obvious condition. . . . However, the issue is whether there is evidence that creates a genuine issue of material fact that [defendant] should have anticipated harm despite plaintiff's knowledge of the stairwell sans stairs, i.e., if special aspects of the condition made the open and obvious risk unreasonably dangerous. We conclude that [defendant] should have anticipated such harm . . . . [*Id.* at 6-7.]

It concluded that there was a genuine issue of material fact "regarding whether there were special aspects of the stairwell that gave rise to a uniquely high likelihood of harm or severity of harm if confronted and, therefore, [defendant] had a duty to undertake reasonable precautions to protect invitees, like plaintiff, from that risk." *Id.* at 8.

Our Supreme Court unanimously peremptorily reversed the panel and reinstated the trial court's grant of summary disposition on the premises liability claim. *Young*, 477 Mich at 931. Citing *Perkoviq*, 466 Mich at 18-20, it held:

> The defendant premises owner *did not have a duty* to protect the plaintiff, an employee of an independent contractor hired to perform construction work on the owner's premises, from the construction site hazardous condition that contributed to the plaintiff's injury. Moreover, the temporary hazardous condition was created by the independent contractor, the defendant premises owner had no notice of the condition, and the condition was not unreasonably dangerous . . . . [*Young*, 477 Mich at 931 (emphasis added).]

Here, defendant had no notice that the grate was being opened; none of its employees was present and it was uncontested that the trapdoor had been open at most 10

seconds before the accident occurred.[3] See *Moore v Traverse City Masonic Bldg Ass'n*, 324 Mich 507, 521; 37 NW2d 457 (1949) (holding that the plaintiff failed to prove "that the door in question was open a sufficient length of time before the accident to charge defendant with knowledge that the door was open"). Additionally, it was an independent contractor that created the temporary hazardous condition. Because Durr employees opened the trapdoor in order to get equipment through, the open trapdoor was a "construction site hazardous condition that contributed to the plaintiff's injury." *Young*, 477 Mich at 931. We find *Young* controlling on this point, and hold that defendant had no duty to protect plaintiff from the open trapdoor.

Plaintiffs argue that *Muth v W P Lahey's, Inc*, 338 Mich 513; 61 NW2d 619 (1953), provides that liability may be imposed on defendant based on Durr employees' actions. We disagree. In *Muth*, a customer who went into a store to buy shoes fell through a trapdoor that was left open by a shoe department employee. *Id.* at 516. At the time, the shoe department was operated by another company pursuant to a lease. *Id.* Our Supreme Court upheld the imposition of liability on the store owner, even though it was the shoe department company's employee who had left the door open. *Id.* at 519-520. In *Bluemer*, 356 Mich at 409-411, however, our Supreme Court distinguished *Muth*, and indicated that the imposition of liability on the store owner was not

[3] Plaintiffs' allegations regarding additional accidents do not provide evidence of notice of the open trapdoor; rather, they are more appropriately applied to whether defendant had notice of whether the location of the trapdoor or how it was hinged was a dangerous condition. We note, however, that plaintiffs' allegations of notice that are premised on an accident that occurred in 1988, before defendant owned the facility, cannot be sustained absent some evidence that defendant acquired knowledge of that accident.

based simply on the fact that the defendant owned the store, but based on the store owner's essentially complete control over the shoe department company's business activities, including employee hiring. *Id.* at 409-410. By contrast, where a lessor does not conduct business or direct its tenant's business, liability is imposed on the lessee, not the property owner. *Id.* at 411-412. See also *Brown v Std Oil Co*, 309 Mich 101; 14 NW2d 797 (1944) (holding that the owner of a gas station was not liable for the injuries to an employee of the lessee gas station because the lease did not reserve to the owner the right to exercise control over the business or operations of the lessee on the premises). Here, defendant had turned over control of the construction site to Durr, and there was no evidence that defendant was exercising control over the construction site. Accordingly, the negligent acts of Durr employees in opening the trapdoor without proper barricading could not be imputed to defendant.

B. THE PRESENCE, LOCATION, AND DESIGN OF THE TRAPDOOR

Alternatively, plaintiffs argue that defendant was liable because it created a dangerous condition by leaving the trapdoor[4] in a place that invitees were free to use, by leaving the trapdoor hinged in a manner that left a completely unguarded hole in the grating when open, and by failing to give any warning regarding its existence or to provide barricades or other safeguards when the trapdoor was open. We conclude that this claim is distinct from the dangerous condition of the open trapdoor and that plaintiffs have shown an outstanding question of fact on this issue, which precludes summary disposition.

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[4] The evidence indicated that the trapdoor was not designed or placed by defendant, but rather existed before defendant purchased the building.

In *Bluemer*, 356 Mich at 410-416, our Supreme Court concluded that the liability of a property owner for the dangerousness of a trapdoor based on "its use, location, and other circumstances" was a question separate and apart from its liability based on the lessee's employee's negligence in leaving the trapdoor open, and that liability could be imposed for the former. *Bluemer* cites two cases that we find similar to the instant case:

> In *Dahl* v. *Glover*, 344 Mich 639 [75 NW2d 11 (1956)], which was an action for damages resulting from plaintiff falling into a manhole in a sidewalk in front of defendants' premises, the proofs indicated that plaintiff stepped on the cover of the manhole, and that the cover tilted upward and rolled away. Plaintiff's fall resulted. It was the theory of the plaintiff that the cover was defective. The trial court in submitting the case to the jury referred to different types of nuisances, including such resulting by reason of circumstances and surroundings, leaving it to the jury to say whether under the facts in the case and inferences to be drawn therefrom the manhole and manhole cover constituted a menace dangerous to the public and therefore a nuisance. The charge as given was approved by this Court and judgment for the plaintiff was affirmed.
>
> In *Brown* v. *Nichols*, 337 Mich 684 [60 NW2d 907 (1953)], plaintiff was injured as the result of being struck by a door to an establishment owned and operated by the defendants, which door was so constructed that it swung out over a public sidewalk. The trial court did not submit the case to the jury on the theory of a nuisance in fact because of the consequences that might result from the use of a door so constructed and operated. In reversing the case and remanding it for a new trial, it was held:
>
> "The question as to what constitutes a nuisance is one of law for the court, but it is for the jury to decide whether a particular act or structure or use of property, which is not a nuisance *per se*, is a nuisance in fact and whether an alleged nuisance is the cause of the losses or injuries

> complained of and to what extent such losses or injuries are attributable to the nuisance." [*Bluemer*, 356 Mich at 413-414.]

Although these cases describe the issue as a nuisance claim, we do not believe that plaintiffs were required to allege a nuisance in order to claim that the location of the trapdoor and its design (i.e. where the hinges were placed) created a dangerous condition. Rather, we believe that such claims fall under the category of premises liability. See Michigan Law and Practice, § 1, p 97 (noting that "several Michigan decisions use the term 'nuisance' liability to refer to what is essentially premises liability"); see also *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910) (defining a nuisance as "involv[ing], not only a defect, but threatening or impending danger to the public" and concluding that the plaintiffs' claims for faulty tower construction sounded in negligence, not nuisance).

Because we read *Bluemer* as using "nuisance" to refer to a premises liability claim rather than a true nuisance claim, we conclude that whether the use or location of a trapdoor makes it a dangerous condition is a factual question for the jury. *Bluemer*, 356 Mich at 413-416. Furthermore, given the evidence that none of Durr's employees was aware that the grating was hinged and the photographs that indicate the hinges are hidden, we conclude that this condition is not open and obvious. Accordingly, the trial court erred by granting summary disposition on plaintiffs' premises liability claim as to the location of the trapdoor and how it was hinged. Therefore, we reverse the trial court's grant of summary disposition, as to the question of trapdoor placement and hinging only, and remand for trial.[5]

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[5] We take no position as to whether the placement of the trapdoor or its design (i.e. where the hinges were placed) was a negligent or dangerous

IV. CONCLUSION

We affirm the trial court's grant of summary disposition as to the open trapdoor, reverse the grant of summary disposition as to the location of the trapdoor and the placement of its hinges, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having fully prevailed.

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condition. We are only holding that a question of fact exists on this issue. Additionally, because we find an error in the granting of summary disposition, we need not consider the question of whether the trial court erred by denying plaintiff's motion for reconsideration.

PEOPLE v MANN

Docket No. 288329. Submitted February 3, 2010, at Grand Rapids. Decided April 8, 2010, at 9:10 a.m.

Jacob P. Mann was convicted by a jury in the Berrien Circuit Court, Alfred M. Butzbaugh, J., of three counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct with regard to victims under 13 years of age. Defendant appealed.

The Court of Appeals *held*:

1. Evidence that defendant committed the crime of attempted first-degree criminal sexual conduct against a different minor victim before committing the instant offenses was admissible under MCL 768.27a(1). The evidence was relevant because it tended to show that it was more probable than not that the two minors in this case were telling the truth when they indicated that defendant had committed criminal sexual conduct offenses against them. The evidence also made the likelihood of defendant's behavior toward the minors in this case more probable. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The jury was properly instructed that the only purpose for which the evidence could be considered was to help the jury judge the believability of the testimony regarding the acts for which defendant was on trial. The trial court did not abuse its discretion by admitting the evidence.

2. Comments by the prosecution about defendant not testifying, when viewed in context, were not comments on defendant's failure to testify, but rather, were comments regarding the fact that a statement by defendant regarding his intent was not necessary in order to prove his intent. Any prejudice that resulted was mitigated by the jury instructions. Defendant was not denied a fair trial or his rights to due process.

Affirmed.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Law Office of John D. Roach, Jr., PLC (by *John D. Roach, Jr.*), for defendant.

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

PER CURIAM. Following a consolidated trial, the jury convicted defendant, Jacob Mann, of three counts of first-degree criminal sexual conduct (CSC I),[1] and one count of second-degree criminal sexual conduct (CSC II).[2] The trial court sentenced Mann to 15 to 50 years' imprisonment for each of the three convictions for CSC I and to 4 to 15 years' imprisonment for the CSC II conviction, with credit for 156 days, the sentences to run concurrently. Mann appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

RB, one of the victims in this case, was eight years old at the time of the offense. He lived with his 18-year-old brother, PP, and their mother in a two-bedroom apartment in Berrien County. PP slept in one of the bedrooms and their mother slept in the other bedroom. RB used what was designed as a dining room for his bedroom. There were bunk beds in this room.

JB, another victim in this case, who was six years old and lived on the same street, sometimes played and spent the night with RB. Mann, who was 17 years old at the time of the offenses, was one of PP's friends. Mann was often at RB and PP's apartment playing video games with PP and frequently spent the night. When JB spent the night at the apartment, RB would usually sleep in one of the bunk beds and JB would sleep in the other. If JB was not spending the night, RB would sleep

[1] MCL 750.520b(1)(a).

[2] MCL 750.520c(1)(a).

in one of the bunk beds and Mann would sometimes sleep in the other. Because RB and PP's mother worked during the day and sometimes on the weekend, there were times when Mann was at the apartment without her being there.

The last time Mann spent the night at the apartment was in early March 2008. On March 10, 2008, RB began wanting to sleep with his mother all the time. RB told his mother that he felt safer sleeping with her. RB also told his mother that he did not want Mann spending the night anymore. When his mother asked why, RB stated that Mann touched him "badly." When asked to explain, RB indicated that Mann put his "front" in RB's "behind" and that Mann used lotion when he did this. RB also indicated that Mann made RB "suck him" and that Mann sucked RB as well. At trial, RB specifically testified that Mann did "[b]ad things" to him every time that Mann came over to the apartment. These bad things happened in RB's bedroom, in the bathroom, and in the front room. In addition, RB testified that when JB spent the night, RB saw Mann sucking JB in the top bunk bed when RB got up to go to the bathroom. JB testified at trial that Mann touched his penis with his hand on more than one occasion, but did not testify that there was any other sexual contact.

In response to RB's disclosure to her, RB's mother took him to the hospital for an examination. The examining physician found redness around RB's anus and a small, superficial abrasion about two millimeters long on his anus. RB's mother also recalled that within a month and a half before RB made his disclosure, she looked at RB's anus in response to his complaints of pain, and she noticed redness around his anus, but at the time, she presumed it was a heat rash.

While being interviewed by the police, Mann indicated that he played video games at RB and PP's apartment, but denied that the alleged crimes occurred. Mann did not testify at trial. A jury subsequently convicted Mann of three counts of CSC I and one count of CSC II as set forth above.

II. PRIOR BAD ACT

A. STANDARD OF REVIEW

Mann argues that his due process rights were violated because the trial court admitted evidence of a prior bad act that likely prejudiced the jury. We review for an abuse of discretion a trial court's decision to admit or exclude evidence.[3] Where the admission of evidence involves a preliminary question of law, we review that question de novo.[4]

B. ANALYSIS

MCL 768.27a(1) provides, in pertinent part: "Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

In this case, Mann was accused of committing two listed offenses,[5] specifically, CSC I and CSC II.[6] And the

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[3] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[4] *Id.*

[5] MCL 768.27a(2)(a) states: " 'Listed offense' means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722."

[6] MCL 28.722(e)(*x*) states that a "[l]isted offense" includes violations of MCL 750.520b (CSC I) and MCL 750.520c (CSC II).

victims in this case, eight-year-old RB and six-year-old JB, were minors when the offenses were committed.[7] In addition, there was evidence that Mann previously committed another listed offense in 2002, specifically, attempted CSC I against another minor.[8]

On the basis of the foregoing, we conclude that evidence that Mann committed the crime of attempted CSC I against a minor in 2002 was admissible to "be considered for its bearing on any matter to which it [was] relevant" in this case.[9] The challenged evidence was relevant because it tended to show that it was more probable than not that the two minors in this case were telling the truth when they indicated that Mann had committed CSC offenses against them.[10] The challenged evidence also made the likelihood of Mann's behavior toward the minors at issue in this case more probable.[11]

In addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.[12] Whether the minors in this case were telling the truth had significant probative value because it underlies whether Mann should be convicted of the crimes for which he was charged. Further, the trial court specifically instructed the jury on two occasions that the only purpose for which the evidence could be considered was to help them judge the believability of the testimony regarding the acts for which Mann was on trial. And jurors are presumed to follow their in-

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[7] MCL 768.27a(2)(b).

[8] MCL 28.722(e)(*x*) and (*xiii*).

[9] MCL 768.27a(1).

[10] MRE 401.

[11] *Id*.; *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007).

[12] MRE 403; *Pattison*, 276 Mich App at 621 (stating that courts must still weigh the evidence under MRE 403).

structions.[13] Moreover, the trial court took precautions to limit any prejudicial effect by ensuring that the videotape of Mann's guilty plea to the prior offense was not played for the jury. Instead, the trial court allowed a stipulation that Mann committed the act to be entered into evidence.

In sum, we conclude that the trial court did not abuse its discretion by admitting evidence that Mann previously committed another listed offense against a minor because that evidence was properly admissible pursuant to MCL 768.27a(1). Because MCL 768.27a applied in this case, we need not consider whether the requirements of MCL 768.27 and its counterpart MRE 404(b) were met.[14]

III. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Mann argues that the prosecutor inappropriately commented during closing arguments on Mann's failure to testify. Therefore, he argues, his constitutional rights against self-incrimination and to due process were violated. Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial.[15] Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context . . . ."[16]

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[13] *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

[14] *People v Smith*, 282 Mich App 191, 205; 772 NW2d 428 (2009) ("Where listed offenses are at issue, the analysis begins and ends with MCL 768.27a.").

[15] *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

[16] *Id*. at 454.

B. ANALYSIS

"A defendant in a criminal case has a constitutional right against compelled self-incrimination and may elect to rely on the 'presumption of innocence.' "[17] Hence, a prosecutor may not comment on a defendant's failure to testify.[18] Such remarks "are prohibited because they ask the jury to draw the inference that the defendant is guilty or hiding something merely because he has not taken the stand."[19] However, "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case."[20]

During her closing argument, the prosecutor discussed CSC II, specifically the difficulty of establishing the intent element of CSC II:

> Now sexual conduct, contact, is the difference. Sexual contact describes more—is more aimed at touching, fondling, that sort of thing, touching of the genital areas and touching with an intent—or a sexual intent.
>
> The judge is also going to instruct you, ladies and gentlemen, that intent can be derived not from just what a person says, but from that person's actions.
>
> So, ladies and gentlemen, it's difficult for me to know what anybody's thinking at any given time. It's difficult for me to prove what anybody's thinking. But you can use not only what their [sic] thinking and what their [sic] saying, but also what they're doing to determine what their intent was at the time.

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[17] *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995), citing US Const, Am V; Const 1963, art 1, § 15.

[18] *Fields*, 450 Mich at 108-109; MCL 600.2159.

[19] *People v Buckey*, 424 Mich 1, 14; 378 NW2d 432 (1985).

[20] *Unger*, 278 Mich App at 236 (citation omitted).

The prosecutor later turned to the subject of Mann's intent:

> So we know . . . that his intent in this particular case, looking at the way that he conducted business, the way that he acted throughout this time, we know that his intent was sexual because it's been his intent, all along it's been sexual. We don't know. He didn't say. He didn't tell us. So we don't have that evidence. But based on—

Defense counsel objected, and the prosecutor withdrew the statement and then stated: "We can't read Jacob's mind, I guess, is a better way to say. So we don't know—I can't prove what's in his mind."

We conclude that although the prosecutor's comment about Mann not testifying could be read as implicating a potential violation of Mann's right to remain silent, the impropriety did not rise to the level of a due process violation. Intent is an element of CSC II, and the prosecutor's theory of the case was that Mann met the elements of CSC II, including the intent element, because Mann intentionally touched the victim for a sexual purpose.[21] Viewed in context, the prosecutor was arguing that the jury could infer intent from Mann's actions and thus proof of Mann's intent did not need to stem from Mann stating his intent, something Mann did not do. The prosecutor's argument supported her theory of the case, which was that Mann intended to commit an offense that was sexual in nature. And it was clear that the prosecutor was not actually commenting on Mann's failure to testify but on the fact that a defendant's statement is not necessary to prove intent. On the record, the argument was not improper.

Moreover, an appropriate response to an objection for an improper remark by a prosecutor is the issuance of a

[21] See MCL 750.520c(1)(a); MCL 750.520a(q).

curative instruction.[22] Although defense counsel did not request a curative instruction or a ruling from the trial court on defense counsel's objection, the trial court instructed the jurors that "[e]very defendant has the absolute right not to testify. When you decide the case you must not consider the fact that he did not testify. It must not affect your verdict in any way." In addition, the trial court also provided the jurors with the standard jury instructions regarding what may be considered as evidence and how they must use their common sense in deciding the case. Any prejudice flowing from the prosecutor's remark was mitigated by the jury instructions.[23] Based on the foregoing, the prosecutor's remark did not deny Mann a fair trial or his due process rights under the Michigan and federal constitutions.

Affirmed.

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[22] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[23] *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.").

PEOPLE v PHELPS

Docket No. 288999. Submitted February 2, 2010, at Grand Rapids. Decided April 13, 2010, at 9:00 a.m.

Kenneth J. Phelps was convicted of first-degree criminal sexual conduct (CSC I) and third-degree criminal sexual conduct (CSC III) following a bench trial in the Allegan Circuit Court, George R. Corsiglia, J. Defendant appealed.

The Court of Appeals *held*:

1. In determining whether the prosecution presented sufficient evidence to sustain a conviction, the reviewing court must consider the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact's finding that all the elements of the crime were proved beyond a reasonable doubt.

2. There was sufficient evidence to support defendant's CSC I conviction. MCL 750.520b(1)(f) provides that a person is guilty of CSC I if he or she uses force or coercion to engage in sexual penetration with another person and causes personal injury. The definition of "force or coercion" includes the use of concealment or surprise to accomplish the sexual penetration. While the 16-year-old complainant had engaged in some consensual sexual acts with defendant, a 24-year-old man, he used the element of surprise to engage in acts of penile-vaginal penetration to which the complainant did not consent. A rational trier of fact could also have concluded that the penetration occurred through the use of actual physical force. Under MCL 750.520h, the complainant's testimony did not need to be corroborated.

3. There was also sufficient evidence to support defendant's CSC III conviction under MCL 750.520d(1)(b), which prohibits sexual penetration through the use of force or coercion. By performing cunnilingus on the complainant immediately after he withdrew his penis from her vagina, defendant seized control of the complainant in a manner to facilitate the accomplishment of sexual penetration without regard to her wishes at a time when she was in shock or surprise, and defendant did not stop when the complainant told him to.

4. In calculating defendant's recommended minimum sentence range under the sentencing guidelines, the trial court did not err by assessing 10 points for offense variable (OV) 10 (exploitation of a vulnerable victim), MCL 777.40(1)(b). Defendant exploited the complainant for selfish purposes. He manipulated the complainant into engaging in sexual acts with him and allowing him to be in a position in which he could engage in nonconsensual intercourse. The complainant was vulnerable because it was readily apparent that she was susceptible to physical restraint, persuasion, or temptation given her age and immaturity.

5. The trial court erred by assessing 10 points for OV 9 (number of victims), MCL 750.39(1)(c), because two to nine victims were not placed in danger of physical injury or death and no victims were placed in danger of property loss. Defendant committed criminal sexual conduct crimes against one victim only, the complainant. Although two of the complainant's friends were in her bedroom while the offense occurred, nothing in the record suggested that they were ever placed in danger of physical injury, loss of life, or loss of property. Defendant did not threaten anyone, and he did not make physical contact with either of the complainant's friends. The error requires resentencing because assessing zero points for OV 9 would result in a lower recommended minimum sentence range.

6. The trial court did not abuse its discretion by assessing zero points for OV 13 (continuing pattern of criminal behavior), MCL 777.43, because defendant had not engaged in a pattern of felonious criminal activity involving three or more crimes against a person within a five-year period. With respect to one of the three incidents alleged by the prosecution, defendant was not charged with a crime, and the evidence merely established that he was accused of wrongdoing.

7. The failure of defendant's counsel to object to the scoring of OV 9 and OV 10 did not deny defendant the effective assistance of counsel.

Convictions affirmed; case remanded for resentencing.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marla R. McCowan* and *Jacqueline C. Ouvry*) for defendant.

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

PER CURIAM. Defendant Kenneth Phelps appeals as of right his convictions of first-degree criminal sexual conduct (CSC I)[1] and third-degree criminal sexual conduct (CSC III).[2] Following a bench trial, the trial court convicted Phelps and sentenced him as a second-offense habitual offender[3] to imprisonment for 23 to 45 years for the CSC I conviction and imprisonment for 14 to 22 years and 6 months for the CSC III conviction. We affirm Phelps's convictions, but remand for resentencing.

I. BASIC FACTS AND PROCEDURAL HISTORY

On December 21, 2007, CJ, age 19, and DH, age 14, went to visit their friend, the complainant, age 16, at the complainant's residence. The complainant lived with her mother, her brother, who was also age 16, and her older sister in a doublewide trailer at a trailer park in Wayland, Michigan. CJ and DH arrived at the complainant's residence at about 6:00 p.m. that evening and socialized with the complainant, her brother, and another friend, J. As the evening progressed, the complainant drank three or four cans of beer.

That same evening, Phelps was spending time with his friends (apparently in the same trailer park), smoking marijuana, and drinking four or five "double shots" of Jack Daniel's whiskey. In the early morning hours of December 22, 2007, after the complainant's mother had gone to bed, sometime between 12:00 and 1:30 a.m., Phelps, age 24, left his friend's residence and noticed

[1] MCL 750.520b(1)(f) (use of force or coercion causing personal injury).

[2] MCL 750.520d(1)(b) (use of force or coercion).

[3] MCL 769.10.

that the complainant's brother's bedroom light was on. Phelps, a friend of both the brother and J, stopped and knocked on the brother's window, and the three friends began talking. At some point, Phelps climbed through the brother's window, sat in the bedroom, and continued conversing with his two friends. After Phelps entered the trailer, CJ, DH, and the complainant all went into the brother's bedroom and joined the conversation. The individuals talked in the brother's bedroom and in the living room of the trailer. The complainant had previously met Phelps on one occasion, and Phelps was aware that the complainant was either age 16 or 17. The complainant testified that a short while after Phelps arrived at the trailer, she conversed with him about the fact that she was still a virgin, and she told him that she was not ready to lose her virginity.

Eventually, the complainant, CJ, and DH retreated to the complainant's bedroom, while Phelps, the brother, and J went into the brother's bedroom located directly across a small six-foot-wide hallway-like space. Sometime thereafter, the complainant informed CJ and DH that she thought Phelps was "cute." CJ and DH then went into the brother's room and encouraged Phelps to go into the complainant's bedroom to "make out" with her. DH testified that she merely encouraged Phelps to give the complainant a "goodnight kiss." Phelps agreed and went into the complainant's room and sat on an air mattress with the complainant and began kissing her while CJ and DH remained in the room. The physical contact between Phelps and the complainant progressed. The two fondled each other, and Phelps removed the complainant's jeans. She consented when he digitally penetrated her vagina and performed cunnilingus on her. CJ and DH remained in the room while the sexual acts took place, but both testified that they were talking to each other and were unaware of what was

occurring other than the kissing. The complainant testified that Phelps asked her to touch his penis, but she refused. Phelps also asked the complainant to have sex with him, but she again refused. During this first encounter in the bedroom, Phelps accepted the complainant's assertion that she did not want to have "sex," and at some point, he went outside the trailer and smoked cigarettes with the brother and J.

About 15 or 20 minutes later, at approximately 2:00 or 3:00 a.m., Phelps returned to the complainant's bedroom. The complainant and Phelps both testified that CJ asked Phelps to return to the room to once again kiss the complainant. The complainant testified, however, that she told her friends not to go get Phelps a second time. However, CJ and DH testified that they were sleeping and that the lights were turned off when Phelps entered the bedroom the second time and climbed into bed with the complainant. All four individuals gave differing testimony regarding what occurred next.

The complainant testified that Phelps entered the room, got into her bed, and began kissing her. According to the complainant, she again consented when Phelps removed her clothing and digitally penetrated her vagina. According to the complainant, Phelps then penetrated her vagina with his penis. The complainant testified that Phelps's conduct of penetrating her with his penis caught her by surprise. According to the complaint, she told him no and that she did not "want to." The complainant testified that she told Phelps "no like 5 times," but Phelps refused to stop. The complainant testified that Phelps eventually pulled his penis out of her vagina but immediately began performing oral sex on her. The complainant stated that she then told Phelps to stop performing oral sex, but he refused until

she yelled for him to get off her and CJ turned the bedroom light on. The complainant testified that Phelps was on top of her when the intercourse occurred and was sitting on the floor next to the bed when he performed oral sex on her after the intercourse.

Phelps gave a different account of his second encounter with the complainant. He testified as follows:

> [W]e started making out again, rubbing on each other, started with fingering . . . . I asked her a couple times if she wanted to go any further, if she wanted to do anything else and her friends had joined in the conversation and we ended up all 3 of us, or 4 of us rather were talking about, you know, pro's and con's I guess you would say of different sexual things we could do or couldn't do or whatever.

Phelps explained that CJ and DH "encouraged" the complainant and "told her you know, well yeah if you want to go ahead and do it if you want to type of thing." Phelps continued his testimony as follows:

> *Q*. [by defense counsel] Did you ask her if she wanted to have intercourse or what did you say?
>
> *A*. Yeah, I asked her—I asked her earlier if she wanted to have intercourse and she wasn't sure. I said so what do you want to do and she says well alright, and I said are you sure, and then she said. Then I engaged in penile/vaginal penetration.
>
> * * *
>
> *Q*. Did she say anything out loud or anything at that time?
>
> *A*. A couple seconds later she was like stop, and I didn't hear her at first and she said stop again and I said what's wrong and she says it hurts, and so I stopped and I pulled my penis out of her and I said well let me help you climax through cunnilingus, . . . that's the gist of what I told her, and she said okay, just kind of mumbled okay and I went to

> do that and then a couple seconds after that she's like no, stop, that doesn't feel right either, I just don't want to do nothing no more. So, as I was sitting up the light came on and I looked at her friends . . . and I noticed there was blood on the mattress there . . . and at that point I left the room and went into the bathroom to wash up. When I came back out of the bathroom . . . [DH] told me that . . . [the complainant] was saying that I had raped her, but that neither [DH] nor anybody else knew why [the complainant] was saying this.

CJ testified that she did not encourage Phelps and the complainant to have sex and was awakened when the complainant yelled at Phelps to "stop now and get off" in a scared voice. At that point, CJ turned the bedroom light on and saw Phelps's face covered in blood. She then turned the light back off and told Phelps to get out. CJ explained that she turned the light off again because it was "a disturbing sight . . . ."

DH also testified that she did not encourage the complainant to have sex with Phelps, and she explained that she was awakened when the complainant yelled, "[N]o, get off me, I don't want to do this, and she was just yelling, and then we just got up." According to DH, the complainant was crying, and when the lights went on, she saw Phelps on the floor near the side of the bed near the "middle" of the complainant's body. DH saw Phelps's face was covered in blood, and she ran out of the room at that point. After Phelps left the bedroom, CJ explained that the complainant sat on the bed "freaking out," almost crying, and then she went outside with CJ and DH where she cried and was "pretty upset." Both CJ and DH convinced Phelps to leave the trailer. Phelps testified that he left the residence after both CJ and DH informed him that the complainant was upset and would not reenter the trailer while Phelps was still present.

On the evening of December 22, 2007, the complainant went with her mother to the YWCA at approximately 9:00 p.m., where nurse examiner Sara Koster performed a sexual assault examination (using what is commonly called a "rape kit"). At trial, Koster testified as an expert in sexual assault trauma identification and treatment. Koster performed a full physical examination of the complainant, and she discovered four injuries related to the sexual activity: (1) a tear in the cervix that was bleeding, which Koster testified is usually caused by digital penetration; (2) a tear at the posterior fourchette, which is a fold of skin on the outside of the opening to the vagina into the vaginal wall (Koster testified that this tear is normally caused by penile-vaginal penetration); (3) redness and swelling of the clitoris; and (4) a tear in the hymen, which Koster testified is normally consistent with penile-vaginal penetration but could be caused by digital penetration. Koster explained that the complainant's injuries appeared painful and were bleeding, but no treatment was necessary because that area of the female body generally heals itself. According to Koster, some virgins suffer injuries similar to the complainant's the first time they have sex, but some do not.

Near the end of March 2007, Officer Trina Sims of the Michigan State Police spoke with Phelps after having a difficult time locating him. Phelps told Officer Sims that he had consensual sex with the complainant and that he stopped having intercourse when she said "no, no, no stop." Lieutenant Harris Edwards, a forensic science interview specialist with the Michigan State Police, interviewed Phelps after his arrest. Phelps waived his constitutional rights and voluntarily spoke with Lieutenant Edwards. Lieutenant Edwards testified regarding Phelps's statements during the interview:

> He said that both himself and [the complainant] were messing around and making out. He initially advised me . . . that the two other young ladies that were there had brought it to his attention that [the complainant] was interested in him, that she liked him, and so he conversed with her. He told the two young ladies that he probably shouldn't be messing with this girl because he knew she was 16 and he's been in trouble before for messing with young girls.
>
> * * *
>
> We talked a little bit more about the, you know, if he had felt he had done anything wrong that day and he was very cooperative and saying yes, and hindsight is 20/20 and I should have never messed with her and she was 16, he felt that she was too immature to make a decision like [sic].

Following the close of proofs, the trial court found Phelps guilty of CSC I and CSC III. Phelps now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Phelps argues that the prosecution failed to present sufficient evidence to show that he used force or coercion to accomplish sexual penetration with the complainant. We review de novo a challenge to the sufficiency of the evidence.[4]

B. APPLICABLE LEGAL PRINCIPLES

In determining whether the prosecution presented sufficient evidence to sustain a conviction, we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a

[4] *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

rational trier of fact in finding that all the elements of the crime were proved beyond a reasonable doubt.[5]

MCL 750.520b(1)(f) provides that a person is guilty of CSC I if that person uses force or coercion to engage in sexual penetration with another person and causes personal injury.[6] MCL 750.520b(1)(f)(*v*) defines "force or coercion" as including the use of concealment or surprise to accomplish the act of sexual penetration. MCL 750.520d(1)(b) provides that a person is guilty of CSC III if that person engages in sexual penetration through the use of "force or coercion." MCL 750.520d(1)(b) provides that "[f]orce or coercion includes but is not limited to any of the circumstances listed in [MCL 750.520b(1)(f)(*i*) to (*v*)]." "The existence of force or coercion is to be determined in light of all the circumstances . . . ."[7] "[T]he prohibited 'force' encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes."[8] Further, in a prosecution for CSC I or CSC III, "[a] victim need not resist the actor,"[9] and "[t]he testimony of a victim need not be corroborated . . . ."[10]

C. APPLYING THE PRINCIPLES

1. CSC I

We conclude that there was sufficient evidence to allow a rational trier of fact to conclude beyond a

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[5] *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

[6] See also *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004).

[7] *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000).

[8] *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002).

[9] MCL 750.520i.

[10] MCL 750.520h.

reasonable doubt that Phelps used force or coercion when he penetrated the complainant's vagina with his penis, causing personal injury. The evidence showed force or coercion through the element of surprise.[11] The complainant testified that, earlier in the evening before the offense occurred, she told Phelps that she was a virgin and did not want to lose her virginity. During their first consensual sexual encounter that evening, the complainant refused to touch Phelps's penis and told him "No" when he asked to have sexual intercourse with her. The complainant testified that when Phelps entered her bedroom the second time, she did not tell him that he could penetrate her vagina with his penis and that she was unaware that Phelps removed his pants. She consented only to digital penetration, and she testified that she was surprised when Phelps penetrated her vagina with his penis. In addition, the complainant was visibly upset and crying after the incident.

Even without additional evidence, the complainant's testimony that she did not give Phelps permission to have penile-vaginal intercourse, was engaged in a different consensual act with him, and was surprised when he inserted his penis into her vagina was sufficient to sustain a conviction of CSC I because "[t]he testimony of a victim need not be corroborated . . . ."[12] The evidence supported that Phelps used the element of surprise to overcome the complainant and engage in penile-vaginal intercourse. Although Phelps testified that the sexual intercourse was consensual, we will not interfere with the fact-finder's role of determining the weight of the evidence or the credibility of witnesses.[13]

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[11] MCL 750.520b(1)(f)(*v*).

[12] MCL 750.520h.

[13] *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

There was also sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that Phelps penetrated the complainant's vagina through the use of actual physical force.[14] The complainant testified that Phelps was physically on top of her when he penetrated her vagina with his penis, and she explained that when she told Phelps no "around 5 [times], give or take a few," Phelps told her "no, I'm not done yet" and kept his penis inside her for approximately "[f]ive minutes" while she was underneath him and telling him no. Again, the complainant's testimony need not be corroborated to sustain a conviction of CSC I,[15] and this Court will not interfere with issues of the credibility of a witness or the weight of the evidence.[16]

2. CSC III

We also conclude that there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that Phelps used force or coercion when he performed cunnilingus on the complainant without her consent immediately after withdrawing his penis from her vagina.[17] Therefore, he was properly convicted of CSC III. The complainant testified that Phelps immediately began performing cunnilingus after he withdrew his penis from her vagina and refused to stop despite her repeatedly telling him to stop. According to the complainant, Phelps only stopped after CJ turned on the bedroom light. This evidence shows that Phelps "seize[ed] control of [the complainant] in a manner to facilitate the accomplishment of sexual penetration without regard to [the complainant]'s

[14] MCL 750.520b(1)(f)(*i*).

[15] MCL 750.520h.

[16] *Wolfe*, 440 Mich at 514-515.

[17] *Johnson*, 460 Mich at 722-723.

wishes."[18] Phelps was on top of the complainant when he engaged in intercourse, and when he withdrew his penis, he began performing cunnilingus while the complainant was lying on the bed in shock or surprise, and he refused to stop when she told him to.

According to CJ, the complainant was yelling in a scared voice, and when CJ turned on the light, Phelps had blood on his face. Although the complainant did not testify that she tried to physically resist Phelps or try to get up from the bed, "[a] victim need not resist the actor in a prosecution [for criminal sexual conduct]."[19] Phelps testified that the complainant "mumbled" her assent when he suggested that he perform cunnilingus, but, as stated earlier, the role of this Court is not to interfere with the fact-finder's role of determining the credibility of the witnesses and the weight of the evidence.[20]

III. OFFENSE VARIABLE SCORING

A. STANDARD OF REVIEW

Phelps contends that the trial court erred in scoring offense variable (OV) 9 and OV 10 at sentencing. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[21] However, this issue also involves statutory interpretation, which this Court reviews de novo.[22] "Scoring decisions for which there is any evidence in support will be upheld."[23] And, ulti-

[18] *Carlson*, 466 Mich at 140.

[19] MCL 750.520i.

[20] *Wolfe*, 440 Mich at 514-515.

[21] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[22] *Id*.

[23] *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

mately, Phelps is entitled to resentencing on the basis of a scoring error only if the error alters the recommended minimum sentence range under the legislative sentencing guidelines.[24]

B. OV 10

MCL 777.40 governs the scoring of OV 10, exploitation of a vulnerable victim, and it provides in relevant part that 10 points must be assessed when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status."[25] The statute defines "exploit" as "to manipulate a victim for selfish or unethical purposes."[26] "Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation."[27] We conclude that the trial court did not abuse its discretion in assessing 10 points for OV 10 because evidence on the record supported that Phelps "exploited" the complainant's youth and that the complainant was "vulnerable" within the meaning of MCL 777.40.[28] The complainant's age alone did not support the scoring of the offense variable. Rather, the record supported that her age and immaturity made her a vulnerable victim.

First, evidence on the record supported that Phelps exploited the complainant for selfish purposes by manipulating her into engaging in sexual acts with him and allowing him to be in a position in which he could

[24] *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

[25] MCL 777.40(1)(b).

[26] MCL 777.40(3)(b).

[27] MCL 777.40(3)(c).

[28] *Endres*, 269 Mich App at 417.

engage in nonconsensual sexual intercourse.[29] Phelps, a 24-year-old man, testified that he was aware that the complainant was only 16 or 17 years old, and he acknowledged that he had previous "trouble" with young girls. Phelps told the complainant's friends that he should not be "messing" with a young girl like the complainant. The complainant informed Phelps that she was a virgin and did not want to lose her virginity, and she refused to engage in intercourse or touch Phelps's penis when he asked her to do so. After the initial sexual encounter, despite knowing that the complainant did not want to have sexual intercourse or touch his penis, Phelps entered the complainant's bedroom a second time, when the lights were off, climbed into her bed, removed his clothing without the complainant's knowledge, and, while the complainant was in a compromised position, took advantage of the situation and inserted his penis into her vagina without her consent. Phelps admitted to the interviewing police officer that he coerced the complainant into engaging in sex with him. Phelps also admitted to the officer that the complainant was too immature to make the decision to have sex. Phelps testified that he tried to talk the complainant into having intercourse even after she said she "wasn't sure" because of his own "[s]elfish reasons."

Second, the evidence showed that the complainant was vulnerable because it was readily apparent that she was susceptible to physical restraint, persuasion, or temptation.[30] The complainant was in a compromised position when Phelps penetrated her with his penis. Phelps was physically on top of the complainant in a dark room. In this position, Phelps could physically

[29] MCL 777.40(3)(b).

[30] MCL 777.40(3)(c).

restrain the complainant while he engaged in intercourse, and he refused to withdraw his penis after the complainant told him to stop. The complainant was susceptible to persuasion or temptation to engage in sexual acts and to allow Phelps to be in a position in which he could penetrate her with his penis. The complainant was only 16 years of age and was a virgin. According to Phelps, he used the complainant's friends to apply peer pressure on her to allow him to engage in sex, and he acknowledged in the police interview that the complainant was too immature to make the decision to have sex with him. Nevertheless, according to Lieutenant Harris, Phelps "emphasized" in the interview that he "coerced" the complainant into engaging in sex with him and took advantage of her willingness to allow him to engage in certain sexual activities by inserting his penis into her vagina without her consent.

In sum, we conclude that the trial court properly scored OV 10.

C. OV 9

MCL 777.39 governs the scoring of OV 9 and provides in relevant part that the trial court assess 10 points when "2 to 9 victims . . . were placed in danger of physical injury or death, or 4 to 19 victims . . . were placed in danger of property loss."[31] The statute defines "victim" as "each person who was placed in danger of physical injury or loss of life or property . . . ."[32] We conclude the trial court abused its discretion by scoring OV 9 at 10 points. There was no evidence on the record to support the conclusion that two people in this case were in danger of physical injury or loss of life or that

[31] MCL 777.39(1)(c).

[32] MCL 777.39(2)(a).

four people were in danger of loss of property when Phelps committed criminal sexual conduct crimes against one victim only.

The only evidence of injury in this case consisted of testimony by a YWCA nurse examiner that the complainant suffered internal injuries to her vaginal area. Although two of the complainant's friends were in the bedroom when the offense took place, nothing in the record suggested that they were ever placed in danger of physical injury, loss of life, or loss of property. Phelps did not threaten anyone, and he did not make physical contact with either of the complainant's friends.

We conclude that the trial court abused its discretion by assessing 10 points for OV 9. Rescoring OV 9 by assessing zero points[33] would result in a lower recommended minimum sentence range.[34] Thus, Phelps is entitled to resentencing.[35]

D. OV 13

The prosecution argues that Phelps is not entitled to resentencing because the trial court should have assessed 25 points for OV 13, continuing pattern of criminal behavior, and any error with respect to scoring OV 9 would become harmless because it would not result in a lower recommended minimum sentence range. We disagree. After reviewing the record, we con-

[33] MCL 777.39(1)(d).

[34] For the CSC I conviction, Phelps's offense variable level was calculated at 65 points and his prior record variable level was calculated at 60 points, resulting in a recommended minimum sentence range of 135 to 281 months with habitual offender enhancement. Reducing the offense variable level by 10 points would result in a recommended minimum sentence range of 126 to 262 months. Phelps's minimum sentence for the CSC I conviction was 276 months. See MCL 777.16y and MCL 777.62.

[35] *Francisco*, 474 Mich at 89 n 8.

clude that the trial court did not abuse its discretion by scoring OV 13 at zero points because there was insufficient evidence to show that Phelps engaged in a pattern of felonious criminal activity involving three or more crimes against a person over the past five years, as defined in the statute.[36]

MCL 777.43 governs the scoring of OV 13 and provides in relevant part as follows:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person ..... 25 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 13:
>
> (a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.
>
> * * *
>
> (c) Except for offenses related to membership in an organized criminal group or that are gang-related, do not score conduct scored in offense variable 11 or 12.[37]

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[36] MCL 777.43(1)(c) and (2)(a); *Endres*, 269 Mich App at 417.

[37] At the time of the offense, MCL 777.43(1)(c) was designated MCL 777.43(1)(b), but the language was identical. 2008 PA 562, which redesignated the subdivision, also added the language "or that are gang-related" to MCL 777.43(2)(c).

Before trial, the prosecution moved to admit evidence pursuant to MRE 404(b) of two instances of sexual misconduct involving Phelps. In the motion, the prosecution proposed to offer evidence that Phelps was convicted of fourth-degree criminal sexual conduct (CSC IV) in December 2005 after he engaged in sexual intercourse with a 14-year-old girl. The prosecution also proposed to offer evidence involving an August 2005 accusation that he engaged in forcible nonconsensual anal sex with an 18-year-old woman. Phelps was not charged in connection with the August 2005 incident.

The prosecution argues that Phelps engaged in a pattern of felonious criminal activity involving three or more crimes against a person (including the CSC I conviction in this case)[38] and thus, pursuant to MCL 777.43(1)(c), the trial court should have assessed 25 points for OV 13. The prosecution concedes that, under MCL 777.43(2)(c), Phelps's CSC III conviction in this case cannot be considered for purposes of scoring OV 13 because that offense was considered for scoring OV 11.

We conclude that the trial court did not abuse its discretion by assessing zero points for OV 13 because the evidence on the record did not support that Phelps engaged in a pattern of felonious criminal activity involving three or more crimes against a person within a five-year period.[39] There was evidence to show that Phelps committed *two* felonies against a person within the previous five-year period: Phelps was convicted of CSC I in this case and CSC IV in 2005. However, the

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[38] MCL 777.43(2)(a); *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009) ("Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise.").

[39] See *McLaughlin*, 258 Mich App at 671; *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

record evidence was insufficient to show that Phelps committed a *third* instance of felonious criminal activity against a person. With respect to the conduct involving the 18-year-old woman in August 2005, Phelps merely acknowledged that the woman had "accused" him, but Phelps was not charged with any criminal offense. The prosecution did not introduce any testimony of the woman or the police officer involved with the incident. Although a crime need not result in a conviction to be counted under OV 13,[40] Phelps's testimony merely established that he was accused of wrongdoing and did not sufficiently support that he engaged in felonious criminal activity against a person. In sum, the trial court did not abuse its discretion by assessing zero points for OV 13 when the record evidence did not support a higher score.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Phelps argues that he was denied the effective assistance of counsel when counsel failed to object to the trial court's scoring of OV 9 and OV 10 at sentencing. In light of the relief afforded Phelps with respect to OV 9, we will not address Phelps's argument with respect to that variable. And with respect to OV 10, defense counsel did not act deficiently by failing to raise an objection to the assessment of 10 points for this variable because, as discussed previously, evidence on the record supported the trial court's scoring.[41]

We affirm, but we remand for resentencing consistent with this opinion. We do not retain jurisdiction.

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[40] MCL 777.43(2)(a).

[41] See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995) ("[C]ounsel is not required to make a groundless objection at sentencing.").

DURAY DEVELOPMENT, LLC v PERRIN

Docket No. 287722. Submitted February 3, 2010, at Grand Rapids. Decided April 13, 2010, at 9:05 a.m.

Duray Development, LLC, brought an action in the Kent Circuit Court against Carl Perrin, Perrin Excavating, LLC, and Outlaw Excavating, LLC, alleging breach of contract. Duray Development had entered into an excavation contract on September 30, 2004, with Perrin, Perrin Excavating, and KDM Excavating in which Robert Munger signed on behalf of Duray Development, Carl Perrin signed on behalf of himself and Perrin Excavating, and Dan Vining signed on behalf of KDM Excavating. On October 27, 2004, Duray Development and Carl Perrin entered into a new contract intended to supersede the September 30, 2004, contract. The new contract contained the same language and provisions as the earlier contract but was between Duray Development and Outlaw only, and Carl Perrin, Perrin Excavating, and KDM Excavating were not parties. Outlaw had been recently formed by Carl Perrin and Vining, who signed the new contract on behalf of Outlaw, holding themselves out to Duray Development as the owners and persons in charge of Outlaw. The two contracts were drafted because on September 30, 2004, Outlaw had not yet been validly formed and Duray Development did not want the excavation work to wait until Outlaw was formed. The October 27, 2004, contract was entered into once the parties thought that Outlaw was a valid limited liability company. After bringing its action, Duray Development discovered that Outlaw did not obtain a "filed" status as a limited liability company until November 29, 2004, and was therefore not a valid limited liability company when the second contract was executed. The trial court, Paul J. Sullivan, J., ruled in favor of Duray Development, finding that Carl Perrin was in breach of contract. Carl Perrin argued in a posttrial memorandum that he was not personally liable and that Outlaw was liable under the doctrine of de facto corporation. The trial court determined that the provisions of the Limited Liability Company Act, MCL 450.4101 *et seq*., regarding when a limited liability company comes into existence and has powers to contract had superseded the de facto corporation doctrine and made it inapplicable to limited liability companies. Carl Perrin appealed.

The Court of Appeals *held*:

1. Carl Perrin did not preserve for appeal his argument that the doctrine of corporation by estoppel precluded Duray Development from arguing that he is personally liable. He did, however, preserve for appeal the de facto corporation issue.

2. The four elements for a de facto corporation require incorporators to have proceeded (1) in good faith (2) under a valid statute (3) for an authorized purpose and (4) to have executed and acknowledged articles of association pursuant to that purpose. There is no question that the elements other than the good-faith element were satisfied in this case. There is no evidence to suggest that Carl Perrin formed Outlaw in anything other than good faith. The trial court correctly concluded that all the elements of a de facto corporation were present in this case. The trial court erred by holding that the de facto corporation doctrine cannot apply to limited liability companies. The de facto corporation doctrine applies to Outlaw and, therefore, Outlaw, and not Carl Perrin, individually, is liable for the breach of the second contract.

3. The doctrine of corporation by estoppel may reasonably be extended to limited liability companies. The record clearly supports a finding of limited liability company by estoppel through the extension of the corporation by estoppel doctrine. However, the trial court did not clearly err by failing to raise sua sponte the issue of corporation by estoppel.

4. The record does not reflect that the trial court considered all the relevant factors in holding that the defendants were barred from calling witnesses because they failed to file a witness list within the time allotted. On remand, the trial court should consider the relevant factors and explain its determination on the record.

Reversed and remanded.

1. CORPORATIONS — LIMITED LIABILITY COMPANIES — LIABILITY OF MEMBERS.

Limited liability applies once a limited liability company comes into existence, and a member or manager is not liable thereafter for the acts, debts, or obligations of the company (MCL 450.4501[3]).

2. CORPORATIONS — CONTRACTS — CONTRACTING BEFORE CORPORATE EXISTENCE — LIABILITY.

A person who signs a contract on behalf of a company that is not yet in existence generally becomes personally liable on the contract; the company can become liable if, after the company comes into existence, it either ratifies or adopts the contract, a court determines that a de facto corporation existed at the time of the

contract, or a court orders that the corporation by estoppel doctrine prevented the opposing party from arguing against the existence of a corporation.

3. CORPORATIONS — DE FACTO CORPORATIONS — CORPORATIONS BY ESTOPPEL.

The de facto corporation and the corporation by estoppel doctrines are separate and distinct doctrines; the former doctrine allows a defectively formed corporation to attain the legal status of a corporation while the latter doctrine prevents a party who dealt with an association as though it were a corporation from denying its existence.

4. CORPORATIONS — DE FACTO CORPORATIONS.

A de facto corporation instantly comes into being when its incorporators have proceeded in good faith under a valid statute for an authorized purpose and have executed and acknowledged articles of association pursuant to that purpose; a de facto corporation is an actual corporation that, with respect to all the world except the state, enjoys the status and powers of a de jure corporation.

5. CORPORATIONS — LIMITED LIABILITY COMPANIES — DE FACTO CORPORATIONS — CORPORATIONS BY ESTOPPEL.

The doctrine of de facto corporation and the doctrine of corporation by estoppel apply to limited liability companies (MCL 450.4101 *et seq*.).

6. TRIAL — WITNESSES — FAILURE TO TIMELY SUBMIT WITNESS LISTS — SANCTIONS.

A trial court's decision to bar witness testimony after a party has failed to timely submit a witness list is reviewed for an abuse of discretion; the record should reflect that the trial court gave careful consideration to the relevant factors involved and considered all of its options in determining what sanction was just and proper in the context of the case.

Schenk, Boncher & Rypma (by *Frederick J. Boncher*) for Duray Development, LLC.

Miller Johnson (by *David J. Gass* and *Joseph J. Gavin*) for Carl Perrin.

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

PER CURIAM. In this breach of contract action, defendant Carl Perrin appeals as of right the August 21, 2008 judgment following a bench trial in which the trial court found that Perrin was in breach of contract and owed damages to plaintiff, Duray Development, LLC, in the amount of $96,637.68. The judgment did not find defendants Perrin Excavating, LLC, or Outlaw Excavating, LLC, in breach of contract, so neither of those defendants are parties to this appeal.

We find no plain error in the trial court's failure to raise sua sponte the issue of corporation by estoppel. However, we reverse the judgment of the trial court that the de facto corporation doctrine cannot apply to limited liability companies, and we reverse the trial court's decision to bar defendants from calling witnesses. Accordingly, we remand for further proceedings in accordance with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Duray Development is a residential development company whose sole member is Robert Munger. Munger's responsibilities were to locate and purchase property, and then work with engineering companies and municipalities to have the property zoned and fully developed for residential living. In 2004, Duray Development purchased 40 acres of undeveloped property called "Copper Corners," located at the intersection of 76th Street and Craft Avenue in Caledonia Township, Michigan.

On September 30, 2004, Duray Development entered into a contract with Perrin, Perrin Excavating, and KDM Excavating for excavating at Copper Corners. In that contract, Munger signed on Duray Development's behalf, Perrin signed on behalf of himself and Perrin Excavating, and Dan Vining signed on behalf of KDM Excavating.

On October 27, 2004, Duray Development and Perrin entered into a new contract, intended to supersede the September 30, 2004 contract. The new contract contained the same language and provisions as the earlier contract. However, the new contract was between Duray Development and Outlaw only, and Perrin, Perrin Excavating, and KDM Excavating were not parties. Outlaw was an excavation company that Perrin and Vining had recently formed. Perrin and Vining signed the new contract on behalf of Outlaw, and both held themselves out to Duray Development as the owners and persons in charge of the company. Although the parties did not execute the second contract until October 27, 2004, it was drafted on September 30, 2004, the same day the parties signed the first contract. Once signed, all parties proceeded under the contract as if Outlaw were the contractor for the Copper Corners development.

Two contracts were drafted because Perrin had not yet formed Outlaw at the time of the first contract. However, Duray Development did not want to wait for Perrin to finish forming the company before starting the excavation of Copper Corners. Therefore, the parties entered into the first contract on September 30, 2004, and then entered into the second contract once the parties thought Outlaw was a valid limited liability company.

Defendants began excavation and grading work pursuant to the contracts, but did not perform satisfactorily or on time. Duray Development then sued defendants for breach of contract. Defendants answered and filed a counterclaim against Duray Development, alleging that they performed the work according to the terms of the contracts and that Duray Development owed defendants approximately $35,000. Duray Devel-

opment later learned through discovery that Outlaw did not obtain a "filed" status as a limited liability company until November 29, 2004, and therefore Outlaw was not a valid limited liability company at the time the parties executed the second contract.[1]

Duray Development filed an amended complaint and obtained a default judgment because defendants failed to file an answer. Defendants then moved for entry of an order to set aside the default judgment. The trial court granted defendants' motion and set aside the default. But the trial court subsequently ruled that defendants would not be allowed to call any witnesses at trial because defendants had failed to provide a witness list by the deadline set forth in the scheduling order. After trial, the trial court ruled in favor of Duray Development, finding that Perrin was in breach of contract and owed $96,367.68 in damages to Duray Development.

In a posttrial memorandum, Perrin argued that he was not personally liable for Duray Development's damages. He asserted that, although Outlaw was not a valid limited liability company at the time of the execution of the second contract, Outlaw was nevertheless liable to Duray Development under the doctrine of de facto corporation. The trial court opined that if Outlaw were a corporation, then the de facto corporation doctrine most likely would have applied. However, the trial court concluded that the Limited Liability Company Act[2] "clearly and specifically provides for the time that a limited liability company comes into existence and has powers to contract" and therefore superseded the de

[1] According to the Limited Liability Company Act, MCL 450.4101 *et seq*., a limited liability company does not exist until the state administrator endorses the articles of organization with the word "filed." MCL 450.4104(2) and (6).

[2] MCL 450.4101 *et seq*.

facto corporation doctrine and made it inapplicable to limited liability companies altogether. Perrin now appeals.

II. PERRIN'S PERSONAL LIABILITY

A. STANDARD OF REVIEW

Perrin argues that he was not personally liable because he signed the second contract on behalf of Outlaw. According to Perrin, even though Outlaw was not yet a properly formed limited liability company, the parties all treated the contract as though Outlaw was a properly formed limited liability company and, therefore, the doctrine of de facto corporation shielded Perrin from personal liability. He further argues that the doctrine of corporation by estoppel precluded Duray Development from arguing that he is personally liable.

The issue whether the doctrine of de facto corporation applies to Perrin requires us to consider the Limited Liability Company Act and the Business Corporation Act.[3] We review de novo questions of law, including questions regarding whether a statute applies and regarding interpretation of the statute.[4]

Despite his contention on appeal, Perrin did not preserve the issue of corporation by estoppel. And although Perrin argues on appeal that corporation by estoppel and de facto corporation are doctrines so closely related that raising one of them at trial preserves both on appeal, caselaw does not support such an argument. Perrin cites *PIM, Inc v Steinbichler Optical*

[3] MCL 450.1101 *et seq*.

[4] *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000); *Alex v Wildfong*, 460 Mich 10, 21; 594 NW2d 469 (1999).

Technologies USA, Inc,[5] in support of this point. But in that case, although this Court noted that the two doctrines were closely related, it never went so far as to support Perrin's argument regarding preservation of the issue. Further, the Michigan Supreme Court later vacated this Court's decision in that case.[6]

Therefore, because Perrin did not preserve the issue of corporation by estoppel, we will only review the issue for plain error.[7] Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.[8]

B. THE LIMITED LIABILITY COMPANY ACT

The Limited Liability Company Act provides precisely when a limited liability company comes into existence. MCL 450.4202(2) provides that "[t]he existence of the limited liability company begins on the effective date of the articles of organization as provided in [MCL 450.4104]." MCL 450.4104(1) requires that the articles of organization be delivered to the administrator of the Michigan Department of Energy, Labor and Economic Growth (DELEG).[9] Under MCL 450.4104(2), after delivery of the articles of organization, "the ad-

[5] *PIM, Inc v Steinbichler Optical Technologies USA, Inc*, unpublished opinion of the Court of Appeals, issued September 4, 2001 (Docket Nos. 220053 and 222221).

[6] *PIM, Inc v Steinbichler Optical Technologies USA, Inc*, 468 Mich 896 (2003).

[7] *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004) (applying the unpreserved plain error standard to civil cases).

[8] *Carines*, 460 Mich at 763.

[9] See also MCL 450.4102(2)(a) and (f) (defining "administrator" and "department").

ministrator shall endorse[10] upon it the word 'filed' with his or her official title and the date of receipt and of filing[.]" And under MCL 450.4104(6), "[a] document filed under [MCL 450.4104(2)] is effective at the time it is endorsed[.]"

Once a limited liability company comes into existence, limited liability applies, and a member or manager is not liable for the acts, debts, or obligations of the company.[11] In contrast, a person who signs a contract on behalf of a company that is not yet in existence generally becomes personally liable on that contract.[12] However, a company can become liable if, (1) after the company comes into existence, it either ratifies or adopts that contract,[13] (2) a court determines that a de facto corporation existed at the time of the contract,[14] or (3) a court orders that corporation by estoppel prevented the opposing party from arguing against the existence of a corporation.[15]

In this case, Perrin signed the articles of organization for Outlaw on the same day as the second contract, October 27, 2004. Perrin then signed the October 27, 2004 contract on behalf of Outlaw. However, the DELEG administrator did not endorse the articles of organization until November 29, 2004. Therefore, pur-

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[10] The Legislature amended both MCL 450.4104(2) and MCL 450.4104(6) after the date of the second contract to change the words "indorse" and "indorsed" to "endorse" and "endorsed." 2005 PA 218, effective January 1, 2006. The Legislature, however, did not amend the substantive portions of the subsections.

[11] MCL 450.4501(3).

[12] *Campbell v Rukamp*, 260 Mich 43, 46; 244 NW 222 (1932).

[13] *Id.*; *Henderson v Sprout Bros, Inc*, 176 Mich App 661, 673; 440 NW2d 629 (1989).

[14] *Tisch Auto Supply Co v Nelson*, 222 Mich 196, 200; 192 NW 600 (1923).

[15] *Estey Mfg Co v Runnels*, 55 Mich 130, 133; 20 NW 823 (1884).

suant to the Limited Liability Company Act, Outlaw was not in existence on October 27, 2004. And Outlaw did not adopt or ratify the second contract. Therefore, Perrin became personally liable for Outlaw's obligations *unless* a de facto limited liability company existed or limited liability company by estoppel applied.[16]

C. DE FACTO CORPORATION AND CORPORATION BY ESTOPPEL

De facto corporation and corporation by estoppel are separate and distinct doctrines that warrant individual treatment. The de facto corporation doctrine provides that a defectively formed corporation—that is, one that fails to meet the technical requirements for forming a de jure corporation—may attain the legal status of a de facto corporation if certain requirements are met, as discussed later in this opinion. The most important aspect of a de facto corporation is that courts perceive and treat it in all respects as if it were a properly formed de jure corporation. For example, it can sue and be sued.[17] Often, as in this case, the status of the company is crucial to determine whether the parties forming the corporation are individually liable.[18]

Corporation by estoppel, on the other hand, is an equitable remedy and does not concern legal status.[19] The general rule is: "Where a body assumes to be a corporation and acts under a particular name, a third

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[16] *Tisch Auto Supply*, 222 Mich at 200; *Estey Mfg*, 55 Mich at 133.

[17] *Tisch Auto Supply*, 222 Mich at 200; *Eaton v Walker*, 76 Mich 579, 586; 43 NW 638 (1889); *Henderson*, 176 Mich App at 672. The only exception is that the state may challenge its status. See *Newcomb-Endicott Co v Fee*, 167 Mich 574, 582; 133 NW 540 (1911); 6 Michigan Civil Jurisprudence, § 40, p 135.

[18] See, e.g., *Berlin State Bank v Nelson*, 231 Mich 463, 465; 204 NW 92 (1925).

[19] *Estey Mfg*, 55 Mich at 133; see also 6 Michigan Civil Jurisprudence, § 44, p 139.

party dealing with it under such assumed name is estopped to deny its corporate existence."[20] Like the de facto corporation doctrine, corporation by estoppel often arises in the context of assessing individual versus corporate liability. The purpose of the doctrine is so "that one who contracts with an association as a corporation is estopped to deny its corporate existence . . . so as to prevent one from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals or partners."[21]

In sum, the de facto corporation doctrine allows a defectively formed corporation to attain the legal status of a corporation. The corporation by estoppel doctrine prevents a party who dealt with an association as though it were a corporation from denying its existence. Stated another way, the de facto corporation doctrine establishes the legal existence of the corporation. By contrast, the corporation by estoppel doctrine merely prevents one from arguing against it, and does nothing to establish its actual existence in the eyes of the rest of the world.

Despite their differences, the two doctrines are often discussed in tandem and the Supreme Court tends to collapse discussion of the two into a single blended analysis.[22] One reason that the two doctrines are often blended together is because a common fact pattern continually emerges in the caselaw: a party conducts business with an association that it believes to be a de jure corporation, but which was defective in some way

[20] *Estey Mfg*, 55 Mich at 133.

[21] 6 Michigan Civil Jurisprudence, § 47, p 140, citing *Lockwood v Wynkoop*, 178 Mich 388; 144 NW 846 (1914).

[22] See, e.g., *Tisch Auto Supply*, 222 Mich at 200-202; *Newcomb-Endicott Co*, 167 Mich at 581-582; *Eaton*, 76 Mich at 586-587; *Swartwout v Michigan Air Line R Co*, 24 Mich 389, 396 (1872).

and never truly incorporated. In that situation, both corporation by estoppel and de facto corporation naturally become relevant.

With that said, we, however, will consider each doctrine separately and deliberately. Each concept involves a separate set of factors, and caselaw suggests that one can exist without the other.[23] Moreover, a separate analysis is especially important in this case because Perrin preserved the issue of de facto corporation for appeal, but failed to preserve the issue of corporation by estoppel. Therefore, the two arguments are subject to different standards of review.

D. THE DE FACTO CORPORATION DOCTRINE

The Michigan Supreme Court established the four elements for a de facto corporation long ago:

> "When incorporators have [1] proceeded in good faith, [2] under a valid statute, [3] for an authorized purpose, and [4] have executed and acknowledged articles of association pursuant to that purpose, a corporation *de facto* instantly comes into being.[24] A *de facto* corporation is an actual

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[23] See, e.g., *Lockwood*, 178 Mich at 391-392 (applying corporation by estoppel after assuming, but not concluding, the corporation was de jure); *City of Kalamazoo v Kalamazoo Heat, Light & Power Co*, 124 Mich 74, 82-83; 82 NW 811 (1900) (applying corporation by estoppel after declining to consider de facto corporation).

[24] Perrin acknowledges these elements in his brief, but he also quotes an opinion from the United States District Court for the Eastern District of Michigan to suggest different elements of the de facto corporation doctrine: " ' (1) a charter or statute under which a corporation with the powers assumed might have been organized; (2) a bona fide attempt to organize a corporation under such charter or statute; and (3) an actual use of the corporate powers.' " *Model Board, LLC v Board Institute, Inc*, 2009 WL 691891, *4; 2009 US Dist LEXIS 19822, *9-*10 (ED Mich, 2009). This case, in turn, cited *Tisch Auto Supply*, 222 Mich at 196, without providing a specific page reference. This language, however, is not found anywhere in *Tisch Auto Supply*. It is worth noting that the

> corporation. As to all the world, except the State, it enjoys the status and powers of a *de jure* corporation."[25]

Here, there is no question that elements (2), (3), and (4) were satisfied. First, the Limited Liability Company Act is a valid statute that allows for limited liability companies in Michigan. Second, Perrin and Vining presumably formed Outlaw for the purpose of starting a new excavation company, which is an authorized purpose. Third, Perrin executed the articles of organization on October 27, 2004, the same day the parties executed the second contract.

It is less obvious whether the first element of the doctrine—good faith—was satisfied. There is little guidance in Michigan caselaw for a definition, or application, of this specific element. But in *Newcomb-Endicott Co v Fee*,[26] the Michigan Supreme Court, although applying a different set of elements,[27] did state that in the absence of a claim or evidence of fraud or false representation on the part of the incorporators, and in light of a bona fide attempt to incorporate, there was no reason to deny a company the status of a de facto corporation.

Here, Duray Development does not allege that Perrin set up the corporation through fraud or false representations; that is, Duray Development does not allege that Perrin set up the corporation as a sham, for fraudulent purposes, or as a mere instrumentality under a theory

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Supreme Court long ago stated the same three elements as *Model Board* in *Newcomb-Endicott Co*, 167 Mich at 580-581; however, the four elements from *Tisch Auto Supply* are the most often cited language regarding a de facto corporation.

[25] *Tisch Auto Supply*, 222 Mich at 200 (citations omitted); see also *Henderson*, 176 Mich App at 672.

[26] *Newcomb-Endicott Co*, 167 Mich at 582.

[27] See n 24 of this opinion.

of piercing the corporate veil. Rather, as the record indicates, Duray Development did not learn until after filing the complaint in this case that Outlaw was not a valid limited liability company on October 27, 2004. Duray Development at all times dealt with Outlaw as a valid corporation with which it contracted. Duray Development's sole member, Munger, testified that once the second contract took effect, Duray Development no longer considered Perrin or Perrin Excavating as parties to the contract, but instead considered Outlaw to be the new "contractor." There is no evidence whatsoever to suggest that Perrin formed Outlaw in anything other than good faith. Accordingly, the trial court was correct to conclude that, had Outlaw been formed as a corporation instead of a limited liability company, it would have been a de facto corporation for purposes of liability on the October 27, 2004 contract. Thus, all elements of a de facto corporation were present in this case.

The trial court, however, concluded that the de facto *corporation* doctrine does not apply to *limited liability companies* and therefore did not apply to Outlaw. It reasoned that the plain reading of the Limited Liability Company Act "clearly and specifically provides for the time that a limited liability company comes into existence and has powers to contract." The trial court then cited a passage from a legal treatise, which states "[t]he *de facto* corporation doctrine and, presumably, a possible *de facto* [limited liability company] doctrine are apparently dead in Michigan, having been replaced by the Business Corporation Act, MCL 450.1221, and the [Limited Liability Company Act], MCL 450.4202."[28] Thus, the trial court concluded that the Legislature had

[28] Cambridge & Christopoulos, Michigan Limited Liability Companies, ICLE (2d ed, 2008 supp), § 3.30.

"clearly spoken on this subject" and did not extend the de facto corporation doctrine to limited liability companies.

Neither this Court nor the Supreme Court has addressed whether the de facto corporation doctrine can be extended or applied to a limited liability company.[29] That is not to say, however, that the doctrine *cannot* be applied to a limited liability company. The 1911 case of *Newcomb-Endicott Co* is similar to the facts here and suggests that the plain language of the Limited Liability Company Act and the Business Corporation Act should not supplant the de facto corporation doctrine.

In *Newcomb-Endicott Co*, the defendants formed a corporation by filing the articles of association with the Secretary of State on June 15, 1908, and with the county clerk in March 1909.[30] At the time, the relevant incorporating statute provided that a corporation did not exist until the articles of association were filed with both offices.[31] Therefore, the defendants' corporation did not technically exist until March 1909. However, the defendants' corporation contracted with the plaintiff in July 1908, and accumulated an unpaid debt for which the plaintiff sued.[32] At trial, the circuit court ruled that, although the corporation did not exist at the time of the contract and when the debts were incurred, it was a de facto corporation and, as such, the corporation, not the individual defendants, was liable.[33] The plaintiff appealed and argued, in part, that the de facto corporation doctrine contradicted the plain language of the appli-

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[29] *Id*. (noting that "there are no reported cases in Michigan concerning this uncertainty").

[30] *Newcomb-Endicott Co*, 167 Mich at 577.

[31] *Id*. at 579-580.

[32] *Id*. at 576.

[33] *Id*. at 578.

cable statute, which clearly stated how and when a corporation was formed.[34] The Supreme Court ruled otherwise, reasoning that, although the plain language of the statute "contemplates the complete organization of the association," including how the articles of association were to be filed, it did not preclude the application of the de facto corporation doctrine.[35]

The Supreme Court's conclusion in *Newcomb-Endicott Co*, that statutes contemplating complete organization of an association do not preclude application of the de facto corporation doctrine, contradicts the idea that the de facto corporation doctrine perished on enactment of the Business Corporation Act and the Limited Liability Company Act. Although *Newcomb-Endicott Co* dealt with a corporation rather than a limited liability company, it would be arbitrary to conclude, without any precedent to the contrary, that the de facto corporation doctrine applies to corporations but not to limited liability companies.

Indeed, the similarities between the Business Corporation Act and the Limited Liability Company Act support the conclusion that the de facto corporation doctrine applies to both. The purposes for forming a limited liability company and a corporation are similar. Notably, the Limited Liability Company Act states, "A limited liability company may be formed under this act for any lawful purpose for which a domestic corporation or a domestic partnership could be formed, except as otherwise provided by law."[36] Further, both the Limited Liability Company Act and the Business Corporation Act contemplate the moment in time when a limited

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[34] *Id.* at 579.

[35] *Id.* at 582.

[36] MCL 450.4201; see also MCL 450.1251(1).

liability company or corporation comes into existence.[37] Because the Business Corporation Act and the Limited Liability Company Act relate to the common purpose of forming a business and because both statutes contemplate the moment of existence for each, they should be interpreted in a consistent manner.[38]

Accordingly, we conclude that the de facto corporation doctrine applies to Outlaw, a limited liability company. As a result, Outlaw, and not Perrin, individually, is liable for the breach of the October 27, 2004 contract.

E. CORPORATION BY ESTOPPEL

As stated previously, generally, a person who signs a contract on behalf of a company that is not yet in existence becomes personally liable on that contract.[39] However, a court can order that the company is instead liable if it finds that corporation by estoppel prevented the opposing party from arguing against the existence of a corporation.[40] The Supreme Court in *Estey Mfg Co v Runnels*,[41] summarized the principle of corporation by estoppel as follows: "Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence."

As with the doctrine of de facto corporation, this Court has not addressed whether corporation by estoppel can be applied to limited liability companies. How-

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[37] MCL 450.1221 (Business Corporation Act); MCL 450.4202 (Limited Liability Company Act).

[38] *McNeil v Charlevoix Co*, 275 Mich App 686, 701; 741 NW2d 27 (2007); *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998).

[39] *Campbell*, 260 Mich at 46.

[40] *Estey Mfg*, 55 Mich at 133.

[41] *Id.*

ever, corporation by estoppel is an equitable remedy, and its purpose is to prevent one who contracts with a corporation from later denying its existence in order to hold the individual officers or partners liable.[42] The doctrine has come up on numerous occasions in conjunction with de facto corporations.[43] In that setting, the rule is:

> In the case of the associates in the corporation *de facto*, and those who have had dealings with it, there is a mutual estoppel, resting upon broad grounds of right, justice and equity. The first class are not suffered to deny their incorporation, nor the second to dispute the validity of their assertions of corporate powers.[44]

With this in mind, and in light of the purpose of corporation by estoppel, the corporate structure has little impact on the equitable principles at stake. In other words, there is no reason or purpose to draw a distinction on the basis of corporate form. Furthermore, like de facto corporation, because corporation by estoppel coexists with the Business Corporation Act, so too can it coexist with the Limited Liability Company Act.

Further, the Supreme Court has on at least one occasion applied the doctrine in a not-for-profit corporate context.[45] Extending the corporation by estoppel doctrine to nonprofit corporations was not a great leap in the application of the doctrine. And extension of the corporation by estoppel doctrine to nonprofit corporations supports the conclusion that the doctrine can also be extended beyond application solely to cases involving

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[42] *Id.*; 6 Michigan Civil Jurisprudence, § 47, p 140, citing *Lockwood*, 178 Mich at 388.

[43] See, e.g., *Newcomb-Endicott Co*, 167 Mich at 581-582, citing *Swartwout*, 24 Mich at 396; *Tisch Auto Supply*, 222 Mich at 201.

[44] *Swartwout*, 24 Mich at 396 (citations omitted).

[45] See *Flueling v Goeringer*, 240 Mich 372, 375; 215 NW 294 (1927).

for-profit corporations. For these reasons, we conclude that the doctrine of corporation by estoppel may reasonably be extended to limited liability companies.

Moreover, here, the record clearly supports a finding of "limited liability company by estoppel" through the extension of the corporation by estoppel doctrine. Perrin was an individual party to the first contract, as was his limited liability company, Perrin Excavating. However, only Outlaw became a party to the second contract, which superseded the first. And all parties dealt with the second contract as though Outlaw were a party. After the second contract, Duray Development received billings from Outlaw, and not from Perrin. Duray Development also received a certificate of liability insurance for Outlaw. Munger testified that he dealt with Perrin, Perrin Excavating, and KDM Excavating before the second contract and only dealt with Outlaw after. Duray Development continued to assume Outlaw was a valid limited liability company after filing the lawsuit and only learned of the filing and contract discrepancies once litigation began in July 2006.

However, we cannot find plain error requiring reversal on the doctrine of limited liability company by estoppel. Perrin did not raise the issue in the trial court, and the trial court did not err by not raising it for him. "Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute."[46] "[A] party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention."[47] Accordingly, it was not the trial court's responsibility to raise an argument for Perrin that he did not raise for himself. And, as indi-

[46] *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).

[47] *Id.*

cated above, corporation by estoppel, like de facto corporation, has never been applied to limited liability companies in the past. Thus, we cannot conclude that the trial court made a clear and obvious mistake by not applying the corporation by estoppel doctrine when there is no precedent indicating that the trial court should have applied the doctrine. Accordingly, we conclude that no plain error occurred requiring reversal on this issue.

III. EXCLUSION OF PERRIN'S TESTIMONY

A. STANDARD OF REVIEW

Perrin argues that the trial court's decision to not allow him to testify because defendants failed to provide a witness list before trial was unreasonable and unprincipled. According to Perrin, he was a party to the litigation who was denied his day in court. Further, Perrin argues, the decision effectively dismissed his counterclaim against Duray Development.

This Court reviews for an abuse of discretion a trial court's decision to bar witness testimony after a party has failed to timely submit a witness list.[48] An abuse of discretion exists when the trial court's decision falls outside the range of principled outcomes.[49]

B. ANALYSIS

MCR 2.401(I)(1) provides that all parties must file and serve witness lists within the time allotted by the trial court. MCR 2.401(I)(2) provides that "[t]he trial

[48] *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993).

[49] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." Here, the trial court entered a scheduling order requiring the parties to submit their witness lists no later than 28 days before the close of discovery. And Perrin concedes that defendants did not provide a witness list within that time.

On the first day of trial, the trial court addressed defendants' failure to submit a witness list pursuant to the scheduling order, and stated:

> Without having listed witnesses or without having listed or exchanged exhibits and so forth, I do believe that the defense will have some difficulty getting me to allow witnesses or exhibits. It's been represented to me that [the] defense does not intend to do so.[50] I agree with plaintiff's counsel here that rebuttal is for the plaintiff to present rebuttal evidence and rebuttal witnesses if it finds the need to do so and desires to do so. The—however, on the other hand, while the plaintiff is not required to call anyone other than those he believes is needed to basically prove his case and the damages being claimed here, that once those witnesses are on the stand, certainly they can be cross-examined by the defense, and potentially the items coming out in that cross-examination might be adequate defense, and for that matter, even sustain a counterclaim.
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> * * *
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> But certainly as far as the defense here, it wouldn't be the first case that was made by use of witnesses called by an opponent, so I can't—the mere fact that they are not going to be presenting any witnesses of their own or presenting any exhibits does not necessarily mean that they lose, at least that's my belief at this particular stage.

[50] Defense counsel stated earlier in the hearing: "With respect to witnesses, we don't intend to have witnesses other than those named by the plaintiff, and Mr. Perrin, who is a party to this case."

After the conclusion of Duray Development's proofs, defense counsel proceeded with his case and attempted to call Perrin as a witness. Duray Development's counsel objected, citing the trial court's earlier ruling. Defense counsel responded that he should be able to question Perrin regarding Munger's testimony that he did not learn until discovery that Outlaw did not exist at the time of the second contract and whether the work performed was pursuant to a contract with Outlaw. He argued that Munger's testimony brought a new issue to the case. Duray Development's counsel replied by pointing out that the original complaint itself addressed the issue, by alleging Perrin was individually liable because Outlaw was not a valid company until after the second contract. The trial court agreed with Duray Development's counsel, at which point defense counsel stated: "That's fine. I think it's been covered anyways."

Once a party has failed to file a witness list in accordance with the scheduling order, it is within the trial court's discretion to impose sanctions against that party. These sanctions may preclude the party from calling witnesses. Disallowing a party to call witnesses can be a severe punishment, equivalent to a dismissal.[51] But that proposition does not mean that disallowing witnesses is *always* tantamount to a dismissal. Nor does it mean that a trial court cannot impose such a sanction even if it is equivalent to a dismissal.[52] Because the decision is within the trial court's discretion, caselaw mandates that the trial court consider "the circumstances of each case to determine if such a drastic

[51] *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993).

[52] *Id.* at 628-629.

sanction is appropriate."[53] "[T]he record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it."[54] Relevant factors can include, but are not limited to,

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.[55]

The trial court should also "determine whether the party can prove the elements of his position based solely on the parties' testimony and any other documentary evidence."[56]

Here, the record does not reflect that the trial court gave consideration to these factors or considered all of its options in determining what sanction was just and proper in the context of the case before it.[57] Therefore, on remand the trial court should reassess Perrin's

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[53] *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). "[T]he mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a sanction." *Id.*

[54] *Id.*

[55] *Id.* at 32-33 (citations omitted). Note that in *Dean*, it was the plaintiff who failed to file a witness list.

[56] *Grubor Enterprises*, 201 Mich App at 629.

[57] See *id.*; *Dean*, 182 Mich App at 32.

request to testify, taking the above-mentioned factors into consideration and explaining its determination on the record.

We find no plain error in the trial court's failure to raise sua sponte the issue of corporation by estoppel. However, we reverse the judgment of the trial court that the de facto corporation doctrine cannot apply to limited liability companies, and we reverse the trial court's decision to bar defendants from calling witnesses. Accordingly, we remand for further proceedings in accordance with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

PEOPLE v MUNGO (ON REMAND)

Docket No. 269250. Submitted July 15, 2009, at Lansing. Decided April 13, 2010, at 9:10 a.m.

Michael W. Mungo was charged in the Washtenaw Circuit Court with unlawfully carrying a concealed weapon. A police officer found the weapon under the driver's seat of defendant's automobile during a search conducted after the officer made a routine traffic stop and arrested defendant's passenger on outstanding warrants for traffic violations. The court, David S. Swartz, J., granted defendant's motion to suppress evidence of the gun and quash the information. The Court of Appeals, WHITBECK, C.J., and TALBOT and ZAHRA, JJ., reversed and remanded, holding that a police officer may search an automobile incident to a passenger's arrest when before the search there was no probable cause to believe that the automobile contained contraband or that the driver and owner of the automobile had engaged in unlawful activity and that the search was therefore constitutionally permissible. 277 Mich App 577 (2008). Defendant sought leave to appeal. The Michigan Supreme Court initially held the application in abeyance and, following the release of the United States Supreme Court's decision in *Arizona v Gant*, 556 US ___; 129 S Ct 1710 (2009), remanded the case to the Court of Appeals for reconsideration in light of *Gant*. 483 Mich 1091 (2009).

On remand, the Court of Appeals *held*:

1. The search of defendant's vehicle incident to the arrest of his passenger was unreasonable and violated the Fourth Amendment. In *Gant*, the United States Supreme Court held that a search incident to an arrest may include only the person of the arrestee and the area within his or her immediate control, that is, the area from which he or she might gain a weapon or evidence that could be destroyed. A police officer may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and is within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. In this case, defendant was not under arrest at the time of the search, which was incident to the passenger's

arrest. Both defendant and the passenger had been secured in the backseat of a police vehicle, and neither defendant nor the passenger would have been able to reach into the passenger compartment of defendant's automobile during the search, so officer safety was not a concern. The passenger was arrested for traffic violations, so there would have been no reasonable basis for the police officer to conclude that evidence of those offenses could be found during the search. The trial court correctly granted defendant's motion to suppress the evidence and quash the information.

2. The retroactivity doctrine provides that a new rule for the conduct of criminal prosecutions must be applied retroactively to all state or federal cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from prior law. The rule of *Gant* applies to this case.

3. The exclusionary rule precludes the use at trial of evidence obtained in violation of the Fourth Amendment. Its purpose is to deter police misconduct. The good-faith exception to the exclusionary rule applies in situations such as one in which a police officer acts in good faith and in an objectively reasonable manner on a search warrant later found defective because of a judicial error. Excluding evidence obtained in such a search would not deter police misconduct. The exclusionary rule should be applied on a case-by-case basis, and only if application of the rule would deter police misconduct.

4. The retroactivity doctrine does not preclude application of the good-faith exception. Even assuming that reliance on Michigan caselaw could form a basis to invoke the good-faith exception, however, the prior opinion in this case was the first published Michigan case to extend the decision in *New York v Belton*, 453 US 454 (1981), which applied the search-incident exception in the context of a vehicle search, to a search incident solely to a passenger's arrest. The law on this point was thus not established and clear, and the search in this case could not have been premised on a good-faith reliance on caselaw.

Affirmed.

1. SEARCHES AND SEIZURES — ARRESTS — SEARCHES INCIDENT TO AN ARREST — AUTOMOBILE SEARCHES.

A search incident to an arrest may include only the person of the arrestee and the area within his or her immediate control, that is, the area from which he or she might gain a weapon or evidence that could be destroyed; a law enforcement officer may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and is within reaching distance of the

passenger compartment at the time of the search or when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle (US Const, Am XIV).

2. CRIMINAL LAW — RETROACTIVITY OF DECISIONS.

A new rule for the conduct of criminal prosecutions must be applied retroactively to all cases pending on direct review or not yet final, even if the new rule constitutes a clear break from prior law.

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

Ferris & Salter, *P.C.* (by *Don Ferris*), and *The Mungo Law Firm*, *PLC* (by *Leonard Mungo*), for defendant.

ON REMAND

Before: WHITBECK, P.J., and TALBOT and ZAHRA, JJ.

ZAHRA, J. The prosecution appeals as of right the circuit court's order granting defendant's motion to suppress evidence and quash the information. Previously, this Court reversed the circuit court's order, holding that "a police officer may search a car incident to a passenger's arrest where before the search there was no probable cause to believe that the car contained contraband or that the driver and owner of the car had engaged in any unlawful activity." *People v Mungo*, 277 Mich App 577, 578; 747 NW2d 875 (2008). Following this Court's decision, defendant appealed in our Supreme Court, which held the application for leave to appeal in abeyance pending release of the United States Supreme Court's decision in *Arizona v Gant*, 556 US ___; 129 S Ct 1710; 173 L Ed 2d 485 (2009). On April 21, 2009, the United States Supreme Court issued an opinion in *Gant*, holding that a vehicle may *not* be

searched "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Id.* at ___; 129 S Ct at 1714. Consequently, our Supreme Court has vacated this Court's decision in *Mungo* and remanded for reconsideration in light of *Gant*. *People v Mungo*, 483 Mich 1091 (2009). On remand, we affirm the circuit court's order suppressing evidence and quashing the information.

I. BASIC FACTS AND PROCEDURE

As stated in this Court's previous opinion:

> Washtenaw County Sheriff's Deputy Ryan Stuck lawfully initiated a traffic stop of a car driven by defendant. Mark Dixon was the sole passenger in the car. Upon request, defendant produced the vehicle registration and proof of insurance. Deputy Stuck also requested the occupants' driver's licenses and ran Law Enforcement Information Network (LEIN) checks on both Dixon and defendant. Deputy Stuck found that Dixon had two outstanding warrants issued for failing to appear in court to answer traffic-violation charges. Deputy Stuck arrested Dixon, asked his dispatcher to send another officer to assist him, and secured Dixon in the backseat of his squad car. Deputy Stuck directed defendant to step out of his car and conducted a pat-down search. Thereafter, Deputy Stuck searched defendant's car and found an unloaded gun in a case underneath the driver's seat and ammunition in the glove compartment. Deputy Stuck asked defendant to produce a permit to carry a concealed weapon. However, defendant produced only a permit to purchase a firearm. Defendant's LEIN check did not reveal that he had been issued a concealed-weapons permit. Deputy Stuck arrested defendant for unlawfully carrying a concealed weapon.
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> In the circuit court, defendant moved to quash the information and suppress evidence of the gun. The prosecutor relied on *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), to argue that the arrest of any person in a car justifies a search of the passenger compart-

> ment of that car. The prosecutor argued that the search that led to the discovery of the gun was constitutionally permissible because Dixon, a passenger in defendant's car, was lawfully arrested. Defendant relied on *State v Bradshaw*, 99 SW3d 73 (Mo App, 2003), a case in which a divided panel of the Missouri Court of Appeals distinguished *Belton* and held that police officers cannot lawfully search a driver's vehicle following the arrest of a passenger where the passenger was safely arrested and there was no reasonable suspicion that the driver possessed unlawful items.
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> The circuit court distinguished *Belton* and followed *Bradshaw*. The circuit court concluded that defendant was not under arrest at the time Deputy Stuck searched his car. The circuit court further concluded that defendant had a protected privacy interest in his car. The circuit court held that there was no probable cause to arrest defendant and, therefore, the search of his car was not constitutionally permissible. This appeal followed. [*Mungo*, 277 Mich App at 578-580.]

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to dismiss a charge on legal grounds. *People v Owen*, 251 Mich App 76, 78; 649 NW2d 777 (2002). This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C).

B. APPLICATION OF *GANT v ARIZONA*

In *Gant*, 556 US at ___; 129 S Ct at 1714-1715, two persons were arrested outside a residence at which narcotics allegedly were sold. These persons were secured in separate police cars. Defendant Gant, who had been at the residence earlier, arrived in his vehicle and was arrested for driving with a suspended license after

he had left the vehicle and walked some 10 to 12 feet. An additional patrol car arrived, and Gant was locked in the backseat of that car. Two officers searched Gant's car and found a gun and a bag of cocaine. Ultimately, the Arizona Supreme Court held that the search of Gant's car was unreasonable under the Fourth Amendment of the United States Constitution. *Id*. at ___; 129 S Ct at 1715.

The United Stated Supreme Court revisited in *Gant* the issue of what circumstances permit a police officer to search the passenger compartment of a vehicle incident to a recent occupant's arrest. *Id*. at ___; 129 S Ct at 1716. The *Gant* Court began its analysis by noting that, generally, warrantless searches are unreasonable per se under the Fourth Amendment. One exception to this general rule is that a search may be permissible if it is incident to a lawful arrest. That exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id*. A search incident to an arrest may include only the person of the arrestee and the area within the immediate control of the arrestee, i.e., the area from which the arrestee might gain a weapon or evidence that could be destroyed. *Id*., citing *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). The *Gant* Court explained that in *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), the Supreme Court considered the application of the *Chimel* rule in the context of a vehicle search. It held that "when an officer lawfully arrests 'the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile' and any containers therein." *Gant*, 556 US at ___; 129 S Ct at 1717, quoting *Belton*, 453 US at 460.

The Supreme Court observed that the decision in *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 556 US at ___; 129 S Ct at 1718. The Court continued:

> Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U. S. at 460, n 3. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.
>
> Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton* [*v United States*, 541 US 615, 632; 124 S Ct 2127; 158 L Ed 2d 905 (2004)] (Scalia, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, *e.g.*, *Atwater* v. *Lago Vista*, 532 U. S. 318, 324 [121 S Ct 1536; 149 L Ed 2d 549] (2001); *Knowles* v. *Iowa*, 525 U. S. 113, 118 [119 S Ct 484; 142 L Ed 2d 492] (1998). But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein. [*Gant*, 556 US at ___; 129 S Ct at 1719.]

The Supreme Court concluded that "[n]either the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case." *Id.* The Court noted that unlike in *Belton*, in which a single police officer had to deal with four unsecured arrestees, in *Gant*, five officers were present to deal with three arrestees, all of whom were secured in police vehicles before the search of Gant's car occurred. Thus, Gant could not have reached into the passenger compartment of his vehicle at the time the vehicle was searched. Furthermore, unlike in *Thornton*, in which the defendant was arrested for a narcotics offense, Gant was arrested for driving with a suspended license. The police could not have expected to find evidence of that offense from a search of Gant's car. The *Gant* Court determined that "[b]ecause police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable." *Id*.

The Supreme Court concluded:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed. [*Id.* at ___; 129 S Ct at 1723-1724.]

Applying *Gant* to the facts presented in this case, we conclude that the search of defendant's vehicle incident

to the arrest of Dixon was illegal and that the circuit court correctly granted defendant's motion to suppress the evidence and quash the information.

Deputy Stuck placed Dixon under arrest after discovering that Dixon had two outstanding warrants for traffic violations. The officer secured Dixon in the backseat of the police vehicle. The officer searched the vehicle only after an additional police unit had arrived and defendant had been secured in the backseat of that police vehicle. Defendant was not under arrest at the time the search occurred, and Deputy Stuck searched defendant's vehicle incident to Dixon's arrest. Neither defendant nor Dixon would have been able to reach into the passenger compartment of defendant's vehicle when the search occurred; thus, concern for officer safety was not at issue. See *Gant*, 556 US at ___; 129 S Ct at 1716. Further, because Dixon was placed under arrest for traffic violations, there would have been no reasonable basis for the officer to conclude that evidence of those offenses could be found in a search of defendant's vehicle. See *id*. at ___; 129 S Ct at 1719; *Thornton*, 541 US at 632 (Scalia, J., concurring in the judgment). Thus, we conclude that Deputy Stuck's warrantless search of defendant's car was unreasonable and in violation of the Fourth Amendment. See *Gant*, 556 US at ___; 129 S Ct at 1723-1724.

C. THE EXCLUSIONARY RULE AND THE RETROACTIVITY DOCTRINE

This Court sua sponte issued an order directing the parties to file supplemental briefs addressing application of the good-faith exception to the exclusionary rule, see *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004), and the retroactivity doctrine, see *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987); *People v Bell (On Second*

Remand), 264 Mich App 58; 689 NW2d 732 (2004). Defendant ignored this Court's directive. The prosecution filed a brief acknowledging that *Gant* must be applied retroactively in the instant case. Nonetheless, the prosecution advocated for reversal of the circuit court's order of suppression under the good-faith exception to the exclusionary rule. We conclude that the search at issue in this case does not fall within the good-faith exception to the exclusionary rule. Defendant is entitled to have the rule of law established in *Gant* applied to this case.

The judicially created exclusionary rule operates to preclude from use at trial evidence obtained in violation of the Fourth Amendment. *Leon*, 468 US at 906. The purpose of the exclusionary rule is to deter police misconduct. *Id*. In *Leon*, the United States Supreme Court established a good-faith exception to the exclusionary rule, noting that application of the exclusionary rule requires weighing the benefits of the resulting deterrence of police misconduct against the costs incurred by preventing the introduction of otherwise valid evidence. *Id.* at 906-907. The *Leon* Court concluded that circumstances could exist in which these costs could outweigh any slight benefits gained by application of the exclusionary rule. For example, if a law enforcement officer acted in good faith and in an objectively reasonable manner on a search warrant later found to be defective because of a judicial error, excluding the evidence obtained in the search would not operate to deter police misconduct. *Id*. at 920-921. The *Leon* Court concluded that the exclusionary rule should be applied on a case-by-case basis, and only if application would deter police misconduct. *Id*. at 918.[1]

[1] In *Goldston*, our Supreme Court adopted the good-faith exception to the exclusionary rule in Michigan. *Goldston*, 470 Mich at 526, 543; Const

The retroactivity doctrine provides that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 US at 328. The interaction between the good-faith exception to the exclusionary rule and the retroactivity doctrine has been addressed by a number of federal courts. Divergent opinions have emerged in the federal courts in regard to the interaction and application of these two legal concepts.

In *United States v Buford*, 623 F Supp 2d 923 (MD Tenn, 2009), a case decided after the United States Supreme Court's decision in *Gant*, the United States District Court for the Middle District of Tennessee addressed application of the good-faith exception to the exclusionary rule in a case factually similar to the instant case. The *Buford* court concluded that while there is tension between the policies supporting the exclusionary rule and the retroactivity doctrine, the retroactivity doctrine required rejection of the good-faith exception to the exclusionary rule in that case:

> [A]n extension of the "good faith" exception would lead to perverse results. For instance, under the [prosecution's] argument, there is no basis for distinguishing the petitioner in the "new rule" case from similarly situated defendants whose cases were proceeding when the new rule was announced. That is, from the [prosecution's] view of the "good faith" exception, there is no distinction between Gant and the defendant here, because both arresting officers were operating in a *Belton* world. Under the

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1963, art 1, § 11. The *Goldston* Court held that the exclusionary rule should be applied on a case-by-case basis, and only in circumstances in which exclusion of evidence would serve to deter police misconduct that occurs during search or seizure or in the preparation of an affidavit. *Goldston*, 470 Mich at 538, 540-543.

> [prosecution's] argument, then, Gant himself would only be entitled to the rather hollow relief of knowing that the search he was subjected to was a violation of his constitutional rights; that is, he would not be entitled to suppression of the evidence because the evidence was obtained in a good faith reliance on *Belton*. Anyone similarly situated to Gant (such as the defendant) who was unfortunate enough to be arrested pre-*Gant* would likewise receive the same hollow relief. Anyone similarly situated to Gant, however, who was arrested subsequent to the *Gant* decision would be entitled to suppression of the evidence because the *Gant* decision would eliminate the good faith requirement. Therefore, the individual (Gant) who successfully convinced the Court that his Fourth Amendment rights had been violated would run the risk of criminal penalty, while subsequent defendants might go free, despite being subject to identical intrusions on privacy. Indeed, discussing a defendant similarly situated to the one in this case, one court noted, "[t]o say that an exception exists under the *Leon* rule to the application of [a] United States Supreme Court[] holding . . . which would permit the principle of the [] holding to be ignored [in a case subsequent to the holding] . . . to Defendant's prejudice, creates logical and rationalogical anomalies in implementation of Fourth Amendment doctrine of a decidedly perverse effect." *U.S. v. Holmes*, 175 F.Supp.2d 62 n. 6 (D.Me.2001) (noting the conundrum but not resolving the issue). [*Buford*, 623 F Supp 2d at 926-927.]

The *Buford* court rejected the prosecution's contention that its interpretation of the law eliminated the good-faith doctrine, noting that the cases that articulated the doctrine had not "gone so far as to extend the doctrine to reliance on decisions of the United States Supreme Court that were reversed or overturned while the defendant's case was on review." *Id*. at 927. The *Buford* court suppressed the evidence obtained in the search of the defendant's vehicle. *Id*.

A contrary result was reached by the United States District Court for the Eastern District of Washington. In *United States v Grote*, 629 F Supp 2d 1201, 1206-1207 (ED Wash, 2009) (*Grote I*), the district court ruled that even if the search incident to the defendant's arrest were not valid under *Gant*, the good-faith exception would apply and the evidence should not be excluded. In its subsequent order denying reconsideration, the court rejected the defendant's assertion that application of the good-faith exception violated the retroactivity doctrine set out in *Griffith* and relied on in *Buford*. In the order denying reconsideration, the court stated:

> This court understands the importance of the retroactivity doctrine in insuring that similarly situated criminal defendants are treated the same. In this court's view, however, the good faith exception to the exclusionary rule is of equal importance. The exclusionary rule is intended to deter future police misconduct, not to cure past violations of a defendant's rights. Future police misconduct is not deterred when, as here, the officer did not engage in any misconduct and did not make a mistake of fact or law, but acted in objective good faith on the search incident to arrest law as it existed at the time, and had existed for many years. There is no deterrent effect to be gained by applying the exclusionary rule in this case. [*United States v Grote*, unpublished order of the United States District Court for the Eastern District of Washington, entered July 15, 2009 (Case No. CR-08-6057-LRS); 2009 WL 2068023, at *3; 2009 US Dist LEXIS 60893, at *9-10 (*Grote II*).]

Similarly in *United States v McCane*, 573 F3d 1037, 1039 (CA 10, 2009), the United States Court of Appeals for the Tenth Circuit concluded that, in light of *Gant*, the district court had erred by concluding that the search of the defendant's vehicle was valid, but affirmed the district court's denial of the defendant's motion to suppress on the basis of the good-faith exception to the

exclusionary rule. The *McCane* court noted that Tenth Circuit pre-*Gant* precedent supported the search of the defendant's vehicle. *Id*. at 1041-1042. The *McCane* court held that the district court properly denied the defendant's motion to suppress the evidence. *Id*. at 1039, 1045. In so doing, the court concluded that application of the retroactivity doctrine did not preclude application of the good-faith exception to the exclusionary rule:

> McCane argues the retroactivity rule announced in *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), requires application of the Supreme Court's holding in *Gant* to this case. The issue before us, however, is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case. In *Leon*, the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to pending cases and the good-faith exception to the exclusionary rule, stating that retroactivity in this context "has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct." 468 U.S. at 897, 912-13, 104 S. Ct. 3405. The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context. *See* [*Illinois v*] *Krull* [480 US 340, 360; 107 S Ct 1160; 94 L Ed 2d 364 (1987)] (declining to apply a court decision declaring a statute unconstitutional to a case pending at the time the decision was rendered and instead applying the good-faith exception to the exclusionary rule because the officer reasonably relied upon the statute in conducting the search). [*Id.* at 1044 n 5.]

Further, in *United States v Lopez*, 567 F3d 755, 757-758 (CA 6, 2009) (*Lopez I*), the United States Court of Appeals for the Sixth Circuit reversed the lower court's denial of the defendant's motion to suppress the evidence in light of *Gant* and remanded for further

proceedings, notwithstanding its conclusion that the search was permitted under the *Belton* standard. On remand, the prosecution asserted that "the exclusionary rule should not apply to the questioned evidence in this case because the search of [the defendant's] car was conducted 'in good faith reliance on *Belton* and its progeny.' " *United States v Lopez*, 655 F Supp 2d 720, 728 (ED Ky, 2009) (*Lopez II*). The United States District Court for the Eastern District of Kentucky noted that *Gant* did not address "the consequences of its holding regarding searches conducted incident to lawful arrests in reliance on *Belton* and subsequent decisions applying *Belton*." *Id*. at 725. The district court also noted that the Sixth Circuit court did not "reverse the judgment of conviction with instructions that the charges be dismissed. Instead, it stated that, '[t]he judgment of the district court is reversed *and remanded for further proceedings consistent with this opinion*." *Id*. at 727-728. The district court thus concluded that the Sixth Circuit court's "opinion did not restrict this Court from considering whether the good faith exception to the exclusionary rule applies to the facts presented.' " *Id*. at 732.

The district court then conducted a hearing regarding whether the police officer acted in good faith in conducting the search of the defendant's car. *United States v Lopez*, unpublished memorandum opinion of the United States District Court for the Eastern District of Kentucky, issued September 23, 2009 (Case No. 6:06-120-DCR); 2009 WL 3112127, at *2; 2009 US Dist LEXIS 87720, at *7 (*Lopez III*). The district court observed, "Like its sister circuits prior to *Gant*, the Sixth Circuit recognized as lawful under *Belton* searches of vehicles conducted incident to an arrest even in circumstances where the arrestee did not have access to the passenger compartment of his car." *Id*.,

citing *United States v White*, 871 F2d 41, 44 (CA 6, 1989), and *United States v Martin*, 289 F3d 392 (CA 6, 2002).[2]

The *Lopez III* court then concluded:

> Here, the arrest was proper and the officer conducted the search in accordance with existing case law from this circuit. There is absolutely no evidence (or even argument) that the officer conducting the search was reckless in any way. While police conducting searches incident to arrests will likely change following *Gant*, the officer conducting the search of Lopez's vehicle acted appropriately at that time. In short, a reasonably well-trained officer would not have known or concluded that the search was "illegal" in light of all the circumstances presented. [*Lopez III*, 2009 WL 3112127 at *4; 2009 US Dist LEXIS 87720 at *12.]

Preliminarily, we reject the notion expressed in *Buford* that the retroactivity doctrine precludes application of the good-faith exception to the exclusionary rule. As stated in *Grote II*, 2009 WL 2068023 at *3; 2009 US Dist LEXIS 60893 at *9, these two legal principles are of equal importance. Further, each principle presents constitutional concerns distinct from the other. As recently stated, "because there is a clear dichotomy between Fourth Amendment violation and remedy, the retroactive application of *Gant* here to conclude that there was a violation does not inevitably lead to the conclusion that the good-faith exception cannot be considered to determine the appropriate remedy." *People v Key*, ___ P3d ___ (Colo App, 2010).*

We conclude that the retroactivity doctrine requires that *Gant* be applied to the instant case. The search at issue in the present case violated the Fourth Amend-

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[2] The district court also cited several cases not selected for publication.

* Opinion withdrawn August 5, 2010, by *People v Key*, unpublished opinion of the Colorado Court of Appeals (Case No. 07CA1257)—REPORTER.

ment and was unconstitutional. Having made this determination, our next inquiry is whether the evidence obtained as a result of the unconstitutional search should be suppressed. It is in this context that we examine the good-faith exception to the exclusionary rule.

Whether reliance on caselaw can form a basis to invoke the good-faith exception to the exclusionary rule is a significant legal question. The United States Supreme Court has been silent on this issue. The Sixth Circuit and Tenth Circuit courts of appeals have expanded the good-faith exception to apply to a law enforcement officer's reliance on caselaw. In *McCane* and similarly in *Lopez*, however, it was the clear and established law of the circuit that law enforcement officers were vested with the right to search a vehicle incident to a recent occupant's arrest. *McCane*, 573 F3d at 1041-1042 (citing several Tenth Circuit opinions upholding searches without regard to the nature of the offense and in which the defendant was already restrained); *Lopez III*, 2009 WL 3112127 at *2; 2009 US Dist LEXIS 87720 at *7 ("Like its sister circuits prior to *Gant*, the Sixth Circuit recognized as lawful under *Belton* searches of vehicles conducted incident to an arrest even in circumstances where the arrestee did not have access to the passenger compartment of his car."). See also *Grote I*, 629 F Supp 2d at 1205 (noting that at the time the defendant's vehicle was searched it was "well accepted in the Ninth Circuit and elsewhere" that police could search a motor vehicle incident to a lawful arrest "without regard to whether an arrestee was secured or unsecured, and without regard to whether evidence particular to the crime of arrest might be found in the vehicle").

Assuming without deciding that reliance on Michigan caselaw can form a basis to invoke the good-faith exception to the exclusionary rule, we conclude that the exception does not apply in the present case. Unlike *Lopez* and *McCane*, in which the caselaw in each circuit was established and clear, the instant case represented the first published case in Michigan to address the applicability and extension of *Belton* to a vehicle search solely incident to a passenger's arrest. Indeed, this panel published its prior opinion in this matter because we concluded that this issue presented a matter of first impression in Michigan. Given our conclusion that the law in this state on this point was not established and clear, the search and seizure of evidence from defendant's vehicle could not, as a matter of law, have been premised on law enforcement's good-faith reliance on caselaw. We therefore conclude that the good-faith exception to the exclusionary rule has no application in the present case. Pursuant to the retroactivity doctrine, defendant is entitled to have the rule of law announced in *Gant* applied to this case.

III. CONCLUSION

We affirm the circuit court's order granting defendant's motion to suppress evidence and quash the information.

ARKIN DISTRIBUTING COMPANY v JONES

Docket No. 287932. Submitted February 10, 2010, at Detroit. Decided April 13, 2010, at 9:15 a.m.

Arkin Distributing Company obtained a default judgment in the Oakland Circuit Court in 1991 against Donna J. Jones and her husband. The judgment was for money that plaintiff alleged Jones had embezzled from it. Jones subsequently pleaded nolo contendere to 24 counts of embezzlement and was sentenced to prison in 1995. Following her release, she made monthly restitution payments to plaintiff beginning in 1998. After her discharge from parole in January 2003, she continued to make monthly payments to plaintiff until January 2008. Jones's husband died in 2007, and she received additional assets. Plaintiff began collection proceedings on the default judgment, and Jones moved to quash the execution. The court, Edward Sosnick, J., granted the motion, and plaintiff appealed.

The Court of Appeals *held*:

The trial court abused its discretion by granting Jones's motion. MCL 600.5809(3) provides that the period of limitations for an action founded on a judgment is 10 years. Any payment on a debt, however, regardless of whether it is made before or after the expiration of the limitations period, extends the limitation period. A discharge from parole is a remission of the remaining portion of a defendant's sentence. Following her discharge, Jones was no longer subject to the jurisdiction of the Department of Corrections and was no longer required to comply with the parole condition regarding restitution. Thus, the payments Jones made after her discharge from parole constituted a recognition of her remaining civil obligation to plaintiff and an indication of her intention to pay it. Her continued payments to plaintiff extended the period of limitations under MCL 600.5809(3) through January 2018.

Reversed.

JUDGMENTS — EXECUTION OF JUDGMENTS — LIMITATION OF ACTIONS — PAYMENTS ON JUDGMENTS.

The period of limitations for an action founded on a judgment or decree is 10 years from the rendition of the judgment or decree,

> but any payment on the judgment extends the limitations period, regardless of whether the person makes the payment before or after the limitations period expires (MCL 600.5809[3]).

Barris, Sott, Denn & Driker, P.L.L.C. (by *Stephen E. Glazek* and *Erica Fitzgerald*), for plaintiff.

Hyman Lippitt, P.C. (by *Norman L. Lippit* and *Daniel J. McCarthy*), for defendant.

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

PER CURIAM. Plaintiff appeals by leave granted an order granting defendant's motion to quash execution of a default judgment against defendant. We reverse.

I

Plaintiff operated as a wholesale distributor of children's toys until 1995. Defendant was employed by plaintiff as a bookkeeper from 1970 to 1991, during which time she handled all of plaintiff's banking and cash. In 1991, plaintiff alleged that defendant had embezzled more than $562,000 over a 10-year period. Plaintiff commenced a civil action against defendant and her husband, Gary Jones. Defendant failed to defend the action, and a default judgment was entered on July 24, 1991, against defendant in the amount of $562,664.97, plus interest totaling $165,743.56. Following a bench trial on the remaining claims against Gary Jones, on January 8, 1993, the trial court granted plaintiff constructive trusts in certain assets owned by defendant and Jones, such as bank accounts and real property.

In separate criminal proceedings, defendant pleaded nolo contendere to 24 counts of embezzlement by an

agent or trustee of more than $100, former MCL 750.174. Pursuant to resentencing ordered by this Court in *People v Jones*, unpublished memorandum opinion of the Court of Appeals, issued March 10, 1995 (Docket No. 165512), defendant was sentenced on July 17, 1995, to 4 to 10 years in prison, with restitution of $537,432.10 to be a parole condition. Defendant was apparently released from prison 1½ years later. As a condition of her parole, defendant began making monthly payments of at least $200 in May 1998. According to defendant's pleadings, she was discharged from parole in January 2003, but the record shows that defendant made monthly payments of $230 to plaintiff until January 2008.

As a result of Gary Jones's death on June 15, 2007, defendant received additional assets, and plaintiff began collection proceedings on the 1991 default judgment. Defendant maintained that the 10-year statutory limit on the default judgment had expired and requested that the trial court quash the execution and return financial assets already seized. The trial court ruled in favor of defendant, reasoning that payments made by defendant under the restitution order in the criminal case did not revive defendant's obligation to make payments under the civil order.

II

On appeal, plaintiff argues that defendant's monthly partial payments revived and extended the period of limitations for the default judgment. We agree. The quashing of an execution rests in the discretion of the trial court. See *Schmidt v Bretzlaff*, 208 Mich App 376, 378; 528 NW2d 760 (1995). An abuse of discretion occurs when a result falls outside the range of principled outcomes. *Woods v SLB Prop Mgt, LLC*, 277 Mich

App 622, 625; 750 NW2d 228 (2008). The applicability of a statute of limitations is a question of law reviewed de novo. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006).

Plaintiff acknowledges that the 1991 default judgment is subject to the 10-year period of limitations set forth in MCL 600.5809(3), which provides:

> Except as provided in [MCL 600.5809(4)], the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record of this state, or in a court of record of the United States or of another state of the United States, from the time of the rendition of the judgment or decree. . . . Within the applicable period of limitations prescribed by this subsection, an action may be brought upon the judgment or decree for a new judgment or decree. The new judgment or decree is subject to this subsection.[1]

Nevertheless, "any payment on a debt, whether before or after the running of the period of limitations, acts to extend the limitations period." *Wayne Co Social Servs Dir v Yates*, 261 Mich App 152, 156; 681 NW2d 5 (2004). Plaintiff argues that the order for restitution and the default judgment constituted the same debt, so defendant's monthly restitution payments made as a condition of parole extended the limitations period for the default judgment. We need not reach the merits of this argument, however, because we conclude that payments

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[1] At the time of the 1991 default judgment, the former version of MCL 600.5809(3) similarly provided:

> Except as provided in [MCL 600.5809(4)], the period of limitations is 10 years for actions founded upon judgments or decrees rendered in a court of record of this state, or in a court of record of the United States or of another state of the United States, from the time of the rendition of the judgment. . . . Within these periods an action may be brought upon the judgment for a new judgment, which in its turn, will be subject to this subsection.

made after defendant was discharged from parole constituted a recognition of the remaining civil obligation to plaintiff and an indication of an intention to pay the same.

The Parole Board, within the Department of Corrections, possesses exclusive jurisdiction over parole matters. *Hopkins v Parole Bd*, 237 Mich App 629, 646; 604 NW2d 686 (1999); see also MCL 791.238(1) ("Each prisoner on parole shall remain in the legal custody and under the control of the department."). Any restitution ordered is a condition of parole. MCL 769.1a(11). MCL 791.242(1) provides:

> If a paroled prisoner has faithfully performed all of the conditions and obligations of parole for the period of time fixed in the order of parole, and has obeyed all of the rules and regulations adopted by the parole board, the prisoner has served the full sentence required. The parole board shall enter a final order of discharge and issue the paroled prisoner a certificate of discharge.

A discharge " 'is a remission of the remaining portion of the sentence.' " *People v Gregorczyk*, 178 Mich App 1, 11; 443 NW2d 816 (1989), quoting *In re Eddinger*, 236 Mich 668, 670; 211 NW 54 (1926). After delivery, a discharge cannot be recalled.

"Unless and until parole is successfully completed, the prisoner is deemed to be serving the sentence imposed by the trial court." *Harper v Dep't of Corrections*, 215 Mich App 648, 650; 546 NW2d 718 (1996), citing MCL 791.238(6); see also MCL 791.234(3) (stating that for certain prisoners serving consecutive sentences, "discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole") and MCL 791.234(4) (similar provisions). The

maximum length of a period of parole is determined by the Department of Corrections within the time remaining of the maximum term of imprisonment. See *People v Tanner*, 387 Mich 683, 695; 199 NW2d 202 (1972) (BRENNAN, J., dissenting).

Nothing in the record contradicts defendant's claim that she was discharged from parole in January 2003. Regardless, even if defendant was not discharged at that time, her maximum discharge date based on her 10-year maximum term of imprisonment was December 4, 2004.[2] See *Tanner*, 387 Mich at 689; *Harper*, 215 Mich App at 650. Following discharge from parole, defendant was no longer subject to the jurisdiction of the Department of Corrections, and any remaining portion of defendant's sentence, including the condition that she pay restitution, abated. *Gregorczyk*, 178 Mich App at 11-12.

Despite the abatement of the parole condition for restitution, defendant continued to make monthly payments to plaintiff of $230 until January 2008. With these partial payments, defendant acknowledged the remaining obligation under the default judgment to compensate plaintiff for the loss suffered as a result of the embezzlement. *Yates*, 261 Mich App at 156. We conclude that these payments on the remaining obligation served to extend the period of limitations under MCL 600.5809(3) through January 2018. *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich App 635; 491 NW2d 864 (1992) ("[A] partial payment made on a note after it matures serves to revive the statute of limitation, and a cause of action begins to accrue on that date."). Because the 10-year period of limitations

[2] For purposes of this appeal, defendant's maximum discharge date includes 215 days' credit for time served, but not good time and disciplinary credits.

had not expired when plaintiff restarted collection proceedings following Gary Jones's death, the trial court abused its discretion when it granted defendant's motion to quash execution of the default judgment.

In light of our conclusion, we need not address plaintiff's remaining claim on appeal.

Reversed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

PEOPLE v ERICKSEN

Docket No. 288496. Submitted April 6, 2010, at Lansing. Decided April 15, 2010, at 9:00 a.m.

An Alpena Circuit Court jury convicted Chad J. Ericksen of assault with intent to commit murder. The court, John F. Kowalski, J., sentenced defendant as a fourth-offense habitual offender to life imprisonment, and defendant appealed.

The Court of Appeals *held*:

1. The elements of assault with intent to commit murder are (1) an assault (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. Circumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction provided the prosecution meets its burden of proof beyond a reasonable doubt.

2. Taken as a whole and viewed in a light most favorable to the prosecution, the evidence presented, together with the reasonable inferences that may be drawn from that evidence, was sufficient to support defendant's conviction. With regard to defendant's intent, the evidence established that defendant secreted a knife before leaving with companions to confront the victim and told his companions that he had "stuck" the victim five times, which a jury could reasonably have interpreted as an admission that he knowingly stabbed the victim several times. Defendant's intent could also be inferred from the nature, extent, and location of the wounds.

3. While defendant challenged the credibility of testimony by his companions and codefendants, questions of credibility are for the trier of fact to resolve. The trial court specifically instructed the jury to examine accomplices' testimony carefully and consider it more cautiously than that of other witnesses, and jurors are presumed to follow the court's instructions.

4. The instances of prosecutorial misconduct that defendant alleged did not deprive him of a fair trial. During opening statement, the prosecutor attempted to describe the victim's anticipated testimony, and while the victim did not testify, other witnesses did describe the victim's condition and the surgeries he

required. The prosecutor's statement in closing argument that the victim was in a wheelchair was conclusory given the evidence presented, but it was brief, there was testimony that the victim's injuries necessitated amputation of his legs, and the trial court instructed the jurors not to let sympathy influence their decisions. The statement was not so inflammatory as to have prejudiced defendant. The prosecutor did not interject his personal beliefs into the case. Moreover, taken in context, the prosecutor's argument in closing that it would not be reasonable for the jury to find defendant guilty of a lesser included offense was a request by the prosecutor for the jury to convict defendant because the evidence showed an intent to commit murder. Finally, the prosecutor did elicit testimony from a police detective that the trial testimony of one of defendant's companions was consistent with an earlier police interview, but while a witness cannot properly comment on another witness's credibility, defendant opened the door to the question through attempts to undermine the companion's credibility by identifying inconsistencies in his statements to the police.

5. While defendant argued that the trial court based his sentence on facts not proved beyond a reasonable doubt, in violation of *Blakely v Washington*, 542 US 296 (2004), *Blakely* does not apply to Michigan's indeterminate sentencing scheme.

6. The trial court properly scored offense variable 4 (psychological injury to victim). MCL 777.34(2) requires the court to assess 10 points if the victim sustained serious psychological injury that may require professional treatment, although treatment need not actually have been sought.

7. The trial court properly scored offense variable 19 (interference with the administration of justice). Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice. Providing a false name to the police may constitute an interference with the administration of justice. In this case, defendant asked one of his companions to dispose of the knife he used to stab the victim and asked others to lie about where defendant was when the crime was committed. These were attempts to create a false alibi and mislead the police investigation and under MCL 777.49(c), were attempts to interfere with the administration of justice.

8. Defendant argued that because he had not previously been charged with assault with intent to commit murder, the trial court should not have considered a statement in his presentence investigation report indicating that he had a history of similar offenses.

Similar does not mean identical, and the stabbing incidents described in the report were similar.

9. Defendant was entitled to 282 days' jail credit for time served in jail before sentencing.

Affirmed; remanded for correction of judgment of sentence.

1. CRIMINAL LAW — ASSAULT WITH INTENT TO COMMIT MURDER — ELEMENTS OF ASSAULT WITH INTENT TO COMMIT MURDER — INTENT TO KILL — CIRCUMSTANTIAL EVIDENCE — INFERENCES FROM CIRCUMSTANTIAL EVIDENCE.

The elements of assault with intent to commit murder are (1) an assault (2) with an actual intent to kill, (3) which, if successful, would make the killing murder; the defendant's intent can be inferred from any facts in evidence, including the nature, extent, and location of any wounds inflicted on the victim (MCL 750.83).

2. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — VICTIMS — PSYCHOLOGICAL INJURY TO VICTIMS.

A sentencing court must assess points under offense variable 4 of the sentencing guidelines if the victim sustained serious psychological injury that may require professional treatment; treatment, however, need not actually have been sought for these points to be assessed (MCL 777.34).

3. SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE.

A defendant's attempts to create a false alibi, mislead police investigators, or divert suspicion away from himself or herself and onto others constitute attempts to interfere with the administration of justice for purposes of scoring offense variable 19 of the sentencing guidelines (MCL 777.49).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Ed Black*, Prosecuting Attorney, and *Andrea Christensen*, Assistant Attorney General, for the people.

Smith & Brooker, P.C. (by *George B. Mullison*), and Chad J. Ericksen, *in propria persona*, for defendant.

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

PER CURIAM. Defendant appeals as of right his jury trial conviction of assault with intent to commit murder, MCL 750.83. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve a life sentence. Because the prosecution presented sufficient evidence from which a jury could convict defendant beyond a reasonable doubt and defendant's claims of prosecutorial misconduct, ineffective assistance of counsel, and sentencing error are without merit, we affirm defendant's conviction and life sentence. We remand only for ministerial correction of defendant's judgment of sentence to include 282 days of jail credit.

I

Before being attacked, the victim, Ervin Ritthaler, Jr., had been involved in an altercation with the sister of one of defendant's friends. Defendant and two other men confronted the victim about the earlier incident. The confrontation soon became violent, and defendant stabbed Ritthaler several times in the back with a knife he had secreted on his person. The wounds resulted in a cascade of severe medical complications for Ritthaler, including multiple organ failures, cardiac arrest, brain injury, and, ultimately, amputation of both of his legs below the knee.

II

Defendant first argues on appeal that his conviction cannot stand because the prosecution failed to present sufficient evidence at trial. We review de novo a challenge on appeal to the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The elements of assault with intent to commit murder are "(1) an assault, (2) with an actual intent to

kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (quotation marks and citations omitted). We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt. *Hawkins*, 245 Mich App at 457; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant specifically asserts that because the prosecution's case rested extensively on circumstantial evidence, he could have been convicted only if that evidence proved the prosecution's theory of guilt with "impelling certainty." This is a misstatement of the law. Circumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction, provided the prosecution meets its constitutionally based burden of proof beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant also argues that the prosecution presented insufficient evidence to establish that he had the requisite specific intent. The evidence at trial established that defendant secreted a knife before leaving with his companions to confront Ritthaler. In addition, defendant told his companions that he had "stuck [Ritthaler] five times." A trier of fact could reasonably have interpreted this statement as an admission that he knowingly stabbed the victim many times. The medical evidence showed that Ritthaler's right back had four knife wounds. Defendant's intent could be inferred from any facts in evidence, including the nature, extent, and location of these wounds. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995); *People v Unger*, 278 Mich App 210, 223, 231; 749 NW2d 272 (2008). This Court

has consistently observed that "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Here, the evidence was more than minimal and clearly demonstrated that defendant acted with the requisite intent.

Defendant also challenges the credibility of the testimony of his companions and codefendants, arguing that they were not credible because each man received a favorable plea deal in exchange for his testimony. Both men, however, acknowledged their respective plea agreements during their testimony. Not only does this Court scrupulously leave questions of credibility to the trier of fact to resolve, *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005), but the jury was also specifically instructed to "examine an accomplice's testimony closely and be very careful about accepting it" and to consider it "more cautiously than you would that of an ordinary witness." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also highlights a statement the trial court made at sentencing to the effect that it did not appear that defendant intended the extent of the injury sustained by Ritthaler. The record reveals that the trial court actually stated that it was "guessing" that the injuries sustained were "more serious than [defendant] ever intended . . . ." The court's conjecture regarding defendant's motivation is, by its very nature, pure speculation, as opposed to the jury's determination of guilt beyond a reasonable doubt.

In sum, taken as a whole and viewed in a light most favorable to the prosecution, the evidence presented

below, together with the reasonable inferences that may be drawn from that evidence, was sufficient to support defendant's convictions. *Hawkins*, 245 Mich App at 457.

III

Defendant next argues that he was denied a fair trial when the prosecutor engaged in numerous instances of misconduct. See *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). However, because a timely objection could have cured any of the alleged errors, we review defendant's allegations of prosecutorial misconduct for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Defendant first asserts that the prosecutor engaged in misconduct when he stated during his opening statement that Ritthaler had many health problems stemming from the attack, and then stated during closing argument that Ritthaler was confined to a wheelchair. Defendant contends that these comments were improper because they were irrelevant, unduly prejudicial, intended to elicit the jury's sympathy for the victim, and, in relation to the second statement, constituted facts not in evidence.

The record reveals that the prosecutor actually stated during his opening statement that although Ritthaler had no memory of the night he was attacked, "he can tell you about his state of health today, and he can testify to a number of other aspects of information which will be useful." When read in context with the rest of the prosecutor's opening statement, it is apparent that the prosecutor was attempting to describe Ritthaler's anticipated testimony. While Ritthaler ultimately did not testify, his treating physicians did testify and described Ritthaler's condition on being brought

into the emergency room and the multiple surgeries he required before he was transported to another hospital for further treatment. This evidence was relevant to all elements of the crime and was congruent with the prosecutor's opening statement.

The prosecutor's statement during closing argument that Ritthaler was now in a wheelchair was conclusory given the record evidence. "[A] prosecutor may not make a statement of fact to the jury that is unsupported by the evidence . . . ." *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). While the prosecutor did assert during opening statement that Ritthaler's lower legs were eventually amputated because of the damage caused by the attack, there was no sworn testimony from a witness during trial that Ritthaler was wheelchair-bound. There is also no indication from the record before us that Ritthaler was in the courtroom or that any documentary evidence was admitted that disclosed that Ritthaler was confined to a wheelchair. However, to the extent that the statement might be considered improper, it constituted only a brief portion of the closing argument, which included a lengthy and detailed discussion of the evidence. Moreover, there was testimony that the victim had to have his lower legs amputated, and without lower legs, it is not a stretch to describe the victim as wheelchair-bound. When viewed as part of the closing argument as a whole, the statement does not appear so inflammatory as to have prejudiced defendant. Additionally, the trial court instructed the jury to consider only the evidence and clarified that the attorneys' statements were not evidence. Further, the trial court instructed the jury that it must not let sympathy influence its decision. "Jurors are presumed to follow their instructions, and

instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).[1]

Defendant also argues that the prosecutor interjected his personal beliefs into the case when he stated during his opening statement that defendant's companions went to see Ritthaler in order to talk to him but defendant had a different intent. Rather than offering his personal beliefs about defendant's guilt, the prosecutor was simply summarizing the anticipated testimony of defendant's companions, as well as providing a fair view of what the evidence would show. Opening statement is the appropriate time to state the facts that will be proved at trial. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). Defendant has not shown error.

Defendant also argues that the prosecutor engaged in misconduct when he argued during closing argument that it would not be reasonable to find defendant guilty of the lesser included offense of assault with intent to commit great bodily harm less than murder or assault with a dangerous weapon. However, when read in context of the entire closing argument, it is apparent that the prosecutor was asking the jury to convict

[1] Defendant also claims that defense counsel's failure to object to the prosecutor's wheelchair reference amounted to ineffective assistance of counsel. Defense counsel's failure to object to the prosecutor's wheelchair reference was likely a strategic decision. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Counsel could have reasonably believed that by raising a procedural objection, defendant would be showing a detrimental lack of sympathy for the victim, especially considering the fact that the victim was a double amputee without lower legs. In any event, defendant has not established that but for the alleged error, a different result was likely or that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Therefore, defendant's claim of ineffective assistance of counsel in this regard is wholly without merit.

defendant because the evidence showed that defendant inflicted "multiple stabbings in the vital area," therefore establishing the element of intent to commit murder.

Defendant's final claim of prosecutorial misconduct relates to testimony elicited from an Alpena Police Department detective that the trial testimony of one of defendant's companions was consistent with an earlier police interview. While a witness cannot properly comment on the credibility of another witness, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), defendant opened the door to the question when he attempted to undermine his companion's credibility by pointing out that his statements to police were not consistent, see *People v Verburg*, 170 Mich App 490, 497-498; 430 NW2d 775 (1988). Again, defendant has not shown error.

Because defendant has not shown error with regard to any of his assignments of prosecutorial misconduct, his concomitant arguments that he was denied due process when the trial court "failed to control the prosecutor" or that he was denied effective assistance of counsel when trial counsel failed to object to the prosecutor's actions also fail. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). And after reviewing the record, we are confident that the trial court satisfied its duty to ensure that defendant received a fair trial. See *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996).

IV

Defendant next challenges his life sentence. He first argues, on the basis of *Blakely v Washington*, 542 US

296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and its progeny, that his sentence is constitutionally barred for the reason that the trial court engaged in impermissible fact-finding and based his sentence on facts that had not been proved beyond a reasonable doubt to a jury. But our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, and defendant's argument is thus without merit. See *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Defendant next argues that the trial court improperly scored offense variables (OVs) 4 and 19 for reasons besides those related to the principle underlying *Blakely*.[2] "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). To the extent that a challenge to the trial court's scoring of a variable involves a question of statutory interpretation, this Court reviews de novo questions of statutory interpretation. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008).

With regard to OV 4, a sentencing court must assess 10 points under OV 4 if the victim sustained serious psychological injury that may require professional treatment, although treatment need not actually have

[2] Defendant accepted the scoring of the sentencing guidelines at the time of sentencing, but did file a subsequent motion for resentencing.

been sought in order for these points to be assessed. MCL 777.34(2). Defendant's argument seems to disregard that portion of the statute stating that actual psychological treatment is not a necessary prerequisite to the scoring of points. The presentence investigation report (PSIR) indicated that Ritthaler suffered from "depression" and that his "personality" had changed as of a result of his continuing poor heath following the assault and amputations. This was sufficient evidence to uphold the scoring decision. *Hornsby*, 251 Mich App at 468.

With regard to OV 19, MCL 777.49(c) requires that the sentencing court assess 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" Defendant challenges the trial court's assessment of 10 points, arguing that his conduct of leaving the scene of the crime and leaving the state did not constitute interference with the administration of justice because he was not actually being chased by police when he left. The prosecution responds that additional conduct on the part of defendant constituted interference with the administration of justice under the language of the statute. The prosecution specifically argues that defendant attempted to impede the investigation of the crime by wiping the knife down, asking one of his companions to dispose of it, and asking others to lie about his whereabouts on the night of the crime.

The primary rule for determining legislative intent is that statutory language is to be strictly construed according to its plain and ordinary meaning. *People v Noble*, 238 Mich App 647, 658-659; 608 NW2d 123 (1999). If the meaning of a statute is clear and unambiguous, further construction is neither required nor permitted. *People v Davis*, 468 Mich 77, 79; 658 NW2d

800 (2003). Interfering or attempting to interfere with the administration of justice includes acts that constitute obstruction of justice, but is not limited to such acts. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Providing a false name to the police may constitute an interference with the administration of justice that can be scored under OV 19. *Id*. at 288. In this case, there was evidence that defendant asked one of his companions to dispose of the knife he used to stab the victim and asked others to lie about his whereabouts during the night of the crime. Clearly, defendant's attempt to hide or dispose of the weapon in conjunction with his encouragement of others to lie about where he was at the time of the stabbing was a multifaceted attempt to create a false alibi and mislead the police. His actions ultimately constituted fabrications that were self-serving attempts at deception obviously aimed at leading police investigators astray or even diverting suspicion onto others and away from him. Unmistakably, defendant's actions were attempts to interfere with the administration of justice as contemplated by the plain language of MCL 777.49(c), and the trial court did not abuse its discretion by assessing 10 points for OV 19.[3]

We also reject defendant's attendant argument that he was denied effective assistance of counsel when his trial counsel agreed that the trial court had properly

[3] We recognize that our Supreme Court has explained that, as a general matter, offense variables should not be scored on the basis of acts occurring after the completion of a crime unless the applicable offense variable statute otherwise provides. *People v McGraw*, 484 Mich 120, 122, 135; 771 NW2d 655 (2009). However, our Supreme Court's directive in *Barbee*, being more specific and applicable, is controlling. See *Crane v Reeder*, 22 Mich 322, 334 (1871); *Darmstaetter v Moloney*, 45 Mich 621, 624; 8 NW 574 (1881); *Wayne Co Prosecutor v Wayne Circuit Judge*, 154 Mich App 216, 221; 397 NW2d 274 (1986).

scored the OVs. Again, failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *Snider*, 239 Mich App at 425. Defendant is not entitled to resentencing.

V

Defendant next argues that the trial court erred by refusing to strike certain information from the PSIR. Defendant first takes issue with a statement contained in the PSIR that he "has a history of offenses similar to the current conviction." Defendant asserts that because this instance is the first in which he was charged with assault with intent to murder, the other conduct listed in the PSIR was insufficient to qualify as similar to the conduct that resulted in the current conviction. The term "similar" is defined by the *Random House Webster's College Dictionary* (1997) as "having a likeness or resemblance, [especially] in a general way[.]" The definition does not require that each occurrence be identical to the others or that each circumstance could be charged under the same criminal statute.

The "Criminal Justice" section of defendant's PSIR reveals that in 1997 defendant was involved in a stabbing outside a bar and that he was involved in another incident involving a knife in 1998, when he threatened two witnesses to the 1997 incident. The final charge in both of these incidents was assault with intent to commit great bodily harm less than murder, which is a necessarily included lesser offense of assault with intent to murder. *Brown*, 267 Mich App at 150-151 (observing that "the elements of assault with intent to do great bodily harm less than murder are completely subsumed in the offense of assault with intent to commit murder"). Further, the PSIR contained a reference to another, uncharged incident that occurred in

1997 in which defendant stabbed an acquaintance at a rest stop in Genesee County.

Finally, defendant asserts that the trial court should not have considered information related to his prior offenses when the information had not been proved beyond a reasonable doubt before a jury. To the extent that this argument rings of *Blakely*, it fails, as we discussed earlier in part III. In any event, it is well established that a PSIR may include information that would not be admissible at trial, including information about prior convictions as well as other criminal activity allegedly committed by the defendant. *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987).

We note that defendant is entitled to 282 days' jail credit for time served in jail before sentencing. See MCL 769.11b. Jail credit was not included in the judgment of sentence.

VI

In sum, defendant's claims that there was insufficient evidence to support his conviction, that he was denied a fair trial because of prosecutorial misconduct, that his sentences are invalid and that he is entitled to resentencing, that he was denied effective assistance of counsel at trial, that the trial court denied him a fair trial, and that the trial court improperly considered inaccurate information in his PSIR all fail, and we affirm defendant's conviction and life sentence.

Defendant's conviction and life sentence are affirmed. We remand this case to the trial court for ministerial correction of the judgment of sentence to include 282 days' jail credit. We do not retain jurisdiction.

PEOPLE v MILLER

Docket No. 294566. Submitted April 13, 2010, at Detroit. Decided April 15, 2010, at 9:05 a.m.

Marvin Miller was charged in the St. Clair Circuit Court with larceny from a motor vehicle, MCL 750.356a(1), and larceny of property with a value of less than $200, MCL 750.356(1) and (5), both in connection with property that he allegedly stole from a truck. Defendant moved to quash the information related to the charge of larceny from a motor vehicle, arguing that MCL 750.356a(1) did not apply to the cell phone that he allegedly removed because such phones are not permanently attached to the vehicle. The court, James P. Adair, J., granted the motion. The Court of appeals granted the prosecution leave to appeal.

The Court of Appeals *held*:

MCL 750.356a(1) provides that a person who steals or unlawfully takes or removes a "wheel, tire, air bag, catalytic converter, radio, stereo, clock, telephone, computer, or other electronic device in or on any motor vehicle, house trailer, trailer, or semitrailer" is guilty of a felony. Nothing in the language of the statute indicates a legislative intent to limit the statute's application to items that are permanently attached to the vehicle. The statute applies to enumerated items that are not generally attached to but are merely included within the space of the vehicle.

Reversed.

LARCENY — LARCENY FROM A VEHICLE — ITEMS NOT ATTACHED TO A MOTOR VEHICLE.

A person who steals or unlawfully removes or takes a wheel, tire, air bag, catalytic converter, radio, stereo, clock, telephone, computer, or other electronic device in or on a motor vehicle, house trailer, trailer, or semitrailer is guilty of a felony under MCL 750.356a(1); the statute applies to enumerated items that are not attached to but are merely included within the space of the vehicle.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Timothy K. Morris*, Assistant Prosecuting Attorney, for the people.

Boucher and Kanan PLLC (by *Michael G. Boucher*) for defendant.

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

PER CURIAM. In this interlocutory appeal, the prosecution appeals by leave granted an order granting defendant's motion to quash a charge of larceny from a motor vehicle, MCL 750.356a(1). We reverse.

I

On June 24, 2009, William Buchheister drove his truck to a softball field in St. Clair County, parked it in a lot about 50 feet away from the field, and left it unlocked. At approximately 9:30 p.m., Buchheister was watching a softball game, and a friend alerted him that someone was in his truck. Buchheister alleged that he saw defendant get out of the truck and flee, so Buchheister and his friends pursued. Buchheister further alleged that his friends apprehended defendant about 15 minutes later. Buchheister's cellular telephone, keys, and wallet had been removed from his truck. His cellular telephone and keys were found on a street corner, and his wallet was found in a factory near the area where defendant allegedly ran.

Defendant was charged with larceny from a motor vehicle under MCL 750.356a(1), on the basis of the allegation that he took Buchheister's cellular telephone, and also with larceny of less than $200, MCL 750.356(1) and (5). Defendant moved to quash the charge of larceny from a motor vehicle, arguing that MCL 750.356a(1) does not apply to cellular telephones because they are not permanently attached to the vehicle and would not reduce the value of the vehicle if taken. In granting defendant's motion, the trial court

concluded that cellular telephones do not fall within the parameters of the statute. After the prosecution unsuccessfully sought reconsideration from the trial court, this Court granted leave to appeal. *People v Miller*, unpublished order of the Court of Appeals, entered November 17, 2009 (Docket No. 294566).

II

On appeal, the prosecution argues that the trial court improperly interpreted MCL 750.356a(1) as being limited to the larceny of electronic devices that are permanently attached to the vehicle. We agree. This Court reviews a trial court's decision on a motion to quash the information for an abuse of discretion. See *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001). To the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo. *Id.*

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). To determine the intent of the Legislature, this Court must first examine the language of the statute. *Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009). The language must be read and understood in its grammatical context and in relation to the statute as a whole. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009); *Bush*, 484 Mich at 167. " '[T]his Court must enforce clear and unambiguous statutory provisions as written.' 'If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.' " *United*

States Fidelity, 484 Mich at 12-13 (citations omitted). Nothing will be read into a clear and unambiguous statute that is not within the manifest intent of the Legislature as derived from the language of the statute itself. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007). If a statute is ambiguous, judicial construction is appropriate. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000). "A provision is not ambiguous just because 'reasonable minds can differ regarding' the meaning of the provision." *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008), quoting *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 165; 680 NW2d 840 (2004). On the contrary, a statutory provision is ambiguous only if it irreconcilably conflicts with another statutory provision or it is equally susceptible to more than one meaning. *Gardner*, 482 Mich at 50 n 12.

MCL 750.356a(1) provides, in relevant part:

> A person who commits larceny by stealing or unlawfully removing or taking any wheel, tire, air bag, catalytic converter, radio, stereo, clock, telephone, computer, or other electronic device in or on any motor vehicle, house trailer, trailer, or semitrailer is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both.

The language of MCL 750.356a(1) is clear and unambiguous. It criminalizes stealing, unlawfully removing, or taking a specific and limited list of items of property (wheels, tires, air bags, catalytic converters, radios, stereos, clocks, telephones, computers, or other electronic devices) from a specific and limited list of vehicles (motor vehicles, house trailers, trailers, or semitrailers). The broad term "telephone" that the Legislature adopted, which is defined as "an apparatus, system, or process, for transmission of sound or speech to a distant

point, [especially] by an electric device," *Random House Webster's College Dictionary* (2000), includes the cellular or "mobile" telephone that defendant allegedly took from Buchheister's truck.

Nothing in the language of MCL 750.356a(1) expresses the legislative intent to limit the statute's application to items that are permanently attached to the vehicle. See *Nugent*, 276 Mich App at 189. Rather, the property listed in MCL 750.356a(1) includes items "in or on" the vehicles listed. "In" is "used to indicate inclusion within space, a place, or limits," whereas "on" means "so as to be attached to or unified with . . . ." *Random House Webster's College Dictionary* (2000). The fact that wheels, tires, air bags, and catalytic converters are generally on or attached to a vehicle does not by itself prevent the application of MCL 750.356a(1) to other enumerated items that are not generally attached to but are merely included within the space of the vehicle.

Contrary to defendant's argument, the application of subsection (1) of MCL 750.356a to all enumerated items "in or on" the listed vehicles does not result in a scheme of punishment in subsection (1) that irreconcilably conflicts with the statute as a whole. See *Gardner*, 482 Mich at 50 n 12. A person who violates subsection (1) is guilty of a felony with a specific punishment, regardless of the value of the property stolen, unlawfully removed, or taken. In contrast, a person who violates subsection (2) of the statute is guilty of a misdemeanor or felony, with a range of possible punishments, depending on the value of the stolen or unlawfully removed property and the person's prior convictions. MCL 750.356a(2). "[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127

(2001). As the Supreme Court explained in *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990), the distinctions between "sentence ranges for different offenses across the spectrum of criminal behavior" reflect the Legislature's "value judgments concerning the relative seriousness and severity of individual criminal offenses." It is reasonable to conclude from the distinctions in subsections (1) and (2) that the Legislature intended to penalize the stealing, unlawful removal, or taking of specific items commonly associated with vehicles in subsection (1) differently than the stealing or unlawful removal of other unspecified property in subsection (2).

Reversed.

PEOPLE v RAILER

Docket No. 291817. Submitted April 13, 2010, at Lansing. Decided April 20, 2010, at 9:00 a.m.

Jeremy E. Railer was convicted of unlawful imprisonment, MCL 750.349b, among other crimes, by a jury in the Ingham Circuit Court, Rosemarie E. Aquilina, J. Defendant appealed only his unlawful-imprisonment conviction, which arose from an incident in which he dragged the woman he was dating across a parking lot, forced her into her car, and drove her to a location he forbade her to disclose.

The Court of Appeals *held*:

1. Evidence that defendant had forced the victim into her car, struck and choked her when she protested his actions, and forbidden her to reveal her location to her sister when she called the victim's cell phone was sufficient to support his conviction for unlawful imprisonment.

2. The trial court did not abuse its discretion by allowing two of defendant's former girlfriends to testify that he had physically abused them. MCL 768.27b(1) allows the admission of evidence of other acts of domestic violence to show a defendant's character or propensity to commit the same act if it is not otherwise excluded under MRE 403 and the other requirements of MCL 768.27b are met.

Affirmed.

EVIDENCE — OTHER ACTS OF DOMESTIC VIOLENCE.

Evidence of other acts of domestic violence that occurred within 10 years of the charged offense is admissible for any purpose for which it is relevant, including to show a defendant's character or propensity to commit the same act, if it is not otherwise excluded under MRE 403 (MCL 768.27b).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, *Guy L. Sweet*, Appellate Division Chief, and *John J. Murray*, Assistant Prosecuting Attorney, for the people.

Lawrence J. Bunting for defendant.

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

MURRAY, J. Defendant appeals as of right his jury trial conviction of unlawful imprisonment, MCL 750.349b, for which he was sentenced as a third-offense habitual offender, MCL 769.11, to 129 months to 30 years' imprisonment.[1] We affirm.

I. BACKGROUND

This is a case about control. It arises out of defendant's romantic relationship with Amy Nichols. These individuals, having dated sporadically in their youth, resumed their amorous affair and began cohabitating in November 2007. Defendant was jobless, without a car, and completely reliant on Nichols for his transportation. In Nichols's words, defendant "did what he wanted to do," and while defendant left her ignorant about his activities, "[her] business was his business."

The relationship had a long history of dysfunction. For example, on one occasion in April 2008, Nichols was arrested—while in her car with her children—when a police officer discovered marijuana under her seat. Nichols testified that although the marijuana was defendant's, she decided to take the blame because she still loved defendant, who had nonetheless threatened that if Nichols faced subsequent criminal charges, he would deny his ownership of the drugs and inculpate Nichols.

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[1] Defendant was also convicted of possession of marijuana, MCL 333.7403(2)(d), and assault and battery, MCL 750.81 (the lesser included offense of his original charge of assault with intent to do great bodily harm less than murder, MCL 750.84), but appeals neither of these convictions.

Nichols had little contact with defendant following her arrest until June 16, 2008. On that date, defendant approached Nichols, who was in her car. Upon Nichols's attempt to leave, defendant reached through the open car window, grabbed Nichols by the throat, and threatened to kill her. Defendant called Nichols later that night, this time threatening to "slit [her] throat." The next night, June 17, 2008, Nichols was driving to her aunt's house when defendant called her phone and told her to stop the car and back up, whereupon defendant got into the car and began driving. With Nichols unsure of their destination, defendant took Nichols's cellular phone after her sister called. Minutes later, defendant and Nichols arrived at the apartment complex of defendant's friend, but defendant refused to return Nichols's phone or keys and instead twisted her wrist and told her that she was going to spend time with him. The two went into the apartment, but returned a short time later when defendant needed to retrieve an item from the car. Seizing the opportunity, Nichols ran into the apartment ahead of defendant, borrowed the cellular phone of an unknown man inside, and informed her sister of her whereabouts. Defendant subsequently located Nichols and took her outside, at which point Nichols sat down in the middle of the parking lot hoping to buy time until the police arrived.

At that, defendant dragged Nichols by her hair across the parking lot and into the car. Defendant then drove Nichols to another parking lot, where he punched her in the mouth and choked her until she lost consciousness because Nichols "wouldn't shut [her] smart mouth." When Nichols resumed consciousness, defendant drove to a store. Nichols, however, refused to accompany defendant into the store because she had "wet [her] pants." During this time, Nichols's sister had been calling repeatedly. On the fourth call, defendant held

the phone to Nichols's ear and instructed her not to reveal their location and threatened to hang up the phone if Nichols did not comply because, as Nichols testified, defendant had told her that "nobody was going to get in the way of him spending time with [Nichols]." Scared of defendant, Nichols complied.

After the call, Nichols reassured defendant that she loved him and convinced him to go into the store by himself, since her pants were wet, to buy her new pants. Once defendant went into the store with Nichols's phone, Nichols enlisted the aid of a man in the parking lot to lead her safely into the store. Inside, the store manager assisted Nichols in reporting the incident to police and her family. Police arrived, and after a brief chase inside the store, defendant was arrested as he was attempting to hide an item on a store shelf. A canine officer later discovered marijuana on a shelf next to the area where defendant was arrested. After a jury trial, defendant was convicted of unlawful imprisonment, possession of marijuana, and assault and battery. The instant appeal ensued.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that insufficient evidence existed to support his conviction of unlawful imprisonment. Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). We do not consider whether any evidence existed that could support a

conviction; rather, we must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979) (opinion by COLEMAN, C.J.). "[C]ircumstantial evidence and reasonable inferences arising from th[e] evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

As noted, defendant was convicted of unlawful imprisonment under MCL 750.349b, which provides as follows:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> (a) The person is restrained by means of a weapon or dangerous instrument.
>
> (b) The restrained person was secretly confined.
>
> (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

Thus, to be guilty of unlawful imprisonment under MCL 750.349b(1)(b), (1) a defendant must knowingly restrain a person, and (2) the restrained person must be "secretly confined." " 'Restrain' means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority." MCL 750.349b(3)(a). To "secretly confine" means either "[t]o keep the confinement of the restrained person a secret" or "[t]o keep the location of the restrained person a secret." MCL 750.349b(3)(b)(*i*) and (*ii*).

Ample evidence was presented to support this conviction. First, it is clear that Nichols was forcibly confined against her will when defendant dragged her by her hair across the parking lot to force her into the car. Twice after leaving the apartment—once at the store and once before arriving—the car was parked. However, Nichols dared not leave while in defendant's presence given that, before arriving at the store, defendant had struck her face and choked her until she lost consciousness when she voiced her displeasure with the situation. Once at the store, defendant—who was in possession of Nichols's phone and answered the fourth call of Nichols's sister—precluded Nichols from communicating freely with her family and took the car keys and Nichols's phone when he went into the store. These same acts provided sufficient evidence that defendant knowingly committed this misconduct, so a jury could have reasonably inferred that defendant knowingly restrained Nichols. Furthermore, the phone call from Nichols's sister revealed that defendant intended to keep both the actual confinement and location of the confinement a secret. Indeed, frightened of defendant, Nichols complied with defendant's demand that she not reveal their location. See *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994) ("[T]he essence of 'secret confinement' . . . is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament.").

Defendant counters that his conviction is unsustainable where (1) he left Nichols alone in the car before she freely walked into the store and reported defendant to police and (2) Nichols's credibility was suspect given her letters to defendant before trial in which she admitted she was lying. Neither argument has merit. First, MCL 750.349b(3)(a) expressly provides that "[t]he restraint does not have to exist for any particular

length of time . . . ." The period from when defendant dragged Nichols into the car until he left Nichols to go inside the store was sufficient to sustain defendant's conviction under the statute. Second, issues of witness credibility are matters for the jury and not this Court. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Hence, defendant's arguments on both scores do not alter our conclusion that this conviction must stand.

B. OTHER ACTS OF DOMESTIC VIOLENCE

Defendant's final argument is that MRE 404(b) precluded the admission of the testimony of two former girlfriends who revealed his prior threats and acts of violence against them. A trial court's evidentiary ruling is reviewed for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, preliminary questions of law pertaining to this issue are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).[2]

Evidence is generally admissible if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice. MRE 402; MRE 403; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Under MRE 404(b), the prosecution may not present evidence of a defendant's other crimes, wrongs, or acts in order to show a defendant's propensity to commit a crime. *People v Magyar*, 250 Mich App 408, 413-414; 648 NW2d 215 (2002). Notwithstanding this prohibition, however, in cases of domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant's character or

[2] Contrary to the prosecution's claim, this issue is preserved because defendant challenged the admission of this evidence at trial and in his pretrial motion.

propensity to commit the same act. *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008). That statute provides in relevant part:

> Except as provided in [MCL 768.27b(4)], in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403. [MCL 768.27b(1).]

Here, defendant was accused of assault with intent to commit great bodily harm less than murder. Such conduct constitutes "domestic violence," which is defined to include occurrences causing physical or mental harm to a family or household member or placing a family or household member in fear of harm.[3] MCL 768.27b(5)(a)(*i*) and (*ii*). At trial, the prosecution called defendant's former girlfriends from four and five years earlier. Both testified about defendant's physical abuse and threats to kill them. One testified that defendant forced her into his van and drove off with her against her will, and the other explained that defendant would grab and yell at her to listen to him. Such behavior clearly meets the definition of "domestic violence" under the statute, occurred within 10 years of the charged offense as required by MCL 768.27b(4), and would be highly relevant to show defendant's tendency to assault Nichols as charged. Furthermore, MRE 403 did not preclude admission of this evidence where the testimony of the former girlfriends was brief and not nearly as graphic or violent as defendant's transgressions recounted in Nichols's testimony. While this evidence was certainly damaging and prejudicial—as is

[3] A "family or household member" includes individuals with whom a defendant had a dating relationship. MCL 768.27b(5)(b)(*iv*).

most evidence presented against a criminal defendant—it was by no means inflammatory, nor did it interfere with the jury's ability to logically weigh the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Its admission was, therefore, proper.

Affirmed.

NORDLUND & ASSOCIATES, INC v VILLAGE OF HESPERIA

Docket No. 289304. Submitted April 15, 2010, at Grand Rapids. Decided April 20, 2010, at 9:05 a.m.

Nordlund & Associates, Inc., brought an action in the Oceana Circuit Court against the village of Hesperia and the Newaygo County Drain Commissioner, alleging breach of contract in connection with two construction projects on which plaintiff had worked but had not been fully paid. Defendants counterclaimed that plaintiff was also liable for breach of contract because the contractor for which plaintiff worked had installed a water main before the necessary permits had been approved, causing the village to incur fines. The court, Terrence R. Thomas, J., entered a stipulation and order for arbitration pursuant to MCL 600.5001 *et seq*. The arbitrator awarded defendants approximately $4,400, which the court affirmed. Plaintiff appealed.

The Court of Appeals *held*:

1. The arbitrator did not exceed his powers under MCR 3.602(J)(2)(c) by deciding whether defendants were entitled to the damages they had sought in their counterclaim, despite the fact that this issue was not included in the parties' arbitration summaries, because the parties' arbitration agreement specifically provided that all issues raised in the pleadings must be submitted to arbitration.

2. The trial court properly refused to modify the arbitration award under MCR 3.602(K)(2)(a) because plaintiff's allegations of error related to the arbitrator's interpretation of the underlying contract, not to an evident mathematical miscalculation or mistaken description.

Affirmed.

ARBITRATION — STATUTORY ARBITRATION — MODIFICATION OF STATUTORY ARBITRATION AWARDS.

The court rule allowing judicial modification of statutory arbitration awards on the basis of an evident miscalculation of figures or an evident mistake in a description does not extend to allegations that the arbitrator misconstrued the underlying contract (MCR 3.602[K][2][a]).

Reisinger Law Firm, PLLC (by *Ralph M. Reisinger*), for Nordlund & Associates, Inc.

Williams, Hughes & Cook, PLLC (by *Douglas M. Hughes* and *Eric C. Grimm*), for the village of Hesperia.

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

PER CURIAM. Plaintiff, Nordlund & Associates, Inc., appeals as of right the circuit court's order confirming an arbitration award and denying plaintiff's motion to vacate or modify the arbitration award. We affirm.

I. FACTS

On January 7, 2005, plaintiff filed a breach of contract action against the village of Hesperia.[1] Defendant filed a counterclaim alleging breach of contract and demanding indemnification.

On January 22, 2007, the circuit court entered a stipulation and order for arbitration pursuant to MCL 600.5001 *et seq*. The order provided that the parties would submit "all issues in this action which are subject to the jurisdiction of this court" to binding arbitration. Pursuant to the circuit court's order, the parties executed an arbitration agreement, which stated that "[a]ll theories/defenses and affirmative defenses raised in the pleadings of the parties during the course of these proceedings and associated damages, offsets, and failure to mitigate claims" would be submitted for arbitration.

Before this dispute, plaintiff acted as defendant's engineer for roughly 22 years. Two projects are relevant to this appeal: (1) the Sunset Boulevard/Family Dollar

[1] Because the village of Hesperia is the only defendant with an interest in this appeal, for purposes of this opinion the singular "defendant" will refer to it exclusively.

water main project and (2) improvements to the sewer system and wastewater treatment plant, known as "the SRF project" for its connection to the State Revolving Fund.

A. SUNSET BOULEVARD/FAMILY DOLLAR PROJECT

Innovative Construction hired plaintiff to do work in relation to the opening of a Family Dollar store near Sunset Boulevard. In furtherance of this project, plaintiff filed an application on behalf of defendant, seeking authorization to extend a water main along Sunset Boulevard. Plaintiff billed defendant $600 for this work, but never received payment.

Plaintiff also prepared additional permit applications and gave them to defendant to submit to the proper authorities. These permits, which were subsequently denied, required approval by the Michigan Department of Environmental Quality (MDEQ) before the water main could be installed. However, Innovative Construction installed the water main before any permits were approved. As a result, the MDEQ fined defendant $12,140. Defendant sought reimbursement from plaintiff for that amount, charging that plaintiff was responsible for the premature installation.

B. SRF PROJECT

On November 10, 2003, by written contract, defendant hired plaintiff to perform professional services. On August 5, 2004, defendant terminated the contract. The contract provided that it could be terminated without cause and that, upon termination, "[a]n equitable adjustment shall be made in the contract price." Defendant argued that because only 65 percent of plaintiff's work was salvageable by the engineering firm that

replaced plaintiff, the "equitable adjustment" should equal that percentage of the fees plaintiff earned, reduced by any payment already made. Defendant claimed that it had paid plaintiff $10,000. Plaintiff disagreed, claiming that it should be paid the full amount of $39,677.18. Plaintiff also disputed the $10,000 reduction, on the ground that defendant's $10,000 payment was for work performed on another, unrelated job, the Division Street Bridge project.

The parties submitted to the arbitrator an "arbitration summary," in which they fully briefed the issues to be decided. Following a hearing, the arbitrator issued an opinion setting forth the following findings: (1) plaintiff was entitled to $14,787.29 for the use of its plans and specifications on the SRF project, (2) defendant was entitled to $19,787.42 in compensation for plaintiff's breach of the SRF project contract (that amount being the difference between plaintiff's contract price and what defendant ultimately paid another party to complete the contract), (3) defendant failed to prove that it had paid plaintiff $10,000 on the SRF project, (4) defendant was not entitled to recover any damages attributable to the Sunset Boulevard/Family Dollar project, and (5) plaintiff was entitled to payment of its overdue $600 invoice relating to the Sunset Boulevard/Family Dollar project. After calculating all offsets, the arbitrator awarded defendant a total of approximately $4,400.

Plaintiff moved to vacate or modify the arbitration award, arguing that the arbitrator had "miscalculated" the award of damages, MCR 3.602(K)(2)(a), and exceeded his powers by deciding an issue that had not been submitted to arbitration, MCR 3.602(J)(2)(c). Specifically, plaintiff argued that the breach of contract claim, which the arbitrator found entitled defendant to

$19,787.42 in compensation, was never brought or argued at arbitration, and that the arbitrator's decision thus reached "beyond the boundaries of the submission" and should be vacated.

In response, defendant argued that there was no mathematical "miscalculation" as envisioned by MCR 3.602(K)(2)(a) and that the arbitrator did not exceed his powers because no express limit was placed on those powers under the arbitration agreement. The motion was heard on November 10, 2008, and the circuit court ruled from the bench as follows:

> I thought the arbitrator was quite thorough relative to the matter and the Court would not intervene and set aside. I agree that none of the statutory bases were clearly struck which would cause this Court to . . . intervene relative to the settlement and the Order and the findings of the arbitrator.
>
> For that reason, I deny your Motion.

The circuit court thereafter issued a written order confirming the arbitration award and denying plaintiff's motion.

II. ANALYSIS

Plaintiff argues that the trial court erred by confirming the arbitration award because the arbitrator both exceeded his powers when he rendered a decision on an issue that had not been submitted to arbitration and "miscalculated" the award of damages. We disagree. A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

If an agreement to arbitrate provides that judgment may be entered on the arbitration award, then it is considered a statutory arbitration. *Gordon Sel-Way, Inc*

v Spence Bros, Inc, 438 Mich 488, 495; 475 NW2d 704 (1991). Here, the parties' arbitration agreement stated that a party could move to enforce the award and that the circuit court could enforce the arbitration award. Therefore, the agreement is for statutory arbitration.

MCR 3.602 governs judicial review and enforcement of statutory arbitration agreements. MCR 3.602(A). MCR 3.602(K) sets forth the reasons for which a trial court may correct or modify an arbitration award:

> (2) On motion of a party filed within 91 days after the date of the award, the court shall modify or correct the award if:
>
> (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
>
> (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
>
> (c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

In addition, a trial court must vacate an arbitration award if a party has filed a motion requesting it and one of the following has occurred:

> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. [MCR 3.602(J)(2).]

Plaintiff first argues that the arbitrator exceeded his powers, MCR 3.602(J)(2)(c), when he rendered a decision on an issue that had not been submitted to arbitration. Specifically, plaintiff claims the arbitrator exceeded his powers in ruling that defendant was entitled to $19,787.42 in damages for plaintiff's breach of the contract for the SRF project.

The scope of an arbitrator's remedial authority is "limited to the contractual agreement of the parties." *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 355; 511 NW2d 724 (1994). Thus, "[a]rbitrators exceed their power when they 'act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.' " *Saveski*, 261 Mich App at 554, quoting *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

In this case, the parties' arbitration agreement provided that "[a]ll theories/defenses and affirmative defenses raised in the pleadings of the parties during the course of these proceedings and associated damages, offsets, and failure to mitigate claims" shall be submitted for arbitration. Defendant's amended counterclaim included the following allegations:

> 1. That a contract for professional services was signed between the parties to this action.
>
> 2. That Paragraph XV, entitled "Professional Standards," required Nordlund to perform contractual services at a competency level maintained by other participating professional engineers.
>
> 3. That Nordlund breached this contract in that contractual services were delivered at less than the competency level maintained by other professional engineers, as neither the design plan, nor the project plan were adequate, both of which had to be redone by other engineers.

> 4. That as a proximate result of the breach by Nordlund, the Village has been damaged in that they were forced to hire another engineer to complete the services required by the contract.
>
> 5. That Nordlund is liable to the Village for damages for their breach of the agreement.

It is clear from these allegations that defendant was seeking damages for breach of the SRF project contract. Thus, the arbitrator did not exceed his powers by concluding that defendant was entitled to $19,787.42 in compensation for plaintiff's breach of the SRF project. See *Saveski*, 261 Mich App at 554. The terms of the agreement limited the scope of arbitration to those issues raised in the pleadings, and defendant raised the issue of damages for breach of the SRF project contract in its pleadings. That this issue was not raised in the parties' subsequent arbitration summaries is irrelevant to whether the arbitrator exceeded his powers when rendering the award. Therefore, the arbitrator did not exceed his powers as set forth in the arbitration agreement, see *Ehresman*, 203 Mich App at 355; *Saveski*, 261 Mich App at 554, and the trial court therefore did not err by confirming the arbitration award and denying plaintiff's motion to vacate or modify it.

Plaintiff's final argument on appeal is that the arbitrator miscalculated the award of damages, asserting that the calculation was faulty because the arbitrator failed to grasp the clear and concise meaning of the contract. Plaintiff contends that this Court must review various valuations and contract interpretations made by the arbitrator by characterizing them as a miscalculation of the award. We disagree.

MCR 3.602(K)(2)(a) states that a court must modify an arbitration award if "there is an evident miscalculation of figures or an evident mistake in the description

of a person, a thing, or property referred to in the award." This Court has repeatedly emphasized that it must carefully evaluate claims of arbitrator error to ensure that they are not being used as a ruse to induce this Court to review the merits of the arbitrator's decision. *Gordon Sel-Way, Inc*, 438 Mich at 497; *Washington v Washington*, 283 Mich App 667, 675; 770 NW2d 908 (2009). MCR 3.602(K)(2)(a) allows for modification or correction of an award only when it is based on a mathematical miscalculation, such as where an arbitrator erred in adding a column of numbers, or an evident mistake in a description. Because plaintiff's alleged error concerns the interpretation of the underlying contract, and not descriptions or mathematical calculations, it cannot be said that there was an evident mistake for purposes of MCR 3.602(K)(2)(a). Therefore, the circuit court properly refused to modify the arbitration award on that basis.

Affirmed.

PEOPLE v SCHAW

Docket No. 286410. Submitted November 12, 2009, at Lansing. Decided April 20, 2010, at 9:10 a.m.

Thomas Schaw, Jr., was convicted by a jury in the Kent Circuit Court of assault with intent to do great bodily harm less than murder, MCL 750.84; torture, MCL 750.85; and unlawful imprisonment, MCL 750.349b, after he choked and restrained his wife, held a knife to her neck, attempted to drug her, and threatened to kill her. At trial, the court, George S. Buth, J., denied defendant's motion for a mistrial based on the admission of audio recordings in which defendant told the victim that he was a convicted felon and had spent time in prison. Defendant appealed.

The Court of Appeals *held*:

1. The prosecution presented sufficient evidence to sustain defendant's torture conviction. The victim testified that defendant's violent acts caused her to hallucinate, lose control, and experience flashbacks, which sufficed to establish that defendant inflicted a mental injury that resulted in a substantial alteration of mental functioning that was manifested in a visibly demonstrable manner under MCL 750.85(2)(d). There was evidence from which the jury could have concluded that these symptoms resulted from the victim's preexisting mental conditions, but the special susceptibility of a victim to a particular injury does not constitute an independent cause that exonerates the defendant from criminal liability. It was the jury's role to determine the extent to which these symptoms were the result of defendant's conduct rather than the victim's preexisting mental conditions.

2. The trial court did not abuse its discretion by denying defendant's motion for a mistrial. Defendant's statements to the victim that he was a convicted felon and had served time in prison were relevant to show his consciousness of guilt under MRE 801(d)(2) because they were made in an effort to convince the victim to alter her expected testimony at trial. There is no danger that the jury gave these statements undue or preemptive weight in light of the victim's detailed testimony regarding the assault, defendant's consistent statements to a police officer, and defense

counsel's statement to the jury that defendant's previous conviction was of a different nature than the offenses for which he was on trial.

Affirmed.

CRIMINAL LAW — TORTURE — SEVERE MENTAL PAIN OR SUFFERING — PREEXISTING CONDITIONS.

A victim's special susceptibility to the type of injury a defendant caused does not constitute an independent cause that exonerates the defendant from criminal liability for torture (MCL 750.85).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

State Appellate Defender Office (by *Peter Jon Van Hoek*) for defendant.

Before: METER, P.J., MURPHY, C.J., and ZAHRA, J.

PER CURIAM. Defendant appeals as of right from his convictions by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; torture, MCL 750.85; and unlawful imprisonment, MCL 750.349b. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 5 to 10 years' imprisonment for the assault conviction, 225 months' to 30 years' imprisonment for the torture conviction, and 5 to 15 years' imprisonment for the unlawful-imprisonment conviction. We affirm.

Defendant's convictions arose from an altercation he had with his wife Cheryl Schaw at their apartment on December 2, 2007. Defendant and Cheryl argued, and defendant choked and restrained Cheryl, held a knife to her neck, attempted to drug her, and threatened to kill her.

Defendant first argues that the prosecution presented insufficient evidence to sustain the torture conviction. We review this issue de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution presented sufficient evidence to sustain a conviction, this Court must construe the evidence in the light most favorable to the prosecution and consider whether a rational trier of fact could have determined that all the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

MCL 750.85 provides, in relevant part:

> (1) A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.
>
> (2) As used in this section:
>
> (a) "Cruel" means brutal, inhuman, sadistic, or that which torments.
>
> (b) "Custody or physical control" means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority.
>
> (c) "Great bodily injury" means either of the following:
>
> (*i*) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, . . . MCL 257.58c.
>
> (*ii*) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds.
>
> (d) "Severe mental pain or suffering" means a mental injury that results in a substantial alteration of mental

> functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following:
>
> (*i*) The intentional infliction or threatened infliction of great bodily injury.
>
> (*ii*) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality.
>
> (*iii*) The threat of imminent death.
>
> (*iv*) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality.
>
> (3) Proof that a victim suffered pain is not an element of the crime under this section.

Defendant did not cause great bodily injury to Cheryl. Therefore, the question is whether he "inflict[ed] . . . severe mental pain or suffering" upon her. MCL 750.85(1). To justify the conviction, defendant must have caused "a mental injury that result[ed] in a substantial alteration of mental functioning that [was] manifested in a visibly demonstrable manner . . . ." MCL 750.85(2)(d).[1] Defendant argues that this definition of "severe mental pain or suffering" was not satisfied at trial. Indeed, defendant specifically contends in his appellate brief that there was insufficient evidence "to permit a trier of fact to conclude that [Cheryl] sustained a mental injury that substantially altered her mental functioning in a visibly demonstrable manner." We disagree.

Significantly, Cheryl testified that she "started to hallucinate after the incident because *it put me in a*

[1] Defendant does not dispute that the additional requirement from MCL 750.85(2)(d)(*i*), (*ii*), (*iii*), or (*iv*) was satisfied here.

state that I could not control . . . ." (Emphasis added.) She also stated that the incident "scarred her," and she replied "yes" when asked whether the incident "affected [her] substantially." She testified: "I've had a flashback of body memories that was brought on by the violence that happened that night, and I haven't had the best of a childhood or anything, and it just brought a memory back and it was a serious one."

It is true that Cheryl had mental issues before the incident; she stated that she was manic-depressive and schizoaffective and was off her medication at the time of the attack. However, she stated that she had "gotten to the point" where she could "think through it" without her medication. As noted above, she indicated that the attack "put [her] in a state that [she] could not control," and she went on to testify that she went back on her medication after the attack.

While there was evidence that the jury could have credited to conclude that all of Cheryl's mental issues resulted solely from her preexisting conditions, there was also evidence that the jury could have credited, and evidently did credit, to conclude that defendant's attack caused some of her mental injuries. It is the jury's role to evaluate and weigh the evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). That Cheryl experienced hallucinations and had to resume her medication after the attack was evidence of a substantial altering of mental functioning and evidence of a visibly demonstrable mental injury. As noted in *People v Alter*, 255 Mich App 194, 204-205; 659 NW2d 667 (2003), when a defendant causes an injury, the special susceptibility of a victim to a particular injury does not constitute an independent cause of the injury

such that a defendant is exonerated from criminal liability. Reversal is unwarranted.[2]

Defendant next argues that the trial court should have granted his motion for a mistrial. We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000). This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269-270; 666 NW2d 231 (2003); *Shulick v Richards*, 273 Mich App 320, 324; 729 NW2d 533 (2006). A trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

This issue involves the recorded evidence of conversations defendant had with Cheryl while he was in jail. The prosecution introduced the audio recordings of one meeting at the jail and four telephone calls to show that defendant attempted to coerce Cheryl into changing her testimony. On the recordings, defendant stated multiple times that he was a convicted felon and had spent time in prison. Defendant contends that the admission of these statements warranted a mistrial.

Under MRE 402, relevant evidence is admissible unless excluded by the state or federal constitution or by a rule of evidence. MRE 401 defines relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

[2] In a footnote in his appellate brief, defendant refers to certain jury instructions provided by the trial court and suggests that they were inadequate; however, he makes no reasoned appellate argument concerning the instructions and fails to assert that they require reversal.

probable than it would be without the evidence." Evidence that a defendant made efforts to influence an adverse witness is relevant if it shows consciousness of guilt. *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). Defendant's statements that he was a convicted felon and that he had previously served time in prison were relevant in this case because they were made in the context of his concerted efforts to convince Cheryl to recant her earlier statements regarding his conduct during the assault. The record makes clear that defendant was using his status as a previous prisoner in an attempt to convince Cheryl to lie during her anticipated testimony at the trial.[3] Defendant's efforts to influence Cheryl showed consciousness of guilt and were admissible as admissions under MRE 801(d)(2).

Defendant contends that the statements were inadmissible under MRE 403. MRE 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." "In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Instead, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Here, defendant's statements that he was a convicted felon and that he spent time in prison were made as

[3] For example, at one point defendant told Cheryl, "Look . . . I don't need to go to prison for this because if I go they're going to keep me there for a long time because I'm already a convicted felon. I've already been there once."

part of a concerted effort to manipulate Cheryl into lying to the authorities prosecuting the case. As such, they were highly probative of consciousness of guilt. Additionally, we find no danger that defendant's statements were given "undue or preemptive weight by the jury," *id*., in light of Cheryl's clear and detailed testimony regarding the assault and defendant's own statements to a police officer, which were consistent with Cheryl's account of the incident. Moreover, we note that defense counsel informed the jury during her closing argument that the offense underlying defendant's previous conviction was different in nature from the charged offenses. Given the circumstances, we cannot conclude that the trial court abused its discretion by denying the motion for a mistrial.[4]

Affirmed.

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[4] Defendant also argues that the prosecutor committed misconduct when he deliberately introduced evidence of defendant's statements in contravention of an agreement made between defense counsel and the prior prosecutor assigned to the case. Defendant asserts that the prosecutor's intentional misconduct amounted to grounds for granting his motion for a mistrial. However, the statements were admissible, as noted previously, and thus defendant did not suffer prejudice that impaired his ability to get a fair trial. *Haywood*, 209 Mich App at 228. Accordingly, a mistrial was not warranted.

CHELSEA INVESTMENT GROUP LLC v CITY OF CHELSEA

Docket No. 288920. Submitted April 6, 2010, at Detroit. Decided April 27, 2010, at 9:05 a.m.

Chelsea Investment Group L.L.C. brought an action in the Washtenaw Circuit Court against the city of Chelsea and Chelsea City Manager Michael Steklac, alleging that defendants' temporary inability to provide sufficient water and sewer capacity to a proposed condominium project pursuant to the parties' planned unit development (PUD) agreement constituted a breach of contract, an unlawful taking of the property without just compensation, and gross negligence. The temporary lack of capacity had led the Department of Environmental Quality (DEQ) to impose a temporary moratorium on development, which caused Pulte Land Company, with whom plaintiff had signed a purchase agreement for the proposed home sites, to terminate the contract after the first of three anticipated phases had been completed. Defendants and plaintiff filed cross-motions for summary disposition. The trial court, David S. Swartz, J., denied plaintiff's motion and granted defendants' motion in part, ruling that plaintiff's negligence claim was barred by governmental immunity under MCL 691.1407(2). After a bench trial, the court ruled that although plaintiff had not established its taking claim, defendants were liable for breach of contract, which entitled plaintiff to $2,276,621.44 in damages, $330.717.80 in interest through September 3, 2008, and interest after that date as calculated under MCL 600.6013(8) until the judgment was satisfied, in addition to costs and sanctions plus interest on the same terms. Defendants appealed, and plaintiffs cross-appealed.

The Court of Appeals *held*:

1. The trial court did not clearly err by ruling that defendants had breached the PUD agreement. The agreement indicated that the existing wastewater treatment plant was adequate to handle the proposed development and specified that the city would expand its water capacity without delaying the development itself or the issuance of related approvals or permits. However, after plaintiff submitted its plans, defendants could not timely approve them because their wastewater treatment plant and water mains

still lacked the necessary capacity. This failure to provide timely approval was the most direct cause of plaintiff's harm.

2. The trial court did not err by awarding plaintiff damages for the second planned phase of the development. The amount awarded was not speculative but was based on the terms of the purchase agreement, and evidence indicated that Pulte would have completed this phase had defendants approved the site plan and offered all the lots at issue.

3. The trial court did not err by failing to award plaintiff damages for the third planned phase of the development because, given the evidence that Pulte was uncertain whether it would move forward with this phase of the development, it cannot be said with certainty that plaintiff's loss of the profits from this phase was the result of defendants' breach of contract.

4. The trial court erred by requiring interest to be calculated at six-month intervals on July 1 and January 1. The plain language of MCL 600.6013(8), which permits the award of interest on a money judgment, indicates that interest must be calculated at six-month intervals from the date the complaint is filed using the interest rates announced on either July 1 or January 1, whichever immediately precedes the six-month calculation date. The conflicting interpretation of the State Court Administrative Office is not entitled to deference because it conflicts with the plain statutory language.

5. Defendants' failure to issue plaintiff permits and approvals during the DEQ-imposed moratorium on development did not constitute a taking that required compensation because plaintiff was not singled out to bear the burden of the regulation. Further, plaintiff presented no evidence demonstrating the extent to which the value of the land at issue was diminished during the moratorium. Finally, plaintiff could not have established that the regulation interfered with its distinct, investment-backed expectations because it was not reasonable to expect that the development would not be subject to obtaining approvals for each stage. For the same reasons, defendants' failure to issue the necessary permits and approvals did not violate plaintiff's substantive due process rights.

6. The trial court did not err by dismissing plaintiff's gross negligence claim against Steklac on governmental immunity grounds because, given that he actively sought solutions for both the wastewater and water capacity issues, the evidence did not indicate that his conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result.

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

INTEREST — MONEY JUDGMENTS — CALCULATION OF INTEREST ON MONEY JUDGMENTS.

The statutory provision governing awards of interest on money judgments requires interest to be calculated at six-month intervals from the date of filing the complaint at a rate of interest equal to one percent plus the average interest rate paid at auctions of five-year United States treasury notes during the six months immediately preceding July 1 and January 1; for example, interest for a complaint filed in August 2008 would be calculated in February 2009 using the January 1, 2009, rate, and would be calculated again in August 2009, using the July 1, 2009, rate (MCL 600.6013[8]).

Bodman LLP (by *Jerold Lax*) and *Jackier Gould PC* (by *Dean J. Gould*) for plaintiff.

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Dullinger*) for defendants.

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. In this contract action, defendants, city of Chelsea and Michael Steklac, appeal and plaintiff, Chelsea Investment Group L.L.C., cross-appeals the trial court's order entering judgment in defendants' favor after a bench trial. We affirm in part and vacate in part.

I. FACTS AND PROCEDURAL HISTORY

In 2000, plaintiff acquired 157 acres of undeveloped real property in Chelsea, Michigan, by land contract. Plaintiff paid $500,000 of the $5 million purchase price at closing, leaving $4,500,000 to be paid in equal semiannual installments over the next five years.[1] Plaintiff also agreed to pay the property taxes.

[1] The land was not immediately released to plaintiff; rather, it was released incrementally with subsequent payments. However, the contract permitted plaintiff to develop infrastructure on the property during the term of the land contract.

After entering into the land contract, plaintiff petitioned the city of Chelsea to rezone the property as a planned unit development (PUD). Plaintiff also petitioned for site plan approval for the purpose of developing single-family units. The city's planning commission issued two resolutions that made findings and recommendations on plaintiff's petitions. Ultimately, the planning commission recommended that defendant approve the rezoning request and the proposed development as long as plaintiff met all the provisions in the resolutions. Accordingly, in November 2001, the property was rezoned. Further discussions ensued concerning the site plan and, in April 2002, plaintiff proposed a detailed plan for the construction of a development called "Heritage Pointe," which would contain 352 single-family condominiums.

A. THE PUD AGREEMENT

In April 2003, the city approved this site plan, and plaintiff and the city entered into a PUD agreement, which was recorded in the Register of Deeds Office. The PUD agreement granted plaintiff site plan approval for all 352 residences and required the development of Heritage Pointe to be carried out in five separate phases, each of which contemplated the development of a certain number of lots. Under the agreement, each phase was conditioned on plaintiff's obtaining site plan approval for the project from the city. In particular, no zoning or building permits could be issued in a phase until "the public water mains, public sanitary sewers, and all appurtenances necessary to support that phase ha[d] been installed," approved, and accepted by defendant.

The PUD agreement was divided into several parts: recitals, statements of mutual agreement, plaintiff's

obligations under Part A, and the city's obligations under Part B. The recitals provided an account of what had occurred over the last several years with regard to the subject property. The statements of agreement indicated that the PUD zoning designation would "consist of the findings and recommendations of the [city] Planning Commission adopted on November 21, 2001 . . . ." In other words, the PUD agreement incorporated a November 2001 resolution of the city's planning commission. Part 3 of the resolution stated, in relevant part:

> b. Sanitary sewer — The existing sanitary sewer is adequate to handle the proposed development. However, the [waste water treatment plant] must be expanded and 10 acres of additional land is needed for that expansion. . . .
>
> c. Water — Existing water mains cannot provide volumes or pressure needed for the proposed 352 houses.

Part A of the PUD agreement set forth plaintiff's contractual obligations and provided conditions under which plaintiff would develop the property. Plaintiff, for instance, was required to donate 10 acres of land to defendant for the expansion of the city's wastewater treatment plant (WWTP) and to convey a conservation easement of approximately 30 acres. Further, Part A of the agreement indicated that it was defendant's duty to expand the existing water capacity. Paragraph 4 of the PUD agreement stated:

> The [city] is in the process of extending the existing 12" water main down Elm Street . . . which 12" Water Main Work will be completed by the [city], at the [city's] expense, *in sufficient time so as not to interfere with or delay* [*plaintiff's*] *development of the Property*. In consideration of the donation/conveyance of the WWTP property . . . , the [city] agrees that neither the Developer . . . nor any of the owners of lots/units in the Development will ever be required to install (or pay to install) any offsite improve-

ments with regard to the provision of water to the Development and, *if there is ever a need to increase the water capacity to the Development, the* [*city*] *will be responsible for installing any and all offsite improvements related to increasing the water capacity to the Development without contribution of any kind from the Developer* . . . or any owners of lots/units in the Development . . . .

Part B of the PUD agreement contained further obligations of the city. It stated, in full:

> The [city] agrees to do the following *in a timely manner so as not to delay any approvals* or the issuance of any permits or certificates of occupancy in the Development:
>
> 1. Approve PUD zoning for the Property, based on the Area/Site Plan.
>
> 2. Extend the 12" water main in Elm Street, at the [city's] expense, to the west line of the Property by Elm Street and Taylor Lane.
>
> 3. Mill and apply a 2" overlay to, at the [city's] expense, the remaining segment of Taylor Lane, between Dexter Chelsea Road and the South line of the Property, in accordance with [city] standards and specifications so as not to delay or interfere with the Development.
>
> 4. *Construct and perform those requisite tasks, at the* [*city's*] *expense, as outlined above, in connection with the installation of any offsite utilities*.
>
> 5. Accept street and public utilities as public facilities upon inspection, testing, submission of as-built drawings, and approval by the [city] Engineer.
>
> 6. To obtain any offsite easements in connection with any requisite improvements to Dexter/Chelsea Road as provided above. [Emphasis added.]

B. THE PULTE PURCHASE AGREEMENT

In May 2004, plaintiff entered into a purchase agreement with Pulte Land Company for the construction of the residential units. Under the purchase agreement,

Pulte agreed to purchase the home sites from plaintiff for $23,000 per lot. Pulte was to purchase the lots and construct the homes in three phases, which roughly corresponded with the five phases in the PUD agreement. Specifically, Phase One was Pulte's purchase of 76 lots, which encompassed the first phase in the PUD agreement; Phase Two was Pulte's purchase of 167 lots, encompassing the middle two phases in the PUD agreement; and Phase Three was Pulte's purchase of 109 lots, encompassing the final two phases in the PUD agreement.

Importantly, Pulte's purchase of the sites was conditioned on plaintiff's securing governmental approval for each phase. The purchase agreement also required Pulte to pay a $250,000 deposit, which would be fully refundable if plaintiff failed to obtain the necessary governmental approvals within certain time limits. For example, once Pulte closed on Phase One, plaintiff had a year from that date to obtain the necessary approvals for Phase Two. In addition, Pulte also agreed to pay the property's taxes.

C. PERFORMANCE

Pulte closed on Phase One by August 2004. Pulte was ready to begin work on Phases Two and Three beginning in the summer of 2005. Thus, plaintiff sought the city's approval of the plans for those phases. Plaintiff's engineer submitted the final plans to the city in March 2005.

In May 2005, the city informed plaintiff that the WWTP lacked sufficient capacity for the development. Apparently, according to defendant Michael Steklac, the city manager, the city was aware of a problem with the reverse osmosis (RO) system, a treatment that provided the city with soft water, as early as 2003 or 2004.

However, this problem related to having to change the system's filter too frequently; Steklac was not aware of the capacity issue until April or May 2005. Up until that point, Steklac had believed, on the basis of the advice of the city's engineers, that the earliest the city would need to address the WWTP capacity issue was within five years of 2004. Steklac was surprised when he learned of the WWTP capacity issue in May 2005.

Steklac worked with plaintiff in attempting to resolve the WWTP issue. Steklac met with the city's engineers, considered plaintiff's proposals, and submitted plaintiff's proposals to the Michigan Department of Environmental Quality (MDEQ) for consideration. Apparently, the city council refused to adopt and implement plaintiff's suggestion that it cease using the RO system. Had the city agreed to turn the RO system off, the additional necessary capacity would have become available, thereby allowing the MDEQ to issue a permit. However, according to Steklac, stopping the RO system was not a viable option. Although keeping the RO system running was not a matter of health and safety but an aesthetic issue, the city council voted to continue the system because citizens were paying for soft water and the city was obligated to provide that water. Thus, the solutions contemplated were explored in the context of keeping the RO system online.

In June 2005, the city learned that it also had a water capacity issue. The city's new water superintendent had found that the city was reporting a greater water capacity to the MDEQ than it really had. After the water superintendent informed the MDEQ of the lack of capacity, the MDEQ issued a moratorium on development in July 2005. The city informed plaintiff of the water capacity problem in July 2005. According to Steven Fisher, plaintiff's president, these capacity prob-

lems were a complete surprise. Although plaintiff had been aware of water moratoriums in 1999 and 2000, it had taken steps to make certain that its development would not be affected by any future moratoriums and had been "very sensitive" to the issue.

Plaintiff and the city continued to work together to solve these problems. At one point, the city indicated that 85 lots might be available. Pulte affirmed that it would take fewer than the 167 lots that it was promised under Phase Two because stopping its operations would be costly. However, the city reneged on the offer of 85 lots.

Despite these efforts, by August 2005, a year after Pulte had completed Phase One, plaintiff still had not obtained the necessary governmental approvals that would permit Pulte to proceed with the project. Thus, Pulte exercised its option under the purchase agreement to terminate the agreement and to receive a full refund of its $250,000 deposit. By March 2006, approximately eight months after the moratorium had been issued, the city resolved both the WWTP and water capacity issues, and the moratorium was removed. Plaintiff mitigated its damages by entering into a contract for the sale of some of the lots with another builder. However, plaintiff was not able to obtain a similar purchase price for the lots.

D. PRETRIAL PROCEDURE

On February 9, 2006, plaintiff filed a suit against the city and Steklac requesting injunctive and declaratory relief, alleging that defendants had breached the PUD agreement by failing to provide sufficient water and sewer capacity, that defendants' actions constituted an unlawful taking of the property, and that defendants

were grossly negligent in carrying out their duties in a manner that caused plaintiff harm.

In August 2007, defendants and plaintiff filed cross-motions for summary disposition. The trial court denied plaintiff's motion and granted defendants' motion in part, dismissing the portion of plaintiff's claim alleging that defendants had been negligent. According to the court, "strategic actions related to the performance of a contract do not fall within the definition of Gross Negligence . . . that was 'the proximate cause' of plaintiff's injuries." Thus, the court ruled that plaintiff's negligence claim was barred by governmental immunity under MCL 691.1407(2). The court, however, ruled that questions of fact existed as to the remaining counts and, thus, denied summary disposition of these claims. The parties moved for summary disposition again in June 2008, but the trial court denied both parties' motions; in its view, questions of fact existed as to the remaining claims.

E. BENCH TRIAL

The matter was set for a bench trial on July 25, 2008. The parties stipulated to waive live testimony except as it related to the issue of damages and agreed to submit proposed findings of fact and conclusions of law. At trial, Fisher testified that the total profit plaintiff would have gained if Pulte had completed Phase Two was $2,349,340, as well as an additional $1,504,068 had Pulte completed Phase Three. Fisher stated that Pulte also agreed to pay property taxes, which brought the total plaintiff was to have gained from Phases Two and Three to $3,873,524. Because Fisher was able to sell some of the property to another developer—approximately 45 lots, albeit at a lower price of $18,000 per lot—the damages were reduced by $342,835, result-

ing in total damages of $3,530,689. Fisher also indicated that plaintiff should be reimbursed for the $250,000 deposit that Pulte had paid to plaintiff in contemplation of completing the contract, which plaintiff had to refund.

At the close of trial, the court adopted plaintiff's findings of fact and conclusions of law, except with regard to plaintiff's taking claim. The court concluded that plaintiff could not establish a taking claim, but that it had established a breach of the PUD agreement. It further indicated that plaintiff's damages would be limited to Phase Two.

Before the court entered its judgment, plaintiff moved for costs and attorney fees. In its brief in support, plaintiff argued that interest on the verdict, costs, and attorney fees should be calculated at six-month intervals from the date the complaint was filed, using the relevant interest rate as of January 1 or July 1. Plaintiff contended that this calculation was consistent with the plain language of MCL 600.6013(8), which allows interest on a money judgment and provides:

> Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

In response, defendants argued that MCL 600.6013(8) requires that interest be calculated at six-month intervals, changing on July 1 and January 1. According to defendants, this method of calculation is the correct one because the State Court Administrative Office has interpreted MCL 600.6013(8) in this manner.

Subsequently, the trial court entered its judgment awarding plaintiff $2,276,621 in damages[2] plus interest on that amount "through September 3, 2008, and interest subsequent to that date until the judgment is satisfied in an amount determined pursuant to MCL 600.6013(8)," in addition to costs and sanctions plus interest on the same terms. Defendants appealed and plaintiff cross-appealed the trial court's judgment and order.

II. DEFENDANTS' APPEAL

Defendants raise two arguments before this Court: that the trial court erred by ruling that the city had breached the PUD agreement and by awarding plaintiff damages. We consider each argument in turn.

A. BREACH OF CONTRACT

Defendants contend that the trial court erred by concluding that the city had agreed to provide plaintiff with instantaneous access to water under the PUD agreement and therefore breached the PUD agreement by failing to do so. We disagree. We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Ligon v Detroit*, 276 Mich

[2] This number was calculated by taking the total profit from Phase Two, plus the $250,000 earnest money deposit and the $20,116 in property taxes, and subtracting the $342,835 that had resulted from plaintiff's mitigation.

App 120, 124; 739 NW2d 900 (2007). A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). The trial court's findings are given great deference because it is in a better position to examine the facts. *Id*. Further, to the extent that this matter requires us to interpret the meaning of the PUD agreement, our review is also de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

After our review of the record, we cannot conclude that the trial court clearly erred by ruling that the city had breached the PUD agreement. The agreement, by incorporating the November 21 resolution, noted that the existing WWTP was "adequate to handle the proposed development." With regard to water capacity, the PUD agreement, also through the resolution, indicated that the existing water mains were inadequate to provide the necessary volume of water or the necessary water pressure. However, the city explicitly agreed under Part A of the PUD agreement to expand the water capacity for the development at its own expense in exchange for plaintiff's donation of almost 40 acres of land. Part A, ¶ 4 of the PUD agreement stated in part:

> The [city] is in the process of extending the existing 12" water main down Elm Street . . . which 12" Water Main Work will be completed by the [city], at the [city's] expense, *in sufficient time so as not to interfere with or delay* [*plaintiff's*] *development of the Property*. In consideration of the donation/conveyance of the WWTP property . . . , *the* [*city*] *agrees that . . . if there is ever a need to increase the water capacity to the Development, the* [*city*] *will be responsible for installing any and all offsite improvements related to increasing the water capacity to the Development without*

> *contribution of any kind from the Developer* . . . or any owners of lots/units in the Development . . . . [Emphasis added.]

Further, under Part B of the PUD agreement, the city explicitly agreed to "[c]onstruct and perform those requisite tasks, at the [city's] expense, *as outlined above*, in connection with the installation of any offsite utilities" in a "*timely manner so as not to delay any approvals* or the issuance of any permits or certificates of occupancy in the Development . . . ." (Emphasis added.)

Despite its explicit promises not to interfere with or delay plaintiff's development, the city did exactly that. In August 2004, Pulte had completed Phase One and was waiting for plaintiff to obtain the necessary governmental approvals for the next phases of the project. Plaintiff submitted its plans to the city in March 2005, but the city did not approve them. Instead, in May 2005, the city reported that the WWTP lacked capacity and, in July 2005, it told plaintiff that water capacity was also lacking and that an MDEQ moratorium had been issued preventing development. By August 2005, the city still had not resolved the issues or otherwise approved plaintiff's plan, and Pulte exercised its right to terminate its agreement with plaintiff. Under these circumstances, the city's actions interfered with and delayed plaintiff's development of Heritage Pointe. Given the foregoing, we are not definitely and firmly convinced that the trial court made a mistake when it ruled that the city had breached the PUD agreement.

Defendants, however, argue that the trial court erred to the extent it concluded that the city was required to provide "instantaneous access" to water and sewer capacity, or to otherwise provide those services at a certain date. In defendants' view, the city was not

contractually obligated to provide water services or facilities at a certain date because the PUD agreement is "devoid of any timing provision." This argument is unavailing. At the outset, this Court notes that the trial court never ruled that the city was required to provide plaintiff with "instantaneous access" to water under the PUD agreement. Nor are we of the view that the PUD agreement contained such a requirement, or, indeed, any certain or firm date requirement.

However, we cannot agree with defendants' contention that the PUD agreement was devoid of any timing provisions, or that it did not contractually obligate the city to provide such services. While it is true that nothing in the language of the agreement required that water services be available by a certain date, Part A, ¶ 4 of the PUD agreement did contain language that required the city to "install[] any and all offsite improvements related to increasing the water capacity to the Development" if such a necessity arose. And the city further agreed, under Part B of the agreement, to "[c]onstruct and perform those requisite tasks, at the [city's] expense, *as outlined above, in connection with the installation of any offsite utilities*" in a "*timely manner so as not to delay any approvals* or the issuance of any permits . . . ." (Emphasis added.) Nothing in the language of Part B limited this requirement to the specific obligations listed in part B of the PUD agreement. Rather, the phrase "as outlined above," when read in context of the entire agreement and in conjunction with the phrase "in connection with the installation of any offsite utilities," related back to the provisions of ¶ 4. Thus, defendants' attempt to limit the city's duties to those contained in Part B (meaning that the city was not contractually obliged to provide water or sewer capacity), and their accompanying contention that Part B is devoid of any timing provision, fail.

Clearly, the phrase "timely manner," as used in Part B, indicated an intent to provide water services, not at a certain date or instantaneously, but in an amount of time that would not delay approvals or interfere with plaintiff's development. The PUD agreement was not devoid of a timing provision.[3]

Finally, defendants assert that even if the breach did occur, it was not the cause of plaintiff's harm. According to defendants, the cause of plaintiff's harm was the condition of the real estate market. We disagree. To recover in a breach of contract action, a plaintiff must prove that the defendant's breach was the proximate cause of the harm the plaintiff suffered. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). In other words, the breach must be the most direct, natural, and foreseeable cause of the plaintiff's harm. See *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 625; 769 NW2d 911 (2009). Here, the city's failure to provide timely approval consistent with the PUD agreement was the most direct cause of the harm plaintiff suffered. Had the city provided the approvals, Pulte would have proceeded with Phase Two. The fact that Pulte was willing and ready to proceed with Phase Two construction with fewer lots was not

[3] Defendants also argue that the trial court erred to the extent it found that the city failed to provide access to water and sewer capacity within "a reasonable time." Defendants' argument is based on the principle that courts may require performance of a contract to be completed within a "reasonable time" if the contract lacks definiteness as to the time of performance. However, the language of the PUD agreement made specific reference to the city's obligation to provide services in a "timely manner so as not to delay any approvals or issuance of any permits . . . ." Thus, given our conclusion that the PUD agreement was not devoid of a timing provision, it is unnecessary for us to assume that the trial court based its conclusion on an application of the principle that courts may infer a reasonable time for performance. Thus, we do not consider defendants' argument.

the result of adverse market conditions, as defendants now argue. Rather, Pulte was willing to do so because the city, at one point, had offered plaintiff and Pulte the opportunity to proceed with 85 lots as opposed to 167. For all the foregoing reasons, we conclude that the trial court did not clearly err by concluding that the city had breached the PUD agreement.

B. DAMAGES

Defendants next contend that the trial court erred by awarding plaintiff damages for Phase Two. In defendants' view, the award should be vacated because it is too speculative. We cannot agree. We review a trial court's determination of damages after a bench trial for clear error. *Alan Custom Homes*, 256 Mich App at 513. It is true that damages that are speculative or based on conjecture are not recoverable. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). However, it is not necessary that damages be determined with mathematical certainty; rather, it is sufficient if a reasonable basis for computation exists. *Id*.

The trial court awarded plaintiff $2,276,621 for Phase Two. The award of damages was not speculative. Rather, it was based on the testimony of Steven Fisher, plaintiff's president, who testified regarding how much profit plaintiff would have realized had Phase Two been completed. It appears from our review of the record that Fisher's computation was based on the terms of the purchase agreement, under which Pulte agreed to pay property taxes and to compensate plaintiff $23,000 per lot. The measure of damages also included Pulte's $250,000 earnest money deposit, minus the amount plaintiff gained from selling some lots to a different

developer. Given this record evidence, we simply fail to see how this measure of damages was speculative.

Further, there is no merit to defendants' contention that the damages were speculative because Pulte did not know whether it would complete Phase Two. In support, defendants cite the testimony of Pulte's representative, Steven Atchinson, who indicated that Pulte was uncertain whether it would acquire more than half the Phase Two lots. However, a review of Atchinson's deposition testimony reveals that Pulte was ready and willing to proceed with Phase Two; the only reason Pulte did not know whether it would complete Phase Two was that the city had not approved plaintiff's site plan and the city had only offered Pulte half the Phase Two lots. Accordingly, the evidence provided permitted a reasonable basis by which to calculate damages, and the trial court did not clearly err. Defendants are not entitled to any relief based on their claims of error raised on appeal.

III. PLAINTIFF'S CROSS-APPEAL

We now consider plaintiff's arguments raised in its cross-appeal, including its allegations that the trial court erred in measuring damages, in calculating interest, and by dismissing plaintiff's taking and gross negligence claims.

A. DAMAGES

Plaintiff first contends that the trial court erred by failing to award plaintiff damages for Phase Three. We cannot agree because we are not convinced, after our review of the record, that a mistake has been made. Atchinson testified that Pulte's business plan in 2006 did include all of Phases Two and Three. But Atchinson

also indicated that Pulte was uncertain whether it would move forward with the entire project given the fact that it would become more difficult to invest money over time. Thus, although Pulte was contemplating completion of Phase Three, it remains entirely speculative whether Pulte actually would have closed on Phase Three. See *Ensink*, 262 Mich App at 525. Pulte could have failed to close on phase three for any number of reasons, such as unfavorable market conditions or a change in business plans. Thus, it cannot be said with certainty that plaintiff's loss of the Phase Three profits was the result of defendants' breach of the PUD agreement. Accordingly, the trial court did not clearly err and plaintiff is not entitled to damages for Phase Three.

B. INTEREST

Plaintiff next asserts that the trial court erred by calculating interest at six-month intervals on July 1 and January 1, inconsistently with MCL 600.6013(8). Plaintiff posits that the statute requires that interest be calculated at six-month intervals from the date of the complaint, using the most immediately preceding interest rate from July 1 or January 1. We agree.

At the outset, we note that it is well established that interest is calculated from the date the complaint is filed. See *Ayar v Foodland Distrib*, 472 Mich 713, 716-717; 698 NW2d 875 (2005). However, when the interest is recalculated under the statute is an issue of first impression.[4] To frame the question more concisely,

[4] The Michigan Supreme Court has considered the meaning of MCL 600.6013(8) on numerous occasions but has not considered the particular question before this Court. See, e.g., *Ayar*, 472 Mich at 716-718 (concluding that the plain language of the statute does not preclude attorney fees or costs from the interest calculation measured from the date the complaint is filed); *Morales v Auto-Owners Ins Co (After Remand)*, 469

we must decide whether MCL 600.6013(8) requires interest to be calculated at six-month intervals from the day the complaint is filed or whether it requires interest to be calculated every six months on January 1 and July 1 from the date the complaint is filed. Issues of statutory construction are questions of law reviewed de novo on appeal. *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363, 366; 579 NW2d 374 (1998). Our goal in construing a statute is to discern the intent of the Legislature, as expressed by the words of the statute. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 327; 696 NW2d 49 (2005). We must "presume every word is used for a purpose, and as far as possible . . . give effect to every clause and sentence." *Verizon North, Inc v Pub Serv Comm*, 263 Mich App 567, 570; 689 NW2d 709 (2004). The Court must give all the statute's words their plain and ordinary meanings, unless otherwise defined by the Legislature. See *Stabley*, 228 Mich App at 367. If the meaning of the language is plain and unambiguous, then we must apply the statute as written and not substitute our own policy preferences for those of the Legislature. *Lantz v Southfield City Clerk*, 245 Mich App 621, 626; 628 NW2d 583 (2001).

MCL 600.6013(8) permits an award of interest on a money judgment. It provides:

> Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, *interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal* to 1% plus the average interest rate paid at auctions of 5-year United States treasury *notes during the 6 months*

Mich 487, 491-492; 672 NW2d 849 (2003) (concluding that MCL 600.6013(8) requires calculation of interest on a judgment following a prejudgment appellate delay, without interruption, from the date the complaint is filed).

> *immediately preceding July 1 and January 1*, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney. [Emphasis added.]

In our view, the language of this provision is plain and unambiguous. It requires that "interest on a money judgment . . . [be] calculated at 6-month intervals from the date of the filing of the complaint at a rate of interest equal to 1% plus the average interest rate [of] . . . United States treasury notes during the 6 months immediately preceding July 1 and January 1 . . . ." When this language is parsed, MCL 600.6013(8) simply requires that interest on a judgment be recalculated every six months from the date of the filing of the complaint using the interest rates announced on July 1 or January 1, whichever is "immediately preceding" the complaint's six-month calculation date. For example, interest for a complaint filed in August 2008 would be calculated in February 2009 using the January 1, 2009, rate, and would be calculated again in August 2009, using the July 1, 2009, rate.

Defendants contend that the trial court's calculation should be affirmed. They argue that the proper interpretation of MCL 600.6013(8) mandates that interest be calculated at six-month intervals on July 1 and January 1, starting from the date the complaint is filed. According to defendants, this interpretation is consistent with the Michigan State Court Administrative Office's July 27, 2009, publication entitled "Interest rates for money judgments under MCL 600.6013." With regard to MCL 300.6013(8), it stated:

> Interest is calculated at 6-month intervals on Jan 1st and July 1st of each year, starting from the date the complaint is filed, compounded annually. The interest rate equals the rate paid on 5-year United States treasury notes, as certified by the state treasurer, for the 6 months preceding each Jan 1st and July 1st, plus 1%.

We disagree. This interpretation is plainly contrary to the clear language of the statute, which requires that interest be recalculated at six-month intervals from the date of the complaint, using the immediately preceding interest rate from July 1 or January 1. While some deference is due to an administrative agency's interpretation of a statute it is charged with executing, *Nelligan v Gibson Insulation Co*, 193 Mich App 274, 281; 483 NW2d 460 (1992), an agency's interpretation is not binding on this Court and it cannot overcome the statute's plain meaning, *Ludington Serv Corp v Acting Ins Comm'r*, 444 Mich 481, 503-504; 511 NW2d 661 (1994). Because the State Court Administrative Office's recommendation is contrary to the statute's plain meaning, this Court is not bound to follow it. Thus, the interest on plaintiff's judgment must be recalculated on remand consistently with the language of MCL 600.6013(8).

C. TAKING CLAUSES AND SUBSTANTIVE DUE PROCESS

Plaintiff next argues that the trial court erred by dismissing its claims that defendants' actions constituted an unlawful taking and violated its substantive due process rights. In particular, plaintiff alleges that defendants engaged in arbitrary action that significantly and adversely affected plaintiff's economic interests in the subject property. Plaintiff alleges that defendants' actions undermined its investment-backed expectations, which were based on defendants' repre-

sentations in the PUD agreement. We disagree. Following a bench trial, we review a trial court's conclusions of law on constitutional issues de novo. *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 248; 701 NW2d 144 (2005).

Both the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation. *Cummins v Robinson Twp*, 283 Mich App 677, 706; 770 NW2d 421 (2009). The Taking Clauses do not prohibit the government's interference with a private individual's property, but require that interferences amounting to a taking be compensated. *Id*. Typically, the government takes private property through formal condemnation proceedings. See *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). However, governmental regulations that overburden a property may also constitute a compensable taking. *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). Regulatory taking claims that do not rise to the level of a categorical taking[5] are governed by the standard set out in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). The balancing test announced in that case requires a reviewing court to engage in an ad hoc factual inquiry, focusing on "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *K & K Constr*, 456 Mich at 577, quoting *Penn Central*, 438 US at

[5] A "categorical" taking occurs when there has been a physical invasion of a landowner's property or when a regulatory taking has deprived an owner of all economically and beneficial use of the land. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992). Plaintiff does not assert such a claim in the instant matter.

124. "While there is no set formula for determining when a taking has occurred under this test, it is at least 'clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains.' " *K & K Constr*, 456 Mich at 588 (citation omitted). Moreover, a mere reduction in the value of regulated property is insufficient by itself to establish that a compensable taking has occurred. *Penn Central*, 438 US at 131; *Dorman*, 269 Mich App at 647.

We agree with the trial court that plaintiff has not satisfied the *Penn Central* test. "The relevant inquiries regarding the character of the government's action is whether it singles [a] plaintiff[] out to bear the burden for the public good and whether the regulation being challenged 'is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally.' " *Cummins*, 283 Mich App at 720 (citation omitted). In this case, the MDEQ imposed a temporary moratorium on the issuance of water and sewer permits because of health and safety concerns arising from the capacity of the WWTP during wet periods. As a result, the city was temporarily precluded from issuing approvals and permits for plaintiff's development. All developers in the area connecting to the water facilities at issue would be subject to the same moratoriums. Thus, plaintiff has failed to establish that the MDEQ moratorium singled it out.

Further, plaintiff has produced no evidence demonstrating the extent to which the land's value was diminished during the moratorium. Even assuming, without deciding, that the value of the land was diminished while the moratorium was in effect, plaintiff still would not be able to establish a taking. This is because the land retained some value, given that plaintiff was

free to use the property in any other way. Further, the fact that plaintiff was not able to realize a profit similar to that which it would have gained under the Pulte purchase agreement does not establish a taking. "The Taking Clause does not guarantee property owners an economic profit from the use of their land." *Paragon Props Co v Novi*, 452 Mich 568, 579 n 13; 550 NW2d 772 (1996).[6]

Finally, plaintiff could not have established that the regulation interfered with its distinct, investment-backed expectations. This is because plaintiff had no reasonable expectation that the development would not be subject to obtaining city approvals for each stage of the development. The PUD agreement explicitly stated that no zoning or building permits could be issued in a phase until "the public water mains, public sanitary sewers, and all appurtenances necessary to support that phase ha[d] been installed," approved, and accepted by the city. Moreover, we note that plaintiff knew problems could arise regarding water facilities, given that the MDEQ had issued moratoriums in 1995 and 2000 and that plaintiff's president had admitted being particularly sensitive to the issue during contract negotiations. Given the foregoing, plaintiff has failed to produce evidence that would satisfy the *Penn Central* test. Accordingly, we conclude that the trial court did not err by concluding that no taking of plaintiff's property had occurred.

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[6] We also note that, generally, "requiring plaintiffs to obtain building and occupancy permits cannot itself constitute a taking of property." *Cummins*, 283 Mich App at 719. However, in instances of abnormally long delays, even temporary takings may be compensable. See *id.* at 716-717. But no extraordinary delay occurred in the instant case; the MDEQ moratorium was only in effect for a period of eight months. The obvious implication is that once the moratorium was lifted, the property would recover its full value.

Lastly, we also find unavailing plaintiff's related argument that the trial court erred by dismissing its claim that defendants' actions violated plaintiff's substantive due process rights. It is true that both the Fourteenth Amendment of the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of " 'life, liberty or property, without due process of law.' " *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). For the reasons explained in the above analysis, plaintiff has failed to show that it suffered a deprivation of property. Further, even if plaintiff had established such a deprivation, its claim would nonetheless fail because the city's reasons for not issuing the permits were reasonable and legitimate. With regard to the WWTP issue, Steklac testified that the city was obligated to provide its citizens with soft water and it could not increase capacity by stopping the RO system. And, with regard to water capacity, the MDEQ issued the moratorium in July 2005 for health and safety reasons after it learned that the city had been mistakenly overreporting its capacity. For these reasons, plaintiff's substantive due process claim necessarily fails.

D. GROSS NEGLIGENCE

Plaintiff next argues that the trial court erred by granting summary disposition in defendants' favor as to its gross negligence claim against Steklac. We disagree. It appears from our review of the record that the trial court granted defendants' motion under MCR 2.116(C)(7). We review de novo a motion decided under MCR 2.116(C)(7), which alleges that a claim is barred because of immunity by law. *Bennett v Detroit Police Chief*, 274 Mich App 307, 310; 732 NW2d 164 (2007). " '[S]ummary disposition is precluded where reasonable

jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence.' " *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006) (citation omitted).

In this case, the trial court, citing MCL 691.1407(2), concluded that Steklac's conduct did not fall within the definition of "gross negligence" and therefore plaintiff's negligence claim against him was barred by governmental immunity. MCL 691.1407(2) provides, in part:

> [E]ach officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer . . . while in the course of employment or service . . . while acting on behalf of a governmental agency if . . . :
>
> * * *
>
> (c) The officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

MCL 691.1407(7)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Evidence of ordinary negligence is not enough to establish a material question of fact regarding whether a government employee was grossly negligent. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Rather, there must be evidence that the employee's conduct was reckless. *Id*. And, further, the employee's conduct must be the proximate cause of the plaintiff's injury. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

There is no question in the present matter that Steklac, as city manager of Chelsea, was a public employee. Nor is there any question that Steklac was acting within the scope of his employment while work-

ing with plaintiff with regard to the PUD agreement. Rather, the only issue on appeal is whether Steklac's conduct was grossly negligent. The trial court held that it was not, and we find no reason to disagree. A review of the record reveals that Steklac actively sought solutions for both the WWTP and water capacity issues. Indeed, Steklac testified that he attempted to solve the problem by considering a broad range of solutions proposed by both the city's and plaintiff's engineers. These suggestions were proposed to the MDEQ, but were ultimately found to be unworkable. The fact that a solution was not reached before Pulte exercised its right to terminate the purchase agreement is not evidence that Steklac's conduct was reckless. Nor does the fact that Steklac knew that the WWTP was not operating optimally as early as 2003 or 2004 demonstrate a substantial lack of concern for whether an injury would result. His knowledge of the issue was with regard to the proper functioning of the RO system, not with regard to the system's capacity. Thus, it cannot be said that Steklac intentionally misled plaintiff with regard to the WWTP's capacity. Therefore, we affirm the trial court's ruling that Steklac was entitled to governmental immunity on plaintiff's claim of gross negligence.

Affirmed in part, but vacated with respect to the trial court's calculation of interest. Remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

BLUE HARVEST, INC v DEPARTMENT OF TRANSPORTATION

Docket No. 281595. Submitted July 7, 2009, at Lansing. Decided April 29, 2010, at 9:00 a.m.

Blue Harvest, Inc., Blueberry Heritage Farms, Inc., and others engaged in the commercial production of blueberries in Ottawa and Muskegon counties brought an action in the Court of Claims against the Department of Transportation (DOT), alleging trespass-nuisance and inverse condemnation as a result of the physical intrusion of road salt from adjacent highways and roads onto plaintiffs' properties. Plaintiffs also brought a claim in the Ottawa Circuit Court against the Ottawa County Road Commission, alleging inverse condemnation as a result of road salt intrusion. The cases were consolidated in the Ottawa Circuit Court. The trial court, Edward R. Post, J., granted summary disposition to DOT and Ottawa County on the inverse-condemnation claims and denied DOT's motion for summary disposition on the trespass-nuisance claim and instead, determining that a trespass-nuisance exception to governmental immunity existed, granted summary disposition in favor of plaintiffs on that claim. DOT appealed as of right the denial of its motion for summary disposition of the trespass-nuisance claim. Plaintiffs cross-appealed the order granting summary disposition to both defendants on the inverse-condemnation claims.

The Court of Appeals *held*:

1. There is no trespass-nuisance exception to the doctrine of sovereign immunity for claims against the state. The Legislature did not provide a trespass-nuisance exception to governmental immunity for claims against the state, and there was no common-law trespass-nuisance exception to sovereign immunity before July 1, 1965. DOT was entitled to summary disposition with regard to the trespass-nuisance claim. The order granting summary disposition of that claim in favor of plaintiffs must be reversed, and the case must be remanded for the entry of a judgment in favor of DOT with regard to that claim.

2. The right to just compensation, in the context of an inverse-condemnation suit for diminution in value caused by the alleged harmful effects to property abutting a public highway, exists only

where the landowner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated. The just-compensation requirement of the Michigan Constitution does not require the state to compensate every property owner in proximity to a public highway for the normal inconveniences associated therewith. A plaintiff states a claim for which relief may be granted only if the plaintiff alleges harm of a unique or peculiar kind. Plaintiffs have suffered some kind of loss as a result of the application of the road salt; however, their claims are precluded under the common-law doctrine of *damnum absque injuria*. Plaintiffs' injury is merely of a different degree than that suffered by the public at large. The trial court properly held that the injury was not actionable. The order granting summary disposition of the inverse-condemnation claims in favor of defendants must be affirmed.

Affirmed in part, reversed in part, and remanded.

BECKERING, J., concurring, wrote separately to elaborate on the majority's analysis that revealed that a common-law exception did not exist before July 1, 1965, with respect to trespass-nuisance claims against the state. Plaintiffs cited no caselaw establishing that any exceptions to governmental immunity with respect to political subdivisions before 1965 are to be imputed to sovereign immunity as well. Although trespass-nuisance claims and unconstitutional-taking claims are similar, they remain distinct actions. The difference between the injuries suffered by plaintiffs and similarly situated property owners is best categorized as one of degree, and not of kind, and therefore the majority properly determined that plaintiffs' inverse-condemnation claims must fail.

1. GOVERNMENTAL IMMUNITY — SOVEREIGN IMMUNITY — EXCEPTIONS — TRESPASS-NUISANCE.

There is no trespass-nuisance exception to the doctrine of sovereign immunity for claims against the state (MCL 691.1407[1]).

2. HIGHWAYS — INVERSE-CONDEMNATION ACTIONS — JUST COMPENSATION — UNIQUE OR SPECIAL INJURIES.

The right to just compensation, in the context of an inverse-condemnation suit for diminution in value caused by the alleged harmful effects to property abutting a public highway, exists only where the landowner can allege a unique or special injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated.

Varnum, Riddering, Schmidt & Howlett LLP (by *Stephen P. Afendoulis* and *Beverly Holaday*) for plaintiffs.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Patrick F. Isom*, Assistant Attorney General, for the Department of Transportation.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg* and *Charles F. Behler*) for the Ottawa County Road Commission.

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

METER, P.J. Defendant Department of Transportation (DOT) appeals as of right from an order denying its motion for summary disposition on grounds of governmental immunity regarding plaintiffs' trespass-nuisance claim. Plaintiffs cross-appeal to challenge the grant of summary disposition to both defendants on plaintiffs' inverse-condemnation claim. We reverse the trial court's order relating to the trespass-nuisance claim but affirm in all other respects. Of particular note is our holding that there is no trespass-nuisance exception to the doctrine of sovereign immunity.

Plaintiffs are engaged in the commercial production of blueberries in Ottawa and Muskegon counties. Plaintiffs own or lease property that is adjacent to highways or primary county roads. DOT contracts with county road commissions, including defendant Ottawa County Road Commission (Ottawa County), to maintain the highways and county roads during the winter, when salt is used to prevent the formation of ice on the highways and roads. Plaintiffs claim that the amount of salt used in western Michigan has increased during a pertinent 15-year period. They allege that droplets of salt-laden

water are thrown into the air by passing vehicles and are then blown by the wind onto plaintiffs' property. They contend that this salt spray causes damage to plaintiffs' blueberry bushes, which results in a loss of blueberry production from those bushes.

Plaintiffs sued DOT and Ottawa County, alleging inverse condemnation. Plaintiffs also raised a claim of trespass-nuisance against DOT. The trial court granted summary disposition under MCR 2.116(C)(10) to DOT and Ottawa County on the inverse-condemnation claim, finding that plaintiffs failed to present evidence to establish that their injury was "of a unique or peculiar character different from the effects experienced by all similarly situated property owners." The trial court concluded that plaintiffs were not permanently deprived of their property and that "the incidental entry of road salt onto Plaintiffs' properties has only rendered the growing of blueberries uneconomical." The trial court further found that there was no "direct and immediate intrusion" onto plaintiffs' property in this case.[1]

The trial court subsequently denied DOT's motion for summary disposition under MCR 2.116(C)(7) (governmental immunity) on the trespass-nuisance claim and instead determined that plaintiffs were entitled to summary disposition on this claim under MCR 2.116(C)(10). The trial court followed *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 147-149; 422 NW2d 205 (1988), overruled by *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). *Hadfield* held that a limited trespass-nuisance exception to governmental immunity existed, consistent with caselaw

[1] The trial court first granted summary disposition to Ottawa County in a separate proceeding and then later applied the same rationale in granting summary disposition to DOT.

predating the enactment of statutory immunity. See *Hadfield*, 430 Mich at 147-150 (opinion by BRICKLEY, J.). The trial court concluded that plaintiffs established the elements for their trespass-nuisance claim and that plaintiffs were therefore entitled to summary disposition.

On appeal, DOT argues that the trial court erred by denying its motion for summary disposition on the trespass-nuisance claim because it is entitled to immunity with regard to this claim.

This Court reviews de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. See *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003); see also *Cain v Lansing Housing Comm*, 235 Mich App 566, 568; 599 NW2d 516 (1999) ("[A]pplicability of governmental immunity is a question of law that is reviewed de novo on appeal.").

Disposition of the present issue requires this Court to resolve the question whether the tort of trespass-nuisance is an exception to governmental immunity. Trespass-nuisance is a trespass or interference with the use or enjoyment of land by way of a physical intrusion that the government sets in motion and that results in personal or property damage. *McDowell v Detroit*, 264

Mich App 337, 352; 690 NW2d 513 (2004), rev'd on other grounds 477 Mich 1079 (2007). Its elements have been stated simply as a condition, a cause, and control by the government. *Id*.

MCL 691.1407(1) provides:

> 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 state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

"Absent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function." *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). A "governmental agency" is "the state or a political subdivision." MCL 691.1401(d). " 'State' means the state of Michigan and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces and includes every public university and college of the state, whether established as a constitutional corporation or otherwise." MCL 691.1401(c). "Political subdivision"

> means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision. [MCL 691.1401(b).]

The statutory exceptions to governmental immunity are failure to maintain highways, MCL 691.1402(1); the negligent operation of government-owned vehicles,

MCL 691.1405; public-building defects, MCL 691.1406; the performance of proprietary functions, MCL 691.1413; and the ownership or operation of certain governmental hospitals, MCL 691.1407(4). MCL 691.1417 *et seq*. also provides for liability for sewage-disposal-system events. None of these exceptions is relevant to the present case.

Previously, the Supreme Court held that a limited, nonstatutory trespass-nuisance exception existed to governmental immunity. *Hadfield*, 430 Mich at 145 (opinion by BRICKLEY, J.). Later, in *Pohutski*, 465 Mich at 685, the Supreme Court noted that it had "strayed from the plain language" of MCL 691.1407(1) when it concluded in *Hadfield* that "the historic trespass-nuisance exception was required by the language of [MCL 691.1407(1)]." The Supreme Court in *Pohuski* overruled *Hadfield* to "rectify *Hadfield*'s misconstruction of the statutory text." *Pohutski*, 465 Mich at 695.

Significantly, however, the *Pohutski* Court, in reaching its conclusions, relied on the word "state" from the second sentence of MCL 691.1407(1). *Id.* at 688-689. Again, this sentence states: "Except as otherwise provided in this act, this act does not modify or restrict the immunity *of the state* from tort liability as it existed before July 1, 1965, which immunity is affirmed." (Emphasis added.) The *Pohutski* Court concluded that because cities, and not the state as defined in MCL 691.1401(c), were involved in that case, the second sentence of MCL 691.1407(1) was simply inapplicable. *Pohutski*, 465 Mich at 689. The Court then held that, for cities, "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity." *Id*. at 689-690.

The *Pohutski* Court stated:

> Because the state is not involved as a party in these cases, we need not explicate fully the meaning of the second sentence of [MCL 691.1407(1)]. We agree with Justice GRIFFIN [in his partial dissent in *Li v Feldt (After Remand)*, 434 Mich 584, 599; 456 NW2d 55 (1990), overruled in part by *Pohutski*] that, at most, the language of the second sentence requires an historical analysis of the *state's* sovereign immunity, but we have no occasion to undertake such an analysis here. Therefore, contrary to the dissent's assertion, we make no determinations regarding common-law exceptions to the state's governmental immunity. [*Pohutski*, 465 Mich at 688 n 1 (emphasis in original).]

Here, the "state," as defined in MCL 691.1401(c), is indeed involved. The question, then, is whether the second sentence of MCL 691.1407(1) allows plaintiffs to pursue the instant lawsuit or whether DOT is protected by governmental immunity.

We find no basis to conclude that a trespass-nuisance exception exists for claims against the state. Plaintiffs argue that the second sentence of MCL 691.1407(1) preserves a common-law exception to governmental immunity for trespass-nuisance, but they cite only *Hadfield* to support this position. *Hadfield* and the pertinent cases cited therein, however, did not address "sovereign immunity" (i.e., the immunity of *the state*). See *Pohutski*, 465 Mich at 682 (discussing sovereign immunity); see also *Myers v Genesee Co Auditor*, 375 Mich 1, 6; 133 NW2d 190 (1965) ("*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.").

> "*So far as the State itself is concerned, the doctrine of sovereign immunity as it presently exists in Michigan is a creature of the legislature*. The doctrine has been modified by the legislature, abolished by the legislature, re-established by the legislature, and further modified by the legislature." [*McDowell v State Hwy Comm'r*, 365 Mich

> 268, 271; 112 NW2d 491 (1961), quoting the brief of the Attorney General (emphasis added).]

The Legislature has not seen fit to expand upon this "creature of the legislature" by providing a trespass-nuisance exception to governmental immunity for claims against the state, and there is simply no indication that a common-law trespass-nuisance exception to *sovereign* immunity was in effect at the time of the enactment of MCL 691.1407(1).

In *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), the Supreme Court examined MCL 691.1407(1). It first discussed the "ancient common-law concept" of sovereign immunity, *Ross*, 420 Mich at 597, and later stated:

> The first sentence of § 7 was intended to not only restore governmental immunity to non-sovereign governmental agencies, but to provide uniform treatment for state and local agencies. Furthermore, the affirmance of common-law sovereign immunity in the second sentence of § 7 was a clear directive that this Court henceforth could not . . . judicially abrogate the state's sovereign immunity. . . .
>
> Therefore, at the time § 7 was enacted, the state was immune from tort liability when it was engaged in the exercise or discharge of a governmental function, unless a statutory exception was applicable. This same immunity is reiterated by the first and second sentences of § 7.
>
> * * *
>
> In summary, at the time § 7 was enacted and became effective, the state enjoyed immunity from tort liability at common law whenever it was engaged in the exercise or discharge of a governmental function, unless a statutory exception was applicable. This common-law sovereign immunity was codified by the second sentence of § 7. The immunity granted to the state by the first sentence of § 7 is

> essentially coextensive with this common-law immunity. We note that this interpretation furthers the Legislature's intent to create uniform standards of liability for state and non-sovereign governmental agencies. [*Id.* at 605-606, 608.]

Ross clearly indicates that exceptions to sovereign immunity must be granted by the Legislature. Again, the Legislature has not provided such an exception for trespass-nuisance claims.[2] We thus hold that DOT was entitled to summary disposition with regard to plaintiffs' trespass-nuisance claim.

In their cross-appeal, plaintiffs claim that the trial court should not have granted defendants summary disposition with regard to the inverse-condemnation claim. In reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmovant. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42 n 2; 672 NW2d 884 (2003). If the evidence fails to demonstrate a genuine issue of material fact, the movant is entitled to judgment as a matter of law. *Franchino v Franchino*, 263 Mich App 172, 181; 687 NW2d 620 (2004). A genuine issue of material fact exists when, after the court reviews the record in the light most favorable to the nonmovant, there remains an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

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[2] Plaintiffs contend that their trespass-nuisance claim rises to the level of an unconstitutional-taking claim and therefore cannot be barred by sovereign immunity. We need not decide whether such a taking claim would be exempt from sovereign immunity because, as noted later in this opinion, plaintiffs have failed to set forth the necessary allegations to constitute an unconstitutional-taking claim.

" 'Eminent domain' or 'condemnation' is the power of a government to take private property." *Silver Creek Drain Dist v Extrusions Div*, *Inc*, 468 Mich 367, 373; 663 NW2d 436 (2003). The United States Constitution precludes the federal government from taking private property unless it is taken for a public use and with just compensation. US Const, Am V. Similarly, the Michigan Constitution requires that "[p]rivate property shall not be taken for public use without just compensation." Const 1963, art 10, § 2. Additionally, MCL 213.55(1) requires that, in the event the parties fail to agree with regard to the purchase of the property, courts ascertain and determine just compensation to be made for condemned property.

"An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings." *Electro-Tech*, *Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989) (citation and quotation marks omitted). "While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006) (citation and quotation marks omitted). Generally, a plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). "Further, a plaintiff alleging inverse condemnation must prove a casual connection between the government's action and the alleged damages." *Id*. Additionally,

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

In cases involving a "legalized nuisance," e.g., "the persistent passing of trains on a railroad, or planes in the air, or vehicles on the road," a plaintiff must allege that the property is directly affected in a manner that is unique or peculiar relative to the property of other similarly situated persons. *Spiek v Dep't of Transp*, 456 Mich 331, 345; 572 NW2d 201 (1998).

In *Spiek*, 456 Mich at 334, the plaintiffs' residence abutted the service drive to an interstate highway, and they initiated an inverse-condemnation action against the defendant, "alleging that defendant's actions in locating the service drive adjacent to their property had 'so interfered with Plaintiffs' quiet use and enjoyment of the property as to render it worthless, and to constitute a taking of property for public purpose without payment of just compensation . . . .' " The trial court granted the defendant's motion for summary disposition " 'as a matter of public policy.' " *Id*. at 336. This Court reversed, concluding that the plaintiffs should have been afforded an opportunity to establish that their use and enjoyment of the property was affected detrimentally to a degree greater than the public. *Id*. The Supreme Court granted leave to appeal "to decide whether noise, dust, vibration, and fumes experienced by owners of property along an interstate freeway constitute a taking of a recognized property interest where the effects alleged are not unique or peculiar in character." *Id*. at 332.

The Supreme Court opined that if "a legalized nuisance affects all in its vicinity in common, damages generally are not recoverable under just-compensation theory" because such common injuries are "incidental effects not amounting to an appropriation." *Id*. at 345. The Court discussed the common-law doctrine of *damnum absque injuria*: " 'Loss, hurt, or harm without injury in the legal sense; that is, without such breach of duty as is redressible by a legal action. A loss or injury which does not give rise to an action for damages against the person causing it.' " *Id*. at 346, quoting Black's Law Dictionary (6th ed).

The *Spiek* Court noted that if

> the plaintiff alleges that the property is directly affected in a manner that is unique or peculiar in comparison to the property of other similarly situated persons, the plaintiff states a claim for which the relief sought may be granted under well-established principles for proving the right to compensation. [*Spiek*, 456 Mich at 346.]

The Court specifically explained:

> The right to just compensation, in the context of an inverse condemnation suit for diminution in value caused by the alleged harmful affects to property abutting a public highway, exists only where the landowner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated. While the Michigan courts have not had the opportunity to address this issue directly in recent years, the overwhelming weight of foreign authority supports this conclusion, as do contemporary public policy considerations. [*Id*. at 348.]

The Court opined further:

> In the context of traffic flow, a degree of harm threshold, as opposed to the well-established difference in kind threshold, would be unworkable both in a practical sense

> and from the standpoint of public policy because it would depend on the amount of traffic traveling a particular highway at a particular time that may change over time because of factors unrelated to and out of the control of the state. For example, demographic changes and economic changes affecting commercial and industrial development may determine the degree of harm, rather than the actual location of the highway in a particular place by the state. To require the state to litigate every case in which a person owning land abutting a public highway feels aggrieved by changing traffic conditions would wreak havoc on the state's ability to provide and maintain public highways and place within the judicial realm that which is inappropriate for judicial remedy. Where harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways. Only where the harm is peculiar or unique in this context does the judicial remedy become appropriate. [*Id*. at 349.]

The Supreme Court concluded that the defendant was entitled to summary disposition because the plaintiffs had failed to overcome the doctrine of *damnum absque injuria* by failing to "alleg[e] harm of a character different from that suffered by all living in similar proximity to a highway." *Id*. at 350. The Court found that the "plaintiffs' complaint alleges the same type of incidental and consequential harm as is experienced by all persons similarly situated to plaintiffs in that they reside near a public highway." *Id*. The Court further rejected the plaintiffs' assertion "that recovery was available if the harm suffered merely differed in degree from the inconvenience experienced by the public at large." *Id*. The Court ultimately held:

> The just-compensation requirement in the Michigan Constitution does not require the state to compensate every property owner living in proximity to a public high-

> way for the normal inconveniences associated therewith. The plaintiff states a claim for which relief may be granted only where the plaintiff alleges harm of a unique or peculiar kind. We reverse the decision of the Court of Appeals and reinstate the trial court's order granting defendant's motion for summary disposition. [*Id*. at 350-351.]

In this case, defendants used salt as a means to prevent ice from building up on public highways and roads. Notably, plaintiffs allege that the harm is caused not by the act of administering salt to the highways and roads, but as a result of traffic causing salt spray to ultimately invade plaintiffs' property, thereby harming their blueberry crops. Ottawa County formed the Ottawa County Road Salt Commission to identify strategies to modify Ottawa County's winter road maintenance to prevent further environmental impacts related to the application of road salt. A survey was conducted, which estimated losses to blueberry production for 2003. The survey looked at 16 property owners with 32 farms. Fifteen farms did not provide any information regarding losses. The other 17 farms listed losses ranging from $3,000 to $200,000. Seven farms listed losses of less than $10,000; seven farms listed losses between $10,000 and $50,000; one farm listed losses of $80,000; one farm listed losses of $120,000; and one farm listed losses of $200,000. The road salt commission noted that the environmental impact from road salt received attention after blueberry growers reported damage to blueberry bushes near roadways. The road salt commission also acknowledged:

> The threat of increasing road salt usage to the blueberry industry is not the only cause for concern. If current winter road maintenance practices are not changed, the damage observed to roadside trees and ornamental plants could become more widespread. Other impacts could also become

> more pronounced. Elevated levels of chloride, for example, have been detected in irrigation ponds adjacent to roadways. Rising chloride levels have also been found in groundwater in Illinois, as well as in the Great Lakes. While the chloride levels detected in groundwater and in the Great Lakes are not yet believed to be harmful to humans, some research indicates that these levels have already altered our ecosystems. For instance, researchers have identified the increased salinity in the Great Lakes as a factor in the migration of some exotic species to this region.

The road salt commission's report, Recommendations for Salt Management, generally focused on the environmental impact on blueberry crops. Nevertheless, as noted in the report's facts and findings regarding impacts of road salt usage:

> Other environmental impacts, including damage to other types of roadside vegetation and water resources, are occurring or suspected of occurring as a result of road salt usage. The effect of road salt exposure on trees is explained in an article which appeared in *Michigan Landscape Magazine* (See Attachment K). The impact on water resources is documented in Table 1 and Figures 1-2.

The road salt commission also provided measures designed to eliminate the damaging effects of road salt exposure to blueberries by establishing windbreaks using salt resistant tree species, placing the first row of blueberry plantings at least 300 feet from the road, digging irrigation ponds at the back of the field away from roads, and improving drainage around fields.

Certainly, plaintiffs have suffered some kind of loss as a result of the application of the road salt; however, their claims are precluded under the common-law doctrine of *damnum absque injuria*. See *Spiek*, 456 Mich at 346. Ultimately, the harm is akin to that resulting from "the amount of traffic traveling a particular highway at

a particular time . . . ." See *id*. at 349. The by-product pollution is suffered by all people owning land adjacent to the salted roads, and the harm-causing factors are "unrelated to and out of the control of the state." *Id*. "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." *Case v Saginaw*, 291 Mich 130, 141; 288 NW 357 (1939) (citation and quotation marks omitted). Thus, such acts do not entitle the property owner to compensation from the state. *Id*. at 141-142.

Plaintiffs maintain that their injury is different from other similarly situated property owners. Plaintiffs emphasize the loss of their cash crop as compared to other property owners' lawns, ornamental plantings, or incidental roadside vegetation. However, plaintiffs' injury clearly is merely of a different *degree* than that suffered by the public at large and therefore is not actionable. *Spiek*, 456 Mich at 350.

Affirmed in part, reversed in part, and remanded for entry of judgment in favor of DOT. We do not retain jurisdiction.

MURRAY, J., concurred.

BECKERING, J. (*concurring*). I concur in the result reached by the majority in this matter, but write separately to elaborate on the majority's analysis and why we are compelled to dismiss plaintiffs' claims.

In reaching its conclusion that there is no trespass-nuisance exception to the doctrine of sovereign immunity, the majority relies in part on *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641

(1984), which predates *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). In *Pohutski*, our Supreme Court held that the first sentence of MCL 691.1407(1) contains no trespass-nuisance exception to governmental immunity for cities. *Pohutski*, 465 Mich at 689-690. MCL 691.1407(1) provides:

> 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 state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The *Pohutski* Court cited *Ross*, a pre-*Hadfield*[1] case, for the propositions that because the state created the courts, it is not subject to the courts, that the governmental tort liability act " 'was intended to provide uniform liability and immunity to both state and local governmental agencies' when involved in a governmental function," and that by enacting the second sentence of MCL 691.1407(1), the Legislature meant to ensure that " 'by restoring to municipal corporations immunity for governmental functions and making uniform the immunity of all governmental entities for governmental functions [in the first sentence], it was not thereby waiving the state's common-law absolute sovereign immunity for non-governmental functions . . . .' " *Pohutski*, 465 Mich at 681-683, 693, citing and quoting *Ross*, 420 Mich at 598, 605, 614, and *Ross*, 420 Mich at 669 (LEVIN, J., dissenting in part). The Court specifically refrained, however, from interpreting or applying the second sentence of MCL 691.1407(1), stating that the second sentence did not apply because

[1] *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), overruled by *Pohutski*, 465 Mich at 695.

the state was not a party, and therefore, it would not "explicate fully the meaning of the second sentence" or make any "determinations regarding common-law [trespass-nuisance] exceptions to the state's governmental immunity." *Pohutski*, 465 Mich at 688 n 1, 689. The Court also stated that, "at most, the language of the second sentence requires an historical analysis of the state's sovereign immunity, but we have no occasion to undertake such an analysis here." *Id*. at 688 n 1 (emphasis omitted). In concluding that the second sentence contains no trespass-nuisance exception to sovereign immunity, the majority in this case also cites *Ross*, reiterating and expanding upon the propositions previously cited in *Pohutski*. Although *Ross* predated *Pohutski* and was superseded in part on other grounds by MCL 691.1407(5), the portions of *Ross* cited in the majority opinion remain good law.

I agree with the majority's outcome primarily, however, because an historical analysis of sovereign immunity before July 1, 1965, reveals no indication that a common-law exception existed with respect to trespass-nuisance claims against the state. As noted by the majority, plaintiffs cite only *Hadfield*, 430 Mich 139, in support of their contention that the second sentence of MCL 691.1407(1) preserves the common-law exception for trespass-nuisance claims against the state. The *Hadfield* Court conducted an extensive historical analysis in its decision; however, the 13 cases referenced in that decision do not shed any light on the concept of sovereign immunity. Significantly, the defendants in those cases, which focus primarily on "nuisance" claims, fall under the "political subdivision" definition of MCL 691.1401(b), not the "state" definition of MCL 691.1401(c). See *Pennoyer v Saginaw*, 8 Mich 534 (1860) (the defendant was a city); *Sheldon v Village of Kalamazoo*, 24 Mich 383 (1872) (the defendant was a village);

Ashley v Port Huron, 35 Mich 296 (1877) (the defendant was a city); *Rice v City of Flint*, 67 Mich 401; 34 NW 719 (1887) (the defendant was a city); *Seaman v City of Marshall*, 116 Mich 327; 74 NW 484 (1898) (the defendant was a city); *Ferris v Detroit Bd of Ed*, 122 Mich 315; 81 NW 98 (1899) (the defendant board of education was a political subdivision); *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646; 127 NW 821 (1910) (the defendant county board of supervisors was a political subdivision); *Attorney General, ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913) (litigation between municipalities); *Donaldson v City of Marshall*, 247 Mich 357; 225 NW 529 (1929) (the defendant was a city); *Robinson v Wyoming Twp*, 312 Mich 14; 19 NW2d 469 (1945) (the defendant was a township); *Rogers v Kent Co Bd of Co Rd Comm'rs*, 319 Mich 661; 30 NW2d 358 (1948) (the defendant was a political subdivision); *Defnet v Detroit*, 327 Mich 254; 41 NW2d 539 (1950) (the defendant was a city); *Herro v Chippewa Co Rd Comm'rs*, 368 Mich 263; 118 NW2d 271 (1962) (the defendant was a political subdivision). As such, the defendants in those cases could not be afforded sovereign immunity. See *Myers v Genesee Co Auditor*, 375 Mich 1, 6; 133 NW2d 190 (1965) ("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.") (emphasis omitted). Plaintiffs cite no caselaw establishing that any exceptions to governmental immunity with respect to political subdivisions before 1965 are to be imputed to sovereign immunity as well.

Additionally, I note that footnote 2 of the majority opinion briefly addresses plaintiffs' argument that their trespass-nuisance claim rises to the level of an unconstitutional-taking claim and is, therefore, exempt from sovereign immunity. The footnote states: "We need

not decide whether such a taking claim would be exempt from sovereign immunity because, as noted later in this opinion, plaintiffs have failed to set forth the necessary allegations to constitute an unconstitutional-taking claim." While I agree with this statement, it is worth noting that while trespass-nuisance and unconstitutional-taking claims are similar, they remain distinct actions.

In *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004), this Court discussed the distinction between claims for trespass-nuisance and unconstitutional taking. The *Hinojosa* Court first discussed the applicability of *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970),[2] noting:

> "This private nuisance was nonetheless one merely because the city had acquired the lot through foreclosure for nonpayment of taxes. Public policy in a civilized community requires that there be someone to be held responsible for a private nuisance on each piece of real estate, and, particularly in an urban area, that there be no oases of nonliability where a private nuisance may be maintained with impunity." [*Id*. at 643-644, quoting *Kurtigian v City of Worcester*, 348 Mass 284, 291; 203 NE2d 692 (1965).]

Our Supreme Court held that "[t]here is no sovereign immunity applicable to a situation of nuisance as we have in this case." *Buckeye*, 383 Mich at 644.

[2] In *Buckeye*, 383 Mich at 632, on April 10, 1963, a fire started in buildings owned by the state and spread to neighboring properties. The plaintiffs sued the state, asserting that the condition of the buildings "constituted a nuisance to the premises and properties insured by plaintiffs." *Id*. The trial court concluded that there was a nuisance, but that the state had sovereign immunity as to the nuisance action. *Id*. at 633. In reversing the trial court and the Court of Appeals, our Supreme Court essentially converted the plaintiffs' nuisance claim to an unconstitutional-taking claim. The Court noted that sovereign immunity does not apply to taking claims, *id*. at 641, and justified its holding on public policy grounds, stating: "Courts of other states have applied similar provisions in their state constitutions to factual situations corresponding to those of this case," *id*. at 642. The Court quoted the Massachusetts Supreme Judicial Court:

> The liability imposed on the state [in *Buckeye*] was for the tort of nuisance, not to justly compensate an owner for the taking of private property for public use. Nevertheless, the *Buckeye* Court relied on the Taking Clause as its rationale for concluding that common-law sovereign immunity did not shield the state from liability for nuisance. [*Hinojosa*, 263 Mich App at 543.]

This Court also noted:

> Regarding *Buckeye*, the *Hadfield* Court observed that, "although the plaintiff had alleged nuisance and this Court found nuisance, the holding was premised on the fact that an unconstitutional taking had occurred," and that the *Buckeye* Court treated the two causes of action as synonymous. . . . But the Court also noted that "[d]irect reliance on [the Taking Clause] should not be confused with the assertion of the trespass-nuisance exception . . . [because] other trespass-nuisance cases that cited the taking provision of the constitution merely employed that provision as a rationale for the judicially created rule that would impose liability in a tort setting involving governmental immunity." . . . Our Supreme Court later would again emphasize that a constitutional taking and the tort of trespass-nuisance are distinct actions. [*Id*. at 545-546, quoting *Hadfield*, 430 Mich at 165 n 10, 168.]

This Court underscored that although judicial decisions have closely associated trespass-nuisance with the Taking Clause, the former action remains a tort. *Hinojosa*, 263 Mich App at 546. See also *Peterman v Dep't of Natural Resources*, 446 Mich 177, 206-207; 521 NW2d 499 (1994) (a constitutional taking and the tort of trespass-nuisance are distinct actions).

The *Hinojosa* Court concluded:

> In the case at bar, the trial court correctly dismissed plaintiffs' tort claim of trespass-nuisance because our Supreme Court in *Pohutski* overruled *Hadfield*, finding that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to govern-

> mental immunity." *Pohutski*, *supra* at 689-690. But the majority in *Pohutski* pointedly declined to address whether facts that previously might have supported liability for a trespass-nuisance could establish an unconstitutional taking. The *Pohutski* Court stated:
>
> "The parties have addressed whether trespass nuisance is not a tort within the meaning of the governmental immunity statute, but rather an unconstitutional taking of property that violates Const 1963, art 10, § 2. The trial courts in these cases have yet to address the taking claims. Therefore, we decline to discuss those claims at this time." [*Id*. at 699.]
>
> Thus, although presented the opportunity, our Supreme Court declined to adopt Justice KELLY's views that *Buckeye* "acknowledged that the trespass-nuisance exception has a constitutional basis," and that "[g]overnmental immunity is not a defense to a constitutional tort claim, hence not to a claim based on trespass-nuisance." *Pohutski*, *supra* at 709 (KELLY, J., dissenting), citing *Thom v State Hwy Comm'r*, 376 Mich 608, 628; 138 NW2d 322 (1965). We conclude, therefore, that the issue whether trespass-nuisance as alleged here may constitute a constitutional taking was not decided in *Buckeye*. Hence, we must consider other decisions addressing the application of the Taking Clause. [*Hinojosa*, 263 Mich App at 547-548.]

The *Hinojosa* Court held that the plaintiffs failed to state a cause of action for a " 'taking' " or " 'inverse condemnation.' " *Id*. at 548.

In sum, courts of this state have held that trespass-nuisance and unconstitutional taking are distinct actions. Our Supreme Court has not yet addressed whether facts that might establish liability for trespass-nuisance could establish an unconstitutional-taking claim. See *id*. at 547. It is clear, however, that while our Legislature has the constitutional authority to modify or abolish the ability to bring trespass-nuisance claims against the state, an unconstitutional-taking action

may not be limited except as provided by the Michigan Constitution. [*Id*. at 546.] Thus, if plaintiffs alleged a taking, they may have a cause of action. As stated by the majority, however, we need not address that issue because plaintiffs failed to set forth the allegations necessary to establish an unconstitutional taking.

Finally, in regard to plaintiffs' inverse-condemnation claim, I agree with the majority's conclusion that the difference between the injuries suffered by plaintiffs and similarly situated property owners is best categorized as one of degree, and not of kind, and therefore, plaintiffs' claim must fail. I acknowledge, however, that this is a close call requiring careful consideration.

The majority compares this case to *Spiek v Dep't of Transp*, 456 Mich 331, 333-334; 572 NW2d 201 (1998), wherein the plaintiffs brought an inverse-condemnation action against the defendant for locating an interstate highway service drive adjacent to their residential property. The plaintiffs' complaint alleged that the service drive produced

> "an essential change in the neighborhood [that] . . . violated restrictive covenants in the subdivision . . . [and] caused grave and serious damage to the value of the . . . property by increasing dramatically the levels of noise, vibrations, pollution and dirt in the once-residential area . . . [thus] destroying the desirability of the . . . property as an area for living and . . . destroying the acceptability of the property for residential purposes." [*Id*. at 334.]

As noted in the majority opinion for this case, the *Spiek* Court held that damages are not recoverable for a "legalized nuisance" such as "the persistent passing of trains on a railroad, or planes in the air, or vehicles on the road" unless "the plaintiff alleges that the property is directly affected in a manner that is unique or peculiar in comparison to the property of other simi-

larly situated persons . . . ." *Id*. at 345-346. The plaintiff must allege an injury "different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Id*. at 348. Significantly, the *Spiek* Court further stated:

> In the context of traffic flow, a degree of harm threshold, as opposed to the well-established difference in kind threshold, would be unworkable both in a practical sense and from the standpoint of public policy because it would depend on the amount of traffic traveling a particular highway at a particular time that may change over time because of factors unrelated to and out of the control of the state. For example, demographic changes and economic changes affecting commercial and industrial development may determine the degree of harm, rather than the actual location of the highway in a particular place by the state. To require the state to litigate every case in which a person owning land abutting a public highway feels aggrieved by changing traffic conditions would wreak havoc on the state's ability to provide and maintain public highways and place within the judicial realm that which is inappropriate for judicial remedy. Where harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways. Only where the harm is peculiar or unique in this context does the judicial remedy become appropriate. [*Id*. at 349.]

The *Spiek* Court reversed the decision of the Court of Appeals and reinstated the Court of Claims order granting summary disposition to the defendant, concluding that the plaintiffs had failed to state a claim upon which relief could be granted because they did not allege harm to their property that differed "in kind from the harm suffered by all living in proximity to a public highway in Michigan." *Id*. at 350. Rather, the plaintiffs' complaint alleged "the same type of incidental and consequential

harm as is experienced by all persons similarly situated to plaintiffs in that they reside near a public highway." *Id*.

In this case, plaintiffs allege that the spreading of salt on public highways and primary county roads adjacent to their blueberry fields ultimately results in reduced blueberry production. According to plaintiffs, after the salt is spread, passing vehicles and the wind throw salt water onto their fields, causing damage to blueberry bushes and reduced production from those bushes. The spreading of salt on the roads may be categorized as a "legalized nuisance" comparable to locating a highway service drive near residential property, resulting in increased levels of noise, vibration, pollution, and dirt from traffic flow. See *id*. at 345. Therefore, like the plaintiffs in *Spiek*, plaintiffs in this case must allege an injury "different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Id*. at 348. Plaintiffs' injury must be unique or peculiar. See *id*. at 346.

As our Supreme Court articulated in *Spiek*, it would be unworkable to apply a degree-of-harm threshold, rather than a difference-in-kind threshold, in the context of traffic flow. *Id*. at 349. It would also be unworkable under the facts of this case. The road commissions responsible for spreading salt do so to prevent the formation of ice on public highways and primary county roads during the winter months. The amount of salt spread on the roads directly correlates to the severity of the weather. According to plaintiffs, once the salt is spread, salt water is thrown onto their fields by passing vehicles and the wind. Thus, the degree of harm suffered by plaintiffs is largely dependent on the weather over the course of the winter, which is out of defendants' control, and traffic flow, which may also be

affected by factors out of defendants' control. Requiring the state and county road commissions to litigate every case in which vegetation is damaged by salt spray would seriously impede their ability to protect Michigan's citizens from the hazards presented by ice-covered roads. I agree with the *Spiek* Court that under facts such as these, a legislative remedy is more appropriate than a judicial remedy. The legislative branch is the appropriate branch to weigh the safety hazards presented by ice-covered roads against the environmental and economic impact of salt usage and, if deemed necessary, order that the spreading of salt be reduced or replaced with an alternative method of deicing the roads.

Plaintiffs claim that the harm they suffer is of a different kind than the harm suffered by those similarly situated. Plaintiffs liken their situation to that experienced by the respondents in *United States v Causby*, 328 US 256, 258-259; 66 S Ct 1062; 90 L Ed 1206 (1946), wherein the persistent intrusion of low-flying army and navy aircraft accessing the glide path of a runway by passing approximately 83 feet over the respondents' property, 67 feet above their house, 63 feet above the barn, and 18 feet above the highest tree forced the respondents to give up using their property as a commercial chicken farm. The United States Supreme Court held that such conduct (which involved traveling below the navigable airspace of the United States)[3] amounted to a physical invasion of the property entitling the respondents to compensation for the taking of their property. *Id*. at 265-267. Plaintiffs argue that the respondents in *Causby* prevailed because their harm

[3] "[N]avigable airspace" was then defined as " 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' " *Causby*, 328 US at 263, quoting 49 USC 180.

was distinguishable from others who suffered the mere normal inconveniences of modern air travel over their lands at higher altitudes. Plaintiffs contend that, like the respondents in *Causby*, they have suffered a unique injury, namely the destruction of their crops hundreds of feet from the roadsides as compared to other property owners who have suffered the incidental burning of some of their lawns. But, unlike the respondents in *Causby*, plaintiffs do not suggest that their properties have been singled out in some way. Rather, they claim that the harm they suffer—damage to their blueberry bushes—is unique because it is economic in nature. Plaintiffs engage in commercial blueberry production, and when their bushes are damaged and rendered less productive, the damage affects plaintiffs' economic viability. While there is merit to the argument that the harm suffered by plaintiffs is different from that suffered by a property owner who, for example, has lost merely a section of lawn or decorative plantings as a result of salt spray, I must agree with the majority that the difference between the injuries is best categorized as one of degree, and not of kind. First, as noted in the majority opinion, there is evidence that blueberry bushes are not the only type of vegetation affected by the spreading of salt on the roads. The report issued by the road salt commission indicates that salt usage damages roadside trees and ornamental plants. It may also negatively affect our ecosystems by raising the level of chloride in nearby bodies of water. Therefore, it is reasonable to presume that persons who use their roadside properties for the commercial production of trees or ornamental plants, or any other type of commercial enterprise that may be negatively affected by the spreading of salt on the roads, would suffer the same kind of injury as plaintiffs. Moreover, in cases where a property owner loses merely decorative plant-

ings or any other type of vegetation that was not intended to produce a profit, the owner loses not only the value of that particular vegetation, which may be substantial if, for example, the owner has costly ornamental plantings along the roadside, but also the option to use the roadside property to grow any new vegetation that would be damaged by salt spray, including cash crops.

Because the harm suffered by plaintiffs differs only in degree, and not in kind, from the harm suffered by those similarly situated, I agree with the majority that plaintiffs' inverse-condemnation claim must fail.

OSHTEMO CHARTER TOWNSHIP v
KALAMAZOO COUNTY ROAD COMMISSION

Docket No. 292980. Submitted March 2, 2010, at Grand Rapids. Decided April 29, 2010, at 9:05 a.m.

Oshtemo Charter Township brought an action in the Kalamazoo Circuit Court against the Kalamazoo County Road Commission, Alamo Township, and Kalamazoo Charter Township, seeking, in part, a preliminary injunction that would stay the decision of the road commission to void certain parts of plaintiff's Truck Route Ordinance No. 478 pursuant to MCL 257.726(3) and prevent heavy trucks from using three streets. The trial court, Alexander C. Lipsey, J., granted a preliminary injunction after finding that plaintiff would likely prevail on the merits of the case because, as a result of an apparent typographical error in the last sentence of MCL 257.726(3), the road commission did not have the authority to void the disputed parts of plaintiff's ordinance. The road commission appealed by leave granted, and Oshtemo Charter Township cross-appealed.

The Court of Appeals *held*:

The trial court misinterpreted MCL 257.726(3). A typographical error exists on the face of the statute. Although the trial court correctly observed that, as a general rule, clear statutory language must be enforced as written, the trial court overlooked the interpretive doctrine of statutory construction known as scrivener's error. Application of the doctrine leads to the conclusion that the reference to MCL 247.671 to MCL 247.675 in MCL 257.726(3) was a product of a clerical error that provides no means to effectuate the text of MCL 257.726(3) and renders the statute nugatory. By construing the phrase "MCL 247.671 to 247.675" as "MCL 247.651 to 247.675" under the scrivener's error doctrine, the provisions of the statute may be given effect and not rendered nugatory. The preliminary injunction must be vacated, and the case must be remanded to the trial court for further proceedings.

Vacated and remanded.

METER, P.J., concurring, agreed with the majority's analysis concerning the doctrine of scrivener's error as applied in this case, but wrote separately to state that the same result could be

obtained by application of additional principles of statutory construction that are grounded in Michigan caselaw, including the principle that apparently plain statutory language can be rendered ambiguous by its interaction with other statutes. An ambiguity exists because the provisions referred to in MCL 257.726(3) provide no means to effectuate the text of the statute, whereas the provisions found in MCL 247.651 through MCL 247.655 do. A construction of MCL 257.726(3) that substitutes "MCL 247.651" for "MCL 247.671" reflects a commonsense construction that best accomplishes the purpose of MCL 257.726(3). The trial court's enforcement of MCL 257.726(3) as written rendered the statute nugatory and produced absurd consequences. Vacation of the preliminary injunction and a remand for further proceedings is appropriate even without application of the doctrine of scrivener's error.

1. STATUTES — DOCTRINE OF SCRIVENER'S ERROR.

The interpretive doctrine of statutory construction known as scrivener's error may be applied when on the face of a statute it is clear that a mistake of expression or clerical error, rather than of legislative wisdom, has been made; if the objective import of the statute is clear, it is not contrary to sound principles of statutory interpretation to give the totality of the context precedence over a single mistake of expression or clerical error.

2. STATUTES — DOCTRINE OF SCRIVENER'S ERROR — HIGHWAYS — WORDS AND PHRASES — COUNTY PRIMARY ROADS.

Use of the phrase "MCL 247.671 to 247.675" in MCL 257.726(3), which was meant to incorporate the provisions of 1951 PA 51 that pertain to the designation of county primary roads, was a clerical error, but under the interpretive doctrine of statutory construction known as scrivener's error, the text of MCL 257.726(3) may be given effect if the phrase is interpreted instead as "MCL 247.651 to 247.675."

Fahey Schultz Burzych Rhodes PLC (by *William K. Fahey* and *Stephen J. Rhodes*) and *James W. Porter, P.C.* (by *James W. Porter*), for Oshtemo Charter Township.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*, *Charles F. Behler*, and *Karl W. Butterer, Jr.*) and *Lewis Reed & Allen, P.C.* (by *Stephen Denenfeld*), for the Kalamazoo County Road Commission.

Ford, Kriekard, Soltis & Wise, P.C. (by *Robert A. Soltis*), for Alamo Township.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *Kenneth C. Sparks*), for Kalamazoo Charter Township.

Before: METER, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM. Defendant Kalamazoo County Road Commission appeals by leave granted an order that granted plaintiff, Oshtemo Charter Township, a preliminary injunction enjoining the implementation of the road commission's decision to void a portion of plaintiff's truck route ordinance. Plaintiff cross-appealed. We hold that the trial court misinterpreted MCL 257.726(3), the statute authorizing the road commission to resolve the dispute among several townships in this matter. We conclude that a typographical error exists on the face of MCL 257.726(3). The trial court erred when it failed to employ the interpretive doctrine known as scrivener's error when construing MCL 257.726(3). We vacate the preliminary injunction and remand this case for further proceedings.

On March 27, 2007, plaintiff adopted its Truck Route Ordinance No. 478. The ordinance designates, "to the exclusion of all other roads," certain specific streets traversing the township for use by heavy trucks, including double-trailer gravel trucks. It also expressly bars any person from operating "a truck or truck-tractor and semi-trailer or truck-tractor and trailer combination, or truck and trailer combination with a combined carrying capacity of over five (5) tons in Oshtemo Charter Township on any road other than a designated truck route," except as expressly provided elsewhere in the ordinance. According to the road commission, this or-

dinance bars double-trailer gravel trucks from using three streets within plaintiff township: Tenth Street, Ninth Street, and H Avenue. This prohibition of the use of these three streets has the effect of routing the truck traffic to roads in defendants Alamo Township and Kalamazoo Charter Township and off the roads that provide the most direct routes of access to US-131. Plaintiff's ordinance became effective on May 4, 2007.

Subsequently, the Michigan Legislature enacted 2008 PA 539, which amended MCL 257.726(3), effective January 13, 2009, to provide:

> If a township has established any prohibition or limitation under subsection (1) [on the operation of trucks or other commercial vehicles] on any county primary road that an adjoining township determines diverts traffic onto a border highway or street shared by the township and the adjoining township, the adjoining township may submit a written objection to the county road commission having jurisdiction over the county primary road, along with a copy to the township that established the prohibition or limitation, on or before the later of March 1, 2009, or 60 days after the township approves the prohibition or limitation. The written objection shall explain how the prohibition or limitation diverts traffic onto the border highway or street shared by the township and the adjoining township. The county road commission shall then investigate the objection. The township and adjoining township shall cooperate with that investigation and negotiate in good faith to resolve the objection. If the objection is not resolved within 60 days after the township receives the copy of the written objection, the county road commission has the authority to, and shall, either approve or void the prohibition or limitation that is the subject of the objection within 60 days thereafter, which decision shall be final. For purposes of this subsection, "county primary road" means a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.671 to 247.675.

Significantly, a review of MCL 247.671 to 247.675 reveals a complete absence of any provisions regarding the designation of a highway or street as a county primary road.

In February 2009, both Alamo Township and Kalamazoo Charter Township filed written objections with the road commission with respect to plaintiff's truck route ordinance. When the three townships involved in this case could not resolve the dispute, the road commission held a public hearing on the objections and, pursuant to MCL 257.726(3), declared the truck route ordinance void with regard to the three contested streets and opened those streets to use by heavy trucks. Plaintiff commenced the present lawsuit in the Kalamazoo Circuit Court on June 4, 2009, with the filing of a 10-count complaint, which sought, in part, the issuance of a preliminary injunction that would stay the road commission's decision and prevent heavy trucks from using the contested streets.

The trial court heard plaintiff's request for a preliminary injunction on June 22, 2009. Following the close of arguments, the trial court granted plaintiff's request for a preliminary injunction from the bench. The trial court began its bench ruling by observing that plaintiff's entitlement to the requested injunction depended on the results of the balancing of four factors: (1) the likelihood that the applicant will prevail on the merits; (2) a demonstration that the applicant will suffer irreparable injury if the relief is not granted; (3) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; and (4) harm to the public interest if the injunction is issued. The trial court then concluded that factors (2), (3), and (4) were a "wash" and "equally balanced out" between the opposing sides. It opined

that "the real question is[,] given that everything else is equally balanced out, does plaintiff have the likelihood of success on the merits."

The trial court, focusing on an apparent typographical error in the last sentence of MCL 257.726(3), resolved this question as follows:

> The Court is aware that there is—there are notes from the complier [sic] who does in fact provide that the destination [sic] set forth in the ordinance [sic], in fact is either typographical or some clerical error, and that the legislature could in fact have, or should [have] probably meant to include a different reference with regard to the definition of county primary roads.
>
> The court is then—thus faced with the very interesting dilemma of interpreting the statue [sic] in a way that actually provides for justification for the Road Commission action. Or interpreting the statue [sic] as it's written with some questions in terms of whether the Road Commission had the authority to void the ordinance, as it presently existed at the time of the hearings in May.
>
> This court after much deliberation and recognizing, to be honest, that either status quo is not going to substantially impact the citizens of these communities to any great extent. It believes that it should follow the lead of our Supreme Court and hold that the language that is written is the language that is written.
>
> Therefore, the court does believe as written there is a substantially [sic] likelihood that Osthemo [sic] will be successful at the—on the merits, and that absent amendment the County Road Commission would not have authority to mediate or determine the relative positions of the townships in this matter.
>
> Therefore, having determined that three, four—two, three and four are a wash in terms of the balances that are necessary, and having determined that as to item one there is a likelihood of success on the part [of] Osthemo [sic]. The court will grant a preliminary injunction in this matter pending further action in court.

The trial court then gave effect to its bench ruling by entering an order granting a preliminary injunction on June 22, 2009.

On appeal, the road commission argues that the trial court erred as a matter of law when it found that plaintiff is likely to prevail because a typographical error contained in MCL 257.726(3) removed from the road commission the power to nullify plaintiff's ordinance.

This Court reviews a trial court's decision to issue a preliminary injunction for an abuse of discretion. *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). We review de novo questions of statutory interpretation. See *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003).

MCL 257.726(1)(c) authorizes local authorities, such as plaintiff township, to enact ordinances that designate only certain highways or streets within their jurisdiction for use by trucks or other commercial vehicles. MCL 257.726(3) establishes a procedure by which townships that adjoin a township that enacts such an ordinance may challenge the ordinance when the prohibition or limitation placed on "any county primary road . . . diverts traffic onto a border highway or street shared by the township and the adjoining township . . . ."

The trial court based its decision that plaintiff was likely to prevail on the merits on a literal application of the language of MCL 257.726(3). The trial court concluded that, in accordance with the last sentence of the statute, the road commission was authorized to resolve conflicts over prohibitions or limitations placed on a street or highway designated as a "county primary road" pursuant to "1951 PA 51, MCL 247.671 to

247.675." The trial court then noted that the statutory provisions codified at MCL 247.671 through MCL 247.675 contain no "county primary road designation[s]" and, therefore, the three streets at issue could not be designated "county primary road[s]" pursuant to MCL 247.671 to MCL 247.675. If the streets at issue were not "county primary road[s]," then the road commission lacked the authority to nullify any portion of plaintiff's truck route ordinance.

The trial court correctly observed that, as a general rule, clear statutory language must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). What the trial court overlooked, however, is the interpretive doctrine of statutory construction known as scrivener's error. In his book, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), pp 20-21, Justice Antonin Scalia described the doctrine as follows:

> I acknowledge an interpretive doctrine of what the old writers call *lapsus linguae* (slip of the tongue), and what our modern cases call "scrivener's error," where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. For example, a statute may say "defendant" when only "criminal defendant" (i.e., not "civil defendant") makes sense. The objective import of such a statute is clear enough, and I think it not contrary to sound principles of interpretation, in such extreme cases, to give the totality of context precedence over a single word. [Citations omitted.]

Applying this doctrine to the case here, we conclude that it is apparent that a typographical error exists in MCL 257.726(3).

MCL 257.726(3) applies, in accordance with its plain language, to challenges raised to prohibitions or limita-

tions placed on a "county primary road." The statute defines the term "county primary road" as "a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.6**7**1 to 247.6**7**5." (Emphasis added.) However, MCL 247.671 repeals all acts and portions of acts that are inconsistent with 1951 PA 51. MCL 247.672 establishes the effective date of the act as June 1, 1951. MCL 247.673 precludes the act from taking effect unless Senate Bill No. 41 of the 1951 session is enacted into law and becomes effective. MCL 247.674 empowers the state transportation commission to issue certain types of bonds. Finally, MCL 247.675(1) establishes a truck safety fund and MCL 247.675(2) establishes a truck safety commission that is to "control the expenditures of the truck safety fund" and ensure that the funds are spent in the manners authorized by MCL 247.675(4).

A further review of 1951 PA 51 reveals that the provisions governing the designation of county primary roads are set forth in §§ 1 through 5 of the act, MCL 247.6**5**1 through MCL 247.6**5**5. A juxtaposition of the provisions of MCL 247.6**5**1 through MCL 247.6**5**5 against the provisions of MCL 247.6**7**1 through MCL 247.6**7**5 makes clear that one of the statutory references found in the last sentence of MCL 257.726(3) is the product of a clerical error, i.e., there was an accidental substitution of a "7" for a "5" in the first statutory citation, MCL 247.671. Significantly, the provisions referred to in MCL 257.726(3) provide no means to effectuate the text of MCL 257.726(3), whereas the provisions found in MCL 247.651 to MCL 247.655 do.

By construing the phrase "MCL 247.671 to 247.675" as "MCL 247.6**5**1 to 247.675," the provisions found in 1951 PA 51 that pertain specifically to the designation of county primary roads are thus incorporated into

MCL 257.726(3). The inclusion of the provisions found at MCL 247.651 to MCL 247.655 is also consistent with the overall text of MCL 257.726(3). The structure of the last sentence of MCL 257.726(3) indicates that the citation that follows the public act citation was meant to be a parallel citation that provides the statutory equivalent to the public act citation; 1951 PA 51 is codified as MCL 247.651 through MCL 247.675. Furthermore, the last sentence of MCL 257.726(3) clearly indicates that the statutory reference contained therein was meant to include the provisions within 1951 PA 51 that provide for the designation of a highway or street as a county primary road. The text of MCL 257.726(3) clearly reflects the Legislature's intent to create a process by which disputes arising from prohibitions or limitations placed on county primary roads are resolved.

The trial court's conclusion that it had to enforce MCL 257.726(3) as written renders MCL 257.726(3) nugatory because the provisions cited do not pertain to the designation of county primary roads; therefore, absent a means to determine whether the highway or street at issue constitutes a county primary road, MCL 257.726(3) cannot be applied to resolve any dispute arising from a prohibition or limitation placed on any highway or street. A court should avoid assigning any construction to a statute that renders any part of the statute nugatory. *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004).

The trial court's assessment of plaintiff's likelihood of success was predicated on an error in statutory construction. Accordingly, we vacate the grant of a preliminary injunction and remand this case for further proceedings. We need not address the additional issues raised on appeal because they are not yet ripe for review.

We vacate the preliminary injunction and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

METER, P.J. (*concurring*). While I concur in the majority's analysis concerning the doctrine of scrivener's error as applied to this case, I write separately to express my opinion that the same result may be obtained using the typical principles of statutory construction as set forth in Michigan caselaw.

At issue here is the trial court's issuance of a preliminary injunction. A trial court must consider the following four factors when deciding whether to issue a preliminary injunction:

> (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. [*Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).]

The decision of the trial court "must not be arbitrary and must be based on the facts of the particular case." *Id*.

This appeal centers on whether the trial court correctly evaluated plaintiff's likelihood of prevailing on the merits—factor 3 from *Thermatool Corp*—and the resolution of this issue depends on whether the trial court correctly construed MCL 257.726(3). I find that the trial court did not correctly construe the statute both because of the doctrine of scrivener's error (as adequately set forth in the majority opinion and not repeated here) *and*, alternatively, because of additional principles of statutory construction that are grounded in Michigan caselaw.

MCL 257.726(3) provides:

> If a township has established any prohibition or limitation under subsection (1) [on the operation of trucks or other commercial vehicles] on any county primary road that an adjoining township determines diverts traffic onto a border highway or street shared by the township and the adjoining township, the adjoining township may submit a written objection to the county road commission having jurisdiction over the county primary road, along with a copy to the township that established the prohibition or limitation, on or before the later of March 1, 2009, or 60 days after the township approves the prohibition or limitation. The written objection shall explain how the prohibition or limitation diverts traffic onto the border highway or street shared by the township and the adjoining township. The county road commission shall then investigate the objection. The township and adjoining township shall cooperate with that investigation and negotiate in good faith to resolve the objection. If the objection is not resolved within 60 days after the township receives the copy of the written objection, the county road commission has the authority to, and shall, either approve or void the prohibition or limitation that is the subject of the objection within 60 days thereafter, which decision shall be final. For purposes of this subsection, "county primary road" means a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.671 to 247.675.

As noted in the majority opinion:

> The trial court based its decision that plaintiff was likely to prevail on the merits on a literal application of the language of MCL 257.726(3). The trial court concluded that, in accordance with the last sentence of the statute, the road commission was authorized to resolve conflicts over prohibitions or limitations placed on a street or highway designated as a "county primary road" pursuant to "1951 PA 51, MCL 247.671 to 247.675." The trial court then noted that the statutory provisions codified at MCL 247.671 through MCL 247.675 contain no "county primary road designation[s]" and, therefore, the three streets at

> issue could not be designated "county primary road[s]" pursuant to MCL 247.671 to MCL 247.675. If the streets at issue were not "county primary road[s]," then the road commission lacked the authority to nullify any portion of plaintiff's truck route ordinance. [*Ante* at 302-303.]

I find that the construction afforded the last sentence of MCL 257.726(3) by the trial court violated principles of statutory construction as set forth by the law of our state.

The trial court correctly noted that clear statutory language must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). However, the trial court failed to acknowledge the principle that "apparently plain statutory language can be rendered ambiguous by its interaction with other statutes." *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 562; 710 NW2d 59 (2005). Here, when MCL 257.726(3) is read in conjunction with MCL 247.671 through MCL 247.675, as referenced in MCL 257.726(3), an ambiguity arises in MCL 257.726(3).

MCL 257.726(3) applies to challenges raised to prohibitions or limitations placed on a "county primary road." "County primary road" is defined in MCL 257.726(3) as "a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.6**7**1 to 247.6**7**5." (Emphasis added.) A review of MCL 247.671 to 247.675 reveals the absence of any provisions regarding the designation of a highway or street as a county primary road. The provisions governing the designation of county primary roads are instead set forth in §§ 1 through 5 of 1951 PA 51: MCL 247.6**5**1 through MCL 247.6**5**5. Thus, an ambiguity exists because the provisions referred to in MCL 257.726(3) provide no means to effectuate the text of MCL

257.726(3), whereas the provisions found in MCL 247.651 through MCL 247.655 do. Therefore, a construction of MCL 257.726(3) that substitutes "MCL 247.651" for "MCL 247.671" reflects a commonsense construction that best accomplishes the purpose of MCL 257.726(3). *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994); *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365, 371; 711 NW2d 391 (2006).

The trial court's conclusion that it had to enforce MCL 257.726(3) as written renders MCL 257.726(3) nugatory and also produces absurd consequences. As noted by the majority, a court should avoid assigning any construction to a statute that renders any part of the statute nugatory. *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004). I additionally note, as I wrote in *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008), that in 2006 a majority of the Supreme Court justices also determined that a court should avoid interpreting a statute in a way that produces absurd consequences.

This analysis and the caselaw cited convince me that vacating the preliminary injunction and remanding for further proceedings would be appropriate even if we were to refrain from relying on Justice Antonin Scalia's recitation of the doctrine of scrivener's error.

ULRICH v FARM BUREAU INSURANCE

Docket No. 289467. Submitted April 13, 2010, at Lansing. Decided April 29, 2010, at 9:10 a.m.

Linda A. Ulrich brought an action on July 16, 2007, in the Washtenaw Circuit Court against Farm Bureau Insurance, Len H. Naylor, and Torron T. Jamerson, seeking damages recoverable under the no-fault automobile insurance act for injuries sustained in a motor vehicle accident on September 19, 2006, when a vehicle driven by Naylor and owned of Jamerson caused an accident that included the vehicle driven by plaintiff and insured by Farm Bureau. The complaint made no claim for uninsured motorist benefits. On January 8, 2008, plaintiff moved to amend her complaint to include claims for uninsured/underinsured coverage. Farm Bureau opposed the motion on the ground that plaintiff failed to comply with the policy by failing to assert a claim for uninsured motorist benefits within the one-year period provided in the insurance contract. Plaintiff claimed that the one-year period was void pursuant to a "Notice and Order of Prohibition Pursuant to MCL 500.2236(5)," Order No. 05-060-M, issued December 16, 2005, by Chief Deputy Insurance Commissioner Frances K. Wallace, that disapproved no-fault insurance forms that provided a contractual limitations period of less than three years for uninsured motorist coverage. Plaintiff's policy, which automatically renewed every six months without any modifications to the policy, had been renewed on September 11, 2006. The trial court, David S. Swartz, J., granted the motion to amend the complaint. Farm Bureau moved for summary disposition, which the trial court denied, holding that the claim was not barred by the one-year contractual limitation period because the amended complaint related back to the original complaint, and that the policy was subject to Order No. 05-060-M, because it was reissued after the date of Order No. 05-060-M. The Court of Appeals granted Farm Bureau's application for leave to appeal the order denying the motion for summary disposition.

The Court of Appeals *held*:

1. Order No. 05-060-M prohibits policies that limit the time to file a claim or commence suit for uninsured motorist benefits to less than three years but it provides an exception where the insurer was legally using a policy with a limitations period of less than three years before the date of Order No. 05-060-M as long as the policy is not revised in any respect. The order contains no sunset provision or expiration date for forms currently in use and does not prescribe any prohibition on renewal. The trial court clearly erred by ruling that the contractual one-year limitations period was unenforceable.

2. There is no authority for applying the relation-back doctrine of MCR 2.118(D) to the contractual limitations period. Plaintiff's claim for personal injury protection insurance benefits and her legal action to recover those benefits cannot be reasonably construed as notice of a claim for uninsured motorist benefits provided to Farm Bureau within one year of the accident as required by the policy.

Reversed.

INSURANCE — CONTRACTS — NO-FAULT BENEFITS — UNINSURED MOTORIST BENEFITS.

An insured's notice of a claim for personal injury protection insurance benefits under the no-fault automobile insurance act is not a notice of a claim for uninsured motorist benefits under the act.

Bredell and Bredell (by *John H. Bredell*) for Linda A. Ulrich.

Bowen, Radabaugh & Milton, P.C. (by *Thomas R. Bowen* and *Mary Rourke Benedetto*), for Farm Bureau Insurance.

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

SAAD, P.J. Defendant Farm Bureau Insurance appeals the trial court's order that denied its motion for summary disposition. We reverse.

I. FACTS AND PROCEEDINGS

On December 16, 2005, the Office of Financial and

Insurance Services[1] (OFIS) issued a "Notice and Order of Prohibition Pursuant to MCL 500.2236(5)," Order No. 05-060-M (Order No. 05-060-M).[2] Order No. 05-060-M was signed by Chief Deputy Insurance Commissioner Frances K. Wallace. Order No. 05-060-M disapproved no-fault automobile insurance forms that provided a contractual limitations period of less than three years for claims for uninsured motorist coverage. The issue presented here is whether a one-year limitations period for uninsured motorist coverage claims is enforceable where the no-fault policy form predated the issuance of Order No. 05-060-M, but the policy was renewed after December 16, 2005.

Plaintiff held a no-fault automobile insurance policy issued by Farm Bureau (hereafter defendant). The continuous renewal policy renewed every six months without any modifications of the terms of the policy. Plaintiff's policy had renewed on September 11, 2006, and was scheduled to expire on March 11, 2007. The accident that gave rise to this action occurred on September 19, 2006. The policy provided uninsured motorist coverage in the amount of $100,000 per person and $300,000 per accident, subject to this condition:

> 3. Time Limitation for Action Against Us
>
> Any person seeking Uninsured Motorist Coverage must:
>
> a. present the claim for compensatory damages in compliance with all the Duties After an Accident or Loss listed

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[1] Pursuant to Executive Order No. 2008-2, effective April 6, 2008, OFIS became known as the Office of Financial and Insurance Regulation. See *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 201 n 2; 747 NW2d 811 (2008).

[2] This order can be found in pdf format on the State of Michigan website at <http://www.michigan.gov/documents/Prohibition_Order_121605_145496_7.pdf> (accessed April 20, 2010).

> on page 4 of this policy and all other terms and conditions of this coverage and the policy; and
>
> b. present to us a written notice of the claim for Uninsured Motorist Coverage within one year after the accident occurs.
>
> A suit against us for Uninsured Motorist Coverage may not be commenced later than one year after the accident that caused the injuries being claimed, unless there has been full compliance with all the Duties After an Accident or Loss listed on page 4 of this policy and all other terms and conditions of this coverage and the policy.

Plaintiff's accident on September 19, 2006, involved defendant Len Henry Naylor, who drove an automobile owned by defendant Torron Thomas Jamerson. Plaintiff alleges that Naylor was driving at more than 90 miles per hour when he rolled his vehicle and caused a multi-car collision that included the vehicle driven by plaintiff. Plaintiff sustained a fractured wrist and other injuries in this collision.

On July 16, 2007, plaintiff brought this action against defendant, Jamerson, and Naylor for damages recoverable under the no-fault act. The complaint made no claim for uninsured motorist benefits. Jamerson and Naylor failed to respond, and plaintiff entered a default against them. On January 8, 2008, plaintiff moved to amend her complaint to include claims against defendant for uninsured/underinsured coverage under the policy. She stated that she sought uninsured motorist coverage because defendants Naylor and Jamerson failed to respond to plaintiff's complaint and defaults had been entered against them.[3] Plaintiff sought mon-

[3] Plaintiff has not provided documentation that either Naylor or Jamerson was uninsured for purposes of obtaining uninsured motorist coverage under defendant's policy. Apparently, her claim is based on the assumption that Naylor or Jamerson's no-fault carriers would deny any claim on the ground that their insureds defaulted.

etary relief under a count for breach of contract, and also declaratory relief that defendant was contractually obligated to provide the coverage. Defendant opposed the motion on the ground that plaintiff failed to comply with the contract by failing to assert a claim for uninsured motorist benefits within the one-year contractual limitations period. Defendant asserted that the amendment would prejudice defendant because it would violate the contractual provision requiring plaintiff to commence this litigation within one year of the date of the accident.

In response, plaintiff said that the one-year contractual limitations provision was void pursuant to the Insurance Commissioner's Order No. 05-060-M prohibiting one-year provisions for policies written after December 16, 2005. Plaintiff contended that this prohibition applied to the policy that was in effect on the date of the accident, because the policy period began on September 11, 2006, after the date of the Insurance Commissioner's Order No. 05-060-M. She also contended that defendant's reliance on the invalidated provision constituted a frivolous argument, warranting sanctions under MCR 2.114(F).

The trial court heard the motion to amend on March 26, 2008. The trial court granted plaintiff's motion, but noted that defendant's objection on the ground of untimeliness was preserved.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). It argued that there was no genuine issue of fact that the policy form in question had legally been in use since before the Insurance Commissioner issued Order No. 05-060-M. Defendant argued that the plain and unambiguous policy language barred coverage where the insured failed to bring her action for uninsured motorist coverage within the one-

year period following the date of loss. Defendant maintained that Order No. 05-060-M "expressly left in force contracts *already in effect*," as of December 16, 2005, and therefore did not abrogate the one-year limitations period in plaintiff's policy.[4] Defendant cited our Supreme Court's decision in *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 201; 747 NW2d 811 (2008), in support of its argument.

Plaintiff argued in response that Order No. 05-060-M voided the one-year contractual limitations period. Plaintiff asserted that her policy was reissued on September 11, 2006, and therefore was subject to Order No. 05-060-M. Alternatively, plaintiff also argued that she satisfied the policy's notice provision because she filed her lawsuit within one year from the date of the accident, and the amendment should relate back to that date. She stated that the original complaint included a third-party claim against the owner and the insured of the subject vehicle, which was sufficient to put defendant on notice that she would file an uninsured motorist coverage claim if these parties had no insurance coverage.

Defendant filed a reply and maintained that renewal of the policy after the issuance of Order No. 05-060-M did not invalidate the one-year contractual provision because the policy had been legally written before the order was issued. It also denied that plaintiff's action for personal injury protection benefits served as notice of a potential uninsured motorist claim.

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[4] Defendant brought a separate motion for summary disposition on the ground that there was no genuine issue of material fact that plaintiff failed to establish a threshold injury under MCL 500.3135 and *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). The trial court denied that motion. There is no issue on appeal concerning this motion.

Defendant also argued that plaintiff's original complaint failed to give defendant notice of the uninsured motorist claim.

The trial court determined that plaintiff's claim was not barred by the contractual limitations period because the amended complaint related back to the date of the original pleading under MCR 2.118(D). The court also concluded that *McDonald*, 480 Mich 191, did not apply retroactively. Finally, it determined that the no-fault policy was subject to Order No. 05-060-M because the policy was reissued on September 11, 2006, after the date of the order. The trial court denied defendant's motion in an order dated November 26, 2008. We granted defendant leave to bring an interlocutory appeal.[5]

II. LEGAL ANALYSIS

In reviewing a trial court's decision to deny or grant a motion for summary disposition under MCR 2.116(C)(10), we review " 'the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.' " *Odom v Wayne Co*, 482 Mich 459, 466-467; 760 NW2d 217 (2008), quoting *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

This appeal stems from the controversy regarding the enforceability of contractual limitations clauses in no-fault automobile insurance policies. In *Tom Thomas*

[5] Plaintiff and defendant subsequently executed a settlement regarding her claim for personal injury protection benefits. This agreement expressly did not affect plaintiff's claim for uninsured motorist benefits.

Org, Inc v Reliance Ins Co, 396 Mich 588; 242 NW2d 396 (1976), our Supreme Court adopted the judicial tolling doctrine, which provides that an insurance policy's contractual period of limitations is tolled from the date that the insured submits a claim to the insurer until the date that the insurer denies the claim. *Id.* at 596-597. In *Tom Thomas Org*, the Court declined to also consider whether a one-year limitations period was unconscionable or inherently unreasonable. *Id.* at 597.

But, in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), the Michigan Supreme Court overruled *Tom Thomas* and held that courts may not rewrite insurance policies on grounds of "reasonableness." In *Rory*, the Michigan Court of Appeals held that an insurance policy's one-year limitations period for claims for uninsured motorist coverage was unenforceable because it was unreasonable to require the insured to discover the other driver's insurance status and other relevant information within a year of the accident. *Rory v Continental Ins Co*, 262 Mich App 679, 686-687; 687 NW2d 304 (2004). The Supreme Court reversed this Court's decision, and held that unambiguous contracts must be enforced as written, and not abrogated on the basis of a court's "independent assessment of 'reasonableness.' " *Rory*, 473 Mich at 468-469. The Court noted that MCL 500.2236(5) conferred on the Insurance Commissioner the discretion to " 'disapprove, withdraw approval or prohibit the issuance, advertising, or delivery' " of any insurance form that " 'contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.' " *Rory*, 473 Mich at 474 (emphasis omitted). It held that "the Legislature has assigned the responsibility of evaluating the 'reasonableness' of an insurance contract to the person within the executive branch charged with re-

viewing and approving insurance policies: the Commissioner of Insurance." *Id.* at 475. "In this instance, the Commissioner has approved the Continental policy form containing the shortened limitations provision for issuance and use in the state of Michigan." *Id.*

On December 16, 2005, Chief Deputy Insurance Commissioner Frances K. Wallace signed Order No. 05-060-M. Citing her statutory authority[6] to disapprove objectionable policy forms, the commissioner determined that a one-year limitations period for claims for uninsured motorist coverage was unreasonable because it does not allow the insured sufficient time to confirm whether the responsible party was insured on the day of the accident. The commissioner stated as follows:

> Under these circumstances, policyholders who purchase optional uninsured motorist benefits with a limitation of less than three years to file claims or commence suit for those benefits will often be paying for coverage that is illusory as a practical matter. Such a provision is "misleading" and "unreasonably or deceptively affect(s) the risk purported to be assumed in the general coverage of the policy" within the meaning of section 2236(5). [Order No. 05-060-M, p 4.]

The commissioner declared the following prohibition:

> Accordingly, effective immediately on the date of this order, ***Insurance Company Name*** shall not issue, advertise, or deliver to any person in this state a policy or rider that limits the time to file a claim or commence suit for uninsured motorist benefits to less than three years unless ***Insurance Company Name*** was legally using that policy or rider form in Michigan prior to the date of this notice and order of prohibition. Moreover, ***Insurance Company Name*** shall not modify in any respect a policy form or rider containing a provision that limits the time to file a claim or commence suit for uninsured motorist benefits to less than

[6] MCL 500.2236(5).

> three years that it was legally using in Michigan prior to this notice and order of prohibition and thereafter issue, advertise, or deliver the revised policy form or rider in this state, unless the limitation is deleted entirely or is changed to not less than three years from the date of the accident.
>
> This notice and order of prohibition does not prohibit ***Insurance Company Name*** from continuing to use any policy form or rider that it may have been legally using in Michigan prior to the date of this notice of prohibition containing a limitation of less than three years to claim or file suit for uninsured motorist benefits, so long as such policy or rider is not revised in any respect. The Commissioner is currently considering what action is appropriate with regard to those policies or riders in use before the date of this notice and order. The Commissioner may withdraw approval of those forms as provided in section 2236(5) at a future time. [Order No. 05-060-M, pp 4-5.]

Here, there is no question of fact that the policy predated the issuance of Order No. 05-060-M. Plaintiff argues, however, that the order applies because her policy was "rewritten" when it was renewed on September 11, 2006.

In *McDonald*, 480 Mich at 193, 200-201, our Supreme Court rejected the insured's argument that her no-fault policy's one-year contractual limitations period for underinsured motorist coverage was tolled from the time she presented a claim to the insurer until the time that the insurer denied the claim. In its analysis, the Court considered the plaintiff's argument that Order No. 05-060-M established a public policy against enforcing contractual limitations periods shorter than three years. *Id.* at 201. The Court rejected this argument, stating as follows:

> [T]he "Notice and Order" also expressly states that it does not prohibit insurers from continuing to use policies that were legally in use before December 16, 2005. Moreover, the general rule is that contracts are interpreted in

> accordance with the law in effect at the time of their formation. See, e.g., *Byjelich v John Hancock Mut Life Ins Co*, 324 Mich 54, 61; 36 NW2d 212 (1949). Thus, the one-year limitation was valid at the time the parties entered into the contract. [*McDonald*, 480 Mich at 201.]

The majority noted that the OFIS had the authority to determine whether an insurance contract was valid, and the order "expressly left in force contracts already in effect." *Id.* at 202. The accident in *McDonald* occurred in 2001, before Order No. 05-060-M was issued. *Id.* at 194. Similarly, in *McGraw v Farm Bureau Gen Ins Co of Mich*, 274 Mich App 298, 304-305; 731 NW2d 805 (2007), this Court held that OFIS Notice and Order of Prohibition No. 06-008-M, issued April 4, 2006, which imposed the same restrictions for underinsured motorist coverage, did not retroactively invalidate one-year contractual limitations periods in policies that were already in effect. Again, in *McGraw*, the insured's claim arose before Order No. 06-008-M was issued. *Id.* at 300.

Although *McDonald*, 480 Mich 191, and *McGraw*, 274 Mich App 298, are instructive, they do not address the precise question presented here of whether Order No. 05-060-M prohibits the renewal of grandfathered policies after December 16, 2005. In both *McDonald* and *McGraw*, the insureds' claims arose before the commissioner's orders were issued. Plaintiff contends that under the automatic renewal process for her own policy, once the policy period expires and the policy is renewed, the renewed policy becomes subject to the requirements of Order No. 05-060-M. This is a misreading of Order No. 05-060-M.

Order No. 05-060-M prohibits the issuance, advertisement, or delivery of policies or riders that limit the time to file a claim or commence suit for uninsured motorist benefits to less than three years, but it unam-

biguously provides an exception where the insurer "was legally using that policy or rider form in Michigan prior to the date of this notice and order of prohibition." The order prohibits the modification of such forms, but it does not prohibit their renewal or reissuance. Indeed, the language of the order further states that an insurer is not prohibited "from continuing to use any policy form or rider that it may have been legally using in Michigan prior to the date of this notice . . . so long as such policy or rider is not revised in any respect." Moreover, the order indicates that the commissioner was "currently considering what action is appropriate with regard to those policies or riders in use before the date of this notice and order" and commented that it "*may* withdraw approval of those forms as provided in section 2236(5) at a future time." (Emphasis added.) The order contains no sunset provision or expiration date for forms currently in use, nor does it prescribe any prohibition on renewal. Plaintiff's argument is based on an attempt to read terms into the order that are not expressed, or even implied, by its plain language.

And, importantly, the order specifically states that the commissioner was not, at that time, taking any action with respect to the grandfathered policies and riders. The order further provides that future action, including withdrawal of approval, was under consideration. These provisions are clearly inconsistent with plaintiff's preferred interpretation of the order. The trial court clearly erred by ruling that defendant's one-year contractual limitations period was unenforceable.

Plaintiff also argues that her claim for uninsured motorist benefits was timely because it related back to the original complaint, which was filed within the one-year period. MCR 2.118(D) provides as follows:

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

The relation-back doctrine applies to amended pleadings and may affect the analysis of the timeliness of an action for purposes of compliance with statutes of limitations. *Doyle v Hutzel Hosp*, 241 Mich App 206, 212 n 2; 615 NW2d 759 (2000). However, defendant does not assert that plaintiff's uninsured motorist claim is untimely pursuant to a statute of limitations, but rather that it is untimely under the contractual limitations period stated in the policy. Plaintiff cites no authority for applying the relation-back doctrine of MCR 2.118(D) to contractual limitations periods. And, there is no authority for the proposition, because to apply the relation-back doctrine in this context would be inconsistent with the principle of applying private contracts in accordance with their terms as stated in unambiguous language. See *Rory*, 473 Mich at 465-468, which held that the rights and limitations contained in an uninsured motorist insurance provision are purely contractual and are to be construed employing the principles of contract construction and without reference to external statutes. See also *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 31-32; 772 NW2d 801 (2009), which held that "[a]pplication of the doctrine of equitable tolling to contractual limitations periods would be inconsistent with the deference afforded to parties' freedom to contract, including the freedom to avoid, by contract, what might otherwise be an applicable rule of law." Moreover, the policy requires the insured to present defendant written notice of a claim for uninsured motorist coverage within one year after the accident occurs. It further provides that a legal

action for uninsured motorist coverage "may not be commenced later than one year after the accident that caused the injuries being claimed, unless there has been full compliance with all the Duties After an Accident or Loss listed on page 4 of this policy and all other terms and conditions of this coverage and the policy." Assuming, arguendo, that the relation-back doctrine enabled plaintiff to avoid the one-year limitation for legal action for uninsured motorist coverage, her failure to present a written claim for that coverage to defendant within the one-year period would nonetheless bar her claim for relief. Plaintiff's claim for personal injury protection insurance benefits, and her legal action to recover the same, cannot be reasonably construed as notice of a claim for uninsured motorist benefits.

III. CONCLUSION

Plaintiff's claim for uninsured motorist coverage is barred by her policy's one-year contractual limitation provision and the trial court incorrectly held that this provision was voided by Order No. 05-060-M.

Accordingly, we reverse the trial court's order that denied Farm Bureau Insurance's motion for summary disposition.

ARATH II, INC v HEUKELS COUNTY DRAIN DISTRICT

Docket No. 288725. Submitted April 15, 2010, at Grand Rapids. Decided April 29, 2010, at 9:15 a.m.

Arath II, Inc., and Arath IV, Inc. (collectively Arath), brought an action in the Kent Circuit Court against the Heukels County Drain District and the Kent County Drain Commissioner, alleging that the design of the drain district caused flooding on its property, which is located within the drain district. Arath sought an order for superintending control to compel the drain commissioner to perform certain construction activities and argued that defendants' failure to undertake the maintenance and improvements necessary to prevent excess storm water from being diverted onto and detained on Arath's property constituted a trespass. Defendants sought summary disposition on the basis that Arath failed to follow the procedure outlined in the Drain Code, MCL 280.1 *et seq*., to petition for the repairs and improvements Arath sought. The trial court, George S. Buth, J., granted summary disposition in favor of the defendants. Arath appealed.

The Court of Appeals *held*:

Arath simply sought a court order ordering defendants to improve the Heukels Drain so that excess water no longer overflows onto Arath's property. The Drain Code provides that if Arath wants defendants to improve the drain it must first institute the filing of a petition with the drain commissioner. Only after a petition is filed and the commissioner makes a determination that the requested improvement or repair is needed may the commissioner then undertake the project. In the absence of such a determination, the drain commissioner has no authority to make any improvements to the drain. Arath failed to petition for such a determination and failed to establish that defendants had the authority to act pursuant to the Drain Code. Arath failed to state a claim on which relief could be granted. Summary disposition pursuant to MCR 2.116(C)(8) was appropriate. Because the drain commissioner has not received the authority to improve the drain in the manner sought by Arath, and remedy the trespass alleged by

Arath, it is premature to determine whether the alleged overflow of water onto Arath's property caused by defects in the drain constitutes a trespass.

Affirmed.

DRAINS — IMPROVEMENTS — REPAIRS — PETITIONS FOR IMPROVEMENTS OR REPAIRS.

The Drain Code provides that when a landowner whose property is in a drain district wants the drain to be improved or repaired, the landowner must first institute the filing of a petition with the drain commissioner; only after a petition is filed and a determination is made that the requested improvement or repair is needed may the drain commissioner undertake the project (MCL 280.1 *et seq*.).

Rhoades McKee PC (*Gregory G. Timmer*) for plaintiffs.

The Hubbard Law Firm, P.C. (by *Michael G. Woodworth* and *Mark T. Koerner*), for defendants.

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

O'CONNELL, J. Plaintiffs, Arath II, Inc., and Arath IV, Inc., appeal as of right the final order of the Kent Circuit Court granting summary disposition in favor of defendants, Heukels County Drain District (the drain district) and the Kent County Drain Commissioner, pursuant to MCR 2.116(C)(8) and (10). We affirm.

The drain district, located in Kent County, was established by a final order of determination on August 28, 1937.[1] When the drain district was established, a special assessment district was created that encompasses approximately 217.3 acres in Sections 22, 23, and 27 of Grand Rapids Township. The special assessment district is bounded on the north by Bradford Street, on the west by Leffingwell Street, on the south by Michigan Street, and on the east by East Beltline. Interstate

[1] The drain itself is known as the Heukels Drain.

96 cuts through the district, which is located immediately to the west of the East Beltline/I-96 interchange. The Kent County Drain Commissioner (drain commissioner) has jurisdiction over the district pursuant to the Drain Code, MCL 280.1 *et seq*.

Plaintiffs are related Michigan corporations.[2] Arath states in its complaint that it owns property located within the drain district. Apparently, this property is in an industrial park immediately south of I-96 and north of the Mid-Michigan Railroad tracks. There is a wetland subject to the regulatory authority of the Michigan Department of Environmental Quality (MDEQ)[3] located on part of Arath's property.

Arath filed its complaint in this case on June 6, 2008, alleging that the design of the drain district caused flooding on its property. According to Arath, the Heukels Drain diverted storm water exceeding natural flow volume and rate from the area north of I-96 through 48-inch-diameter culverts under both westbound and eastbound I-96 to Oak Industrial Court. When the water entered Oak Industrial Court, it apparently traveled south over a portion of Arath's property and through a 24-inch-diameter culvert under the Mid-Michigan Railroad tracks. From there, the water would continue to flow south to 2925 Michigan Street, a parcel of land owned by the city of Grand Rapids, and flow under Michigan Street, where an overflow structure had been installed.[4] In its complaint, Arath claimed that

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[2] Apparently James Azzar is the president of both corporations. We will refer to both corporations, collectively, as "Arath."

[3] Pursuant to Executive Order 2009-45, on October 8, 2009, the MDEQ was eliminated and the Department of Natural Resources and Environment was created in its stead. MDEQ will be used in this opinion to refer to the relevant department.

[4] This runoff eventually flowed into Middleboro Lake, located south of Michigan Street.

the culvert under the Mid-Michigan Railroad tracks and the overflow structure at Michigan Street were inadequate, causing water to be retained on Arath's property.

In its complaint, Arath first sought an order for superintending control to compel the drain commissioner to construct a 48-inch-diameter culvert under the Mid-Michigan Railroad tracks and to remove the overflow structure under Michigan Street. Arath also argued that defendants' failure to undertake the maintenance and improvements necessary to prevent excess storm water from being diverted onto and detained on Arath's property constituted a trespass on Arath's property. In its request for relief, Arath asked that the trial court "enter an Order in Plaintiffs' favor enjoining Defendants from continuing their trespass, and further Order Defendants to complete the necessary maintenance, repair and improvements more specifically identified above."

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), claiming, in pertinent part, that Arath could not seek an order for superintending control to compel the drain commissioner to act. Instead, defendants argued, the Drain Code required Arath to petition the drain commissioner to act before the drain commissioner would have the authority to make repairs and improvements to the Heukels Drain. Defendants then provided information indicating that Arath had never pursued a petition under the Drain Code to obtain work on the Heukels Drain. Douglas Sporte, the deputy drain commissioner for Kent County, noted that in November 2004, he provided Arath's attorney with the form of the petition needed to initiate a drain project pursuant to the provisions of the Drain Code, as well as a form listing the procedures

needed to accomplish drain work in accordance with the code. However, Arath never filed a petition seeking to initiate a project on the Heukels Drain. Because no petition had ever been filed, the drain commissioner never convened a board of determination to consider whether a project on the Heukels Drain would be necessary.

In 2007, Arath's president, James Azzar, apparently attempted to install a 48-inch-diameter culvert near the Mid-Michigan Railroad tracks in order to address the flooding on Arath's property. The MDEQ issued a public notice regarding the project on June 26, 2007. When the drain commissioner's office received the notice, it informed Azzar that he was required to receive a permit from the drain commissioner's office in order to continue the project and the drain commissioner's office enclosed a permit application. However, on August 21, 2007, the MDEQ refused to approve the project and denied Azzar's request for a permit to install the 48-inch-diameter culvert. In explaining its decision, the MDEQ noted that "the proposed project will have a greater adverse impact to regulated resources than is required to achieve the project purpose." Azzar petitioned for reversal of the denial, but the record does not indicate whether this petition was successful.

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), finding that summary disposition was appropriate because Arath "did not follow the law and did not file a petition with the drain commission[er]."

On appeal, Arath claims that the trial court erred by dismissing its underlying cause of action in this case. According to Arath, it was not required to file a petition with the drain commissioner before commencing this cause of action because it did not seek the repair or

maintenance of an existing drain. Instead, Arath appears to argue that because there is no "public drain" on its property, it is somehow exempt from filing a petition and, instead, is entitled to seek injunctive relief requiring defendants to repair and maintain the drain in order to prevent an overflow of storm water onto its property.

However, in its complaint, Arath indicates that it is simply seeking an injunction to force defendants to make repairs and improvements to certain portions of the Heukels Drain that it believes are necessary to prevent the overflow of storm water onto its property.[5] In claiming that defendants are "trespassing" on Arath's property by "detaining" and "diverting" excess storm water in the drainage district onto its property, Arath appears to assert that the alleged "trespass" is simply the overflow of water onto its property, as opposed to a more overt act. Although Arath presents its cause of action as a plea to protect infringement of its property rights, the relief it seeks reveals the true nature of the case: Arath simply wants the trial court to order defendants to improve the Heukels Drain so that excess water no longer overflows onto Arath's property.

However, the Drain Code, MCL 280.1 *et seq*., makes clear that when a landowner whose property is in a particular drain district wants the drain to be cleaned

[5] Notably, although Arath alleges that the Heukels Drain transverses its property, it does not argue that the drain should be moved or removed from its property. Instead, it wants the drain to be repaired and improved so that storm water does not collect on its property. Accordingly, it appears that the situation that Arath wants the trial court to address is not the transportation of water over its property, but the buildup of excess water on its property. Otherwise, Arath would have requested that the drain commissioner reroute the drain around its property, instead of simply requesting the court to require the drain commissioner to repair and improve the drain so that water flows over its property more efficiently.

or improved in some manner, that landowner, in conjunction with a certain number of other landowners whose lands would also be liable for assessment to pay for such work, should petition the drain commissioner to perform the requested work. MCL 280.191.[6] The drain commissioner can then undertake a review process, including the appointment of a three-member "board of determination" to review the proposal and providing an opportunity for a public hearing. MCL 280.191; MCL 280.72. Once the board makes a deter-

[6] MCL 280.191 states:

> When a drain or portion thereof, which traverses lands wholly in 1 county, and lands only in 1 county which is subject to assessment, needs cleaning out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway, or requires structures or mechanical devices that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relieve the flow of the drain, or needs supplementing by the construction of 1 or more relief drains which may consist of new drains or extensions, enlargements, or connections to existing drains, or needs 1 or more branches added thereto, any 5 or at least 50% of the freeholders if there are less than 5 freeholders whose lands shall be liable to an assessment for benefits of such work, may make petition in writing to the commissioner setting forth the necessity of the proposed work and the commissioner shall proceed in the same manner provided for the location, establishment, and construction of a drain. If the project includes a tiled relief drain, or the tiling of an existing open drain or any portion thereof, with a conduit a part of which has an inside diameter in excess of 36 inches or the retiling of an existing drain with a conduit, a part of which has an inside diameter in excess of 36 inches, then the petition shall comply with [MCL 280.71]. The preceding sentence shall not be applicable to the construction of bridges, culverts, and passageways. The word tiling as used in this and other sections of this act, means the laying of a conduit composed of tile, brick, concrete, or other material. . . . After the board of determination determines the necessity for the work, as provided in [MCL 280.72], the commissioner shall, as soon as practicable after the final order of determination prescribed in [MCL 280.151] has been filed by him, proceed as provided in [MCL 280.151 to 280.161]. If the apportionment is the same as the last recorded apportionments, no day of review is necessary, but in other cases the commissioner shall proceed as provided in sections 151 to 161, including the notice of and the holding of a day of review.

mination regarding the necessity of the proposed improvement or repair, MCL 280.72(3), "any person feeling aggrieved by the determination may institute an action in the circuit court for the county in which the real property is located for a determination of necessity," MCL 280.72a. If a determination is made that a repair or improvement is needed, the drain commissioner may then undertake the project, apportioning project costs among those benefiting from it. MCL 280.151; MCL 280.191. See also *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 284-286; 745 NW2d 513 (2007).

Arath does not dispute that its property is located in the drain district. Further, in its complaint, it notes that "[t]he Drain Commissioner is legally obligated to inspect, maintain, repair and improve the Heukels Drain pursuant to the Drain Code" and specifically requests that defendants "comply with its [sic, their] obligations under the Drain Code . . . ." However, the Drain Code provides that if Arath wants defendants to improve the drain, it must first institute the filing of a petition with the drain commissioner. Only after a petition is filed and a determination is made that the requested improvement or repair is needed may the drain commissioner then undertake the project. Arath has not participated in filing a petition to request improvements to the Heukels Drain, nor has it established that such a petition has been filed or that a determination has otherwise been made that would permit the drain commissioner to make the improvements to the Heukels Drain that Arath desires. In the absence of such a determination, the drain commissioner has no authority to make any improvements to the Heukels Drain. Accordingly, although Arath claims that defendants breached their duty to maintain, repair, and improve the drain in the manner set forth in the Drain Code, it has failed to establish that defendants even had the

authority to act pursuant to the Drain Code. Arath failed to state a claim on which relief could be granted, and summary disposition was appropriate pursuant to MCR 2.116(C)(8).[7]

In *Bosanic*, the plaintiffs sought recovery from the county drain commissioner for damages arising from the flooding of their homes. *Bosanic*, 277 Mich App at 278. In particular, the plaintiffs claimed that the drain commissioner was, in part, responsible for the undersized drain system in their subdivision that, they claimed, caused the flooding. *Id.* The *Bosanic* Court concluded that recovery was precluded under MCL 691.1417 because before the flooding occurred, no petition had been filed or determination made directing the drain commissioner to " 'repair, correct, or remedy' " any problem in the drain system. *Bosanic*, 277 Mich App at 285. "In the absence of those prerequisite actions, defendant had no authority to address the defect in the drain system." *Id.* at 285-286.

Admittedly, the *Bosanic* Court addressed whether the plaintiffs could seek damages from the drain commissioner under an exception to governmental immunity set forth in MCL 691.1417. However, the rationale set forth by the *Bosanic* Court's decision is also applicable to this case: The Drain Code limits the authority of a drain commissioner to remedy defects to a drain by requiring outside actors to undertake prerequisite actions before providing the drain commissioner with authority to act.

In its complaint, Arath also requested that the trial court determine whether the detention and diversion of excess storm water on its property constitutes a tres-

[7] Because summary disposition was appropriate pursuant to MCR 2.116(C)(8), we need not consider whether summary disposition was appropriate pursuant to MCR 2.116(C)(10).

pass. Yet again, it appears that the "trespass" to which Arath refers is the overflow of excess water onto Arath's property caused by poorly designed culverts in the Heukels Drain.[8] Further, Arath seems to indicate that if the drain were repaired and improved, the alleged trespass would cease. Accordingly, it appears that because the drain commissioner has not yet even received the authority to repair and improve the Heukels Drain in the manner sought by Arath (and, hence, remedy the trespass alleged by Arath), a determination whether the alleged overflow of water onto Arath's property caused by defects in the Heukels Drain constitutes a trespass would be premature.

In addition, MCL 280.195 permits the drain commissioner to obtain any right-of-way from Arath that it might need in order to undertake a project to maintain or improve the Heukels Drain. Therefore, if the drain commissioner were to receive the authority to improve and repair the Heukels Drain in the manner sought by Arath, it would have the authority to obtain any necessary right-of-way in the manner set forth in the Drain Code.

Affirmed.

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[8] When setting forth its allegation of trespass in its complaint, Arath described the nature of the trespass in question as the "detaining" and "diverting" of excess storm water onto its property, indicating that it was not challenging the normal flow of water within the Heukels Drain, but instead was claiming that a trespass occurred when water overflowed the drain and settled on Arath's property.

MIDWEST BUS CORPORATION v DEPARTMENT OF TREASURY

Docket No. 288686. Submitted March 4, 2010, at Lansing. Decided March 16, 2010. Approved for publication May 4, 2010, at 9:00 a.m.

Midwest Bus Corporation, formerly known as Midwest Bus Rebuilders Corporation, brought an action in the Court of Claims against the Department of Treasury and the state treasurer, seeking the refund of single business taxes paid for certain tax years. Plaintiff claimed that for purposes of its single business tax base its sales of bus parts that were installed on buses when the plaintiff rehabilitated or remanufactured the buses should have been allocated to the states to which the buses were delivered after the rehabilitation work. Defendants claimed that the sales were incident to the rehabilitation work and should be allocated to Michigan, where the work was performed. The Court of Claims, James R. Giddings, J., granted summary disposition for defendants, agreeing with defendants that the predominate purpose of the bus rehabilitation contracts at issue was the provision of the rehabilitation service and that the service of actually installing the bus parts was not merely incident to the sale of the parts. Plaintiff appealed.

The Court of Appeals *held*:

1. The Single Business Tax Act, MCL 208.1 *et seq*., repealed effective December 31, 2007, distinguishes between two types of sales for purposes of computing a taxpayer's tax base. The first type, sales of tangible personal property, are considered "in this state" if the property is shipped or delivered to any purchaser within this state. The second type, sales other than sales of tangible personal property, are considered "in this state" if either the business activity is performed in Michigan or, if performed in Michigan and elsewhere, based on costs of performance, the greater proportion of the business activity is performed in Michigan. The transactions at issue in this case are mixed transactions that involve sales of tangible personal property and sales other than sales of tangible personal property.

2. A six-part incidental-to-service test is applied to determine whether a transaction should be considered a sale of tangible personal property or a sale of a service, i.e., a sale other than a sale of tangible personal property, when a business relationship in-

volves both the provision of services and the transfer of tangible personal property. The test looks objectively at the entire transaction to determine whether it was principally a transfer of tangible personal property or a provision of a service. A court, in determining whether the transfer of tangible personal property was incidental to the rendering of personal or professional services, should examine (1) what the buyer sought as the object of the transaction, (2) what the seller or service provider was in the business of doing, (3) whether the goods were provided as a retail enterprise with a profit-making motive, (4) whether the tangible goods were available for sale without the service, (5) the extent to which intangible services have contributed to the physical item that was transferred, and (6) any other factors relevant to the particular transaction. Consideration of these factors in this case indicates that the Court of Claims correctly concluded that the remanufacturing contract primarily considered by the Court of Claims, as well as other remanufacturing contracts like it, are predominately for the provision of a service—a rehabilitation service. These sales are, for purposes of the sales factor used to determine the tax base, sales other than sales of tangible personal property and, because the services were provided in Michigan, the sales were in this state for purposes of MCL 208.53.

3. The sale of the bus parts was incidental to the service of actually performing the rehabilitation of the buses, and that service was provided in Michigan.

4. The Court of Claims did not abuse its discretion when it determined that plaintiff was not entitled to an award of sanctions under MCR 2.313(C) for defendants' failure to admit, pursuant to plaintiff's request for an admission under MCR 2.312(A), with regard to a matter that the parties voluntarily settled before the hearing on the parties' cross-motions for summary disposition.

Affirmed.

TAXATION — SINGLE BUSINESS TAX ACT — SALES — SERVICES — SALES INCIDENTAL TO SERVICES.

An incidental-to-service test may be applied to determine, for purposes of establishing a taxpayer's tax base under the Single Business Tax Act, whether a business transaction that involved both the transfer of tangible personal property and the provision of a service involved a transfer of tangible personal property that was incidental to the rendering of personal services; the test examines what the buyer sought as the object of the transaction, what the seller or service provider was in the business of doing, whether the goods were provided as a retail enterprise with a

profit-making motive, whether the goods were available for sale without the service, the extent to which intangible services have contributed to the physical item that was transferred, and any other relevant factors (MCL 208.1 *et seq*., repealed effective December 31, 2007).

Timothy J. Rudolph for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heidi L. Johnson-Mehney*, Assistant Attorney General, for defendants.

Before: FITZGERALD, P.J., and CAVANAGH and DAVIS, JJ.

CAVANAGH, J. Plaintiff appeals as of right a Court of Claims order granting defendants' motion for summary disposition in this tax dispute involving the Single Business Tax Act (SBTA), MCL 208.1 *et seq*., repealed effective December 31, 2007. We affirm.

Plaintiff filed its declaratory judgment action following an audit covering single business tax years 1999 through 2004, and the receipt of tax due bills. Plaintiff averred that it was in the business of selling bus parts and remanufacturing buses. Plaintiff alleged that its remanufacturing contracts with various transit authorities involved primarily the sale of tangible personal property—bus parts, regardless of the fact that charges for plaintiff's installation of those parts were also included in the contracts. Accordingly, revenue from the sales at issue, which gave rise to the disputed tax due bills, should have been allocated to the destinations where the parts were shipped, as sales of tangible personal property under MCL 208.52, and not allocated to Michigan, under MCL 208.53, where the installation services were performed. Thus, plaintiff alleged, it was entitled to a refund of the overpayment of taxes.

Subsequently, cross-motions for summary disposition were filed and the parties agreed that the matter was controlled by the holding in *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004). Plaintiff's legal position remained the same. Defendants, however, argued that plaintiff's business of remanufacturing buses did not merely involve the sale of bus parts. Rather, plaintiff "remanufactured" buses, which meant that the service of actually installing the bus parts was not merely incidental to the sale of the parts—the rehabilitation service was the predominant purpose of the business contracts. Accordingly, revenue from the disputed sales is properly allocated to Michigan, under MCL 208.53, where the services were performed and plaintiff was not entitled to any refund or other relief. After consideration of the "incidental to service" six-part test set forth in *Catalina Mktg Sales Corp*, the Court of Claims agreed with defendants and granted their motion for summary disposition. This appeal followed.

First, plaintiff argues that the revenue it received from remanufacturing contracts like the one it had with the Massachusetts Bay Transportation Authority (MBTA) is predominantly for the sale of tangible personal property and should be allocated, under MCL 208.52, to destinations outside Michigan. We disagree. This Court reviews de novo a decision by the Court of Claims on a motion for summary disposition and issues requiring statutory interpretation. *Herald Wholesale, Inc v Dep't of Treasury*, 262 Mich App 688, 693; 687 NW2d 172 (2004).

The single business tax (SBT) was explained in *Trinova Corp v Dep't of Treasury*, 433 Mich 141; 445 NW2d 428 (1989), as follows:

> The single business tax is a form of value added tax, although it is not a pure value added tax. "Value added is

> defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale." In short, a value added tax is a tax upon business activity. The act employs a value added measure of business activity, but its intended effect is to impose a tax upon the privilege of conducting business activity within Michigan. It is not a tax upon income. [*Id*. at 149 (citations omitted).]

The "value added" concept has been described as "a means of consistently measuring the size of business firms and other economic enterprises comprising the total economy . . . ." Haughey, *The economic logic of the single business tax*, 22 Wayne L R 1017 (1976). "[T]he measure of the tax is the use of labor and capital." Kasischke, *Computation of the Michigan single business tax: Theory and mechanics*, 22 Wayne L R 1069, 1070 (1976).

The computation of the SBT involves several steps, but begins with calculation of the taxpayer's tax base. "The tax base computation is designed to calculate the contribution each business makes to the total economy; in economic terms, this contribution is the economic size of the business." *Id*. "Each business will pay a tax proportionate to its economic size." *Id*. If the taxpayer's business activities are confined to Michigan, the entire tax base is allocated to Michigan and subject to taxation under the SBTA. See MCL 208.40. If the taxpayer's business activities are taxable both in Michigan and another state, only a certain part of its tax base is allocated to Michigan because a state may not tax value earned outside of its borders. See MCL 208.41; *Trinova Corp*, 433 Mich at 151 (citation omitted).

The SBTA provides a formula for apportioning a tax base between two or more taxing states and the formula takes into consideration three factors: property, payroll, and sales. *Id*. at 151-152; see, also, MCL 208.45a. At

issue in this case is the sales factor. Under MCL 208.51(1), the sales factor is a fraction that has as its numerator the taxpayer's total sales in this state, and as its denominator "the total sales of the taxpayer everywhere during the tax year." The SBTA distinguishes between two types of sales: sales of tangible personal property and sales "other than sales of tangible personal property . . . ." MCL 208.52 and MCL 208.53. For purposes of the sales factor, under MCL 208.52(b), sales of tangible personal property are considered "in this state," if "the property is shipped or delivered to any purchaser within this state . . . ." And, under MCL 208.53, sales, "other than sales of tangible personal property," are considered "in this state" if either the business activity is performed in Michigan or if performed in Michigan and elsewhere, "based on costs of performance, the greater proportion of the business activity is performed in this state . . . ." Sales "in this state" are placed in the numerator of the sales factor, while sales not considered "in this state" are placed in the denominator.

On appeal the parties agree that the transactions at issue in this case are "mixed transactions" in that they involve elements of both sales of tangible personal property and sales other than sales of tangible personal property. That is, bus parts were sold, but so was the service of installing the bus parts. However, plaintiff claims that the sale of bus parts was the primary purpose of the transactions and that the bus parts were "sold," for purposes of the sales factor, when each completely rehabilitated bus was delivered back to its out-of-state owner. Thus, the "sale" of tangible personal property was not "in this state" and belongs in the denominator of the sales factor. Defendants disagree and claim that plaintiff's complete rehabilitation of each bus was the primary purpose of the transaction

and, because this business activity was performed in Michigan, the "sale" was "in this state" and belongs in the numerator of the sales factor. The SBTA is silent with regard to these types of transactions. But the parties agree that the six-part incidental-to-service test set forth in *Catalina Mktg Sales Corp* is applicable to determine whether a transaction should be considered a sale of tangible personal property or a sale of a service, i.e., a sale other than a sale of tangible personal property.

In *Catalina Mktg Sales Corp*, the issue was whether, under MCL 205.52 of the General Sales Tax Act, a retail sales tax should be imposed in a transaction that involved both the provision of services and the transfer of tangible personal property because sales tax does not apply to sales of services. The *Catalina* Court, citing *Univ of Mich Bd of Regents v Dep't of Treasury*, 217 Mich App 665; 553 NW2d 349 (1996), adopted "the 'incidental to service' test for categorizing a business relationship that involves both the provision of services and the transfer of tangible personal property as either a service or a tangible property transaction." *Catalina Mktg Sales Corp*, 470 Mich at 24. The *Catalina* Court explained that the test "looks objectively at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or a provision of a service." *Id*. at 24-25. And "[i]n determining whether the transfer of tangible property was incidental to the rendering of personal or professional services, a court should examine what the buyer sought as the object of the transaction, what the seller or service provider is in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the tangible goods were available for sale without the service, the extent to which intangible services have contributed to the value

of the physical item that is transferred, and any other factors relevant to the particular transaction." *Id*. at 26. In our case, the parties agree that the *Catalina* factors are applicable, but their analysis of each factor significantly differs. We first turn to plaintiff's argument.

Plaintiff argues that its remanufacturing business involves principally a transfer of tangible personal property. Plaintiff claims that its contract with the MBTA proves its contention. The contract required plaintiff to replace 427 parts on each of the MBTA's 125 transit buses, and also set forth a list of 164 parts that plaintiff should replace on those same buses if needed. Thus, plaintiff argues, "[c]learly, these 552 items of tangible personal property are the focus of the contract and any labor involved in their installation is incidental to the tangible personal property." And, "the cost of tangible personal property in performing the contractual obligations was 5.086 times the cost of labor." This evidence "all supports a ruling that tangible personal property is the 'substance of the transaction' . . . . Therefore, the revenue should be sourced out of Michigan."

With regard to the specific factors, plaintiff appears to argue that (1) what the MBTA sought as the object of the transaction was brand new bus parts, (2) plaintiff is in the bus parts business, (3) plaintiff's "profits are dependent upon bus parts sales," (4) "while the [bus] parts are available without the services, capital grant funding is available for a rehabilitation project of a fleet of buses and is not available if the transit authority simply buys the parts and replaces them," (5) it has not been established that any services, other than the installation of parts, increase the value of the buses beyond the value of the replaced parts, themselves, and (6) "Buy America requirements," as well as the fact that

bus remanufacturing is a capital project eligible for capital grants, support the conclusion that such transactions should be treated as the transfer of tangible property—bus parts.

To the contrary, defendants argue, the MBTA contract "conclusively establishes that the transfer of parts is incidental to the provision of [plaintiff's] rehabilitation service." The title of the contract itself—"Technical Specification for Nova Bus Rehabilitation"—proves that contention. The object of the transaction, as far as the MBTA was concerned, was for its buses to be "rehabilitated." The contract defines "rehabilitation" to include (1) "the restoration of items to new, as new, or reconditioned functionally, as the case may be, to the original manufacturer's recommendations," (2) "the complete disassembly of an assembly or sub-assembly into its component parts, or, to the degree defined in the individual sections of the Specifications," (3) "[t]he cleaning, inspection and qualification for repair or replacement of the component parts," and (4) "[t]he reassembly of the component parts into complete assemblies." Thus, contrary to plaintiff's claims, the contract required that plaintiff perform extensive servicing of the buses.

With regard to the six specific factors, defendants appear to argue that (1) what the MBTA sought as the object of the transaction was the service of having its buses rehabilitated, i.e., overhauled, (2) plaintiff is in the business of remanufacturing or rehabilitating buses, as well as supplying bus parts because parts can be ordered and sent to a customer instead of having plaintiff perform the installation service, (3) defendants contend that this factor is not applicable because it "is clearly intended to help determine whether a retail sale that is taxable under the General Sales Tax Act took place," (4) bus parts are

available for sale by plaintiff without the service but that is not "remanufacturing," (5) the rehabilitation service necessarily contributes significantly to the value of the bus parts because the MBTA contracted to have its buses rehabilitated and thus, absent their installation, the parts would have been worthless to the MBTA, and (6) no other factors were relevant to the particular transaction.

After objectively considering the entire transaction, *Catalina Mktg Sales Corp*, 470 Mich at 24-25, we agree with the Court of Claims and conclude that the remanufacturing contract at issue, as well as other remanufacturing contracts like it, are predominantly for the provision of a service—a rehabilitation service. Thus, for purposes of the sales factor, these are sales "other than sales of tangible personal property" and, because the services were provided in Michigan, the sales were "in this state" under MCL 208.53. This conclusion was reached in light of the following considerations.

First, we reviewed the MBTA remanufacturing contract. The contract clearly states that it is for a "midlife overhaul, (i.e., Rehabilitation)" of transit buses. In that regard, the contract provides:

> This overhaul project shall include repairs or replacement of the components utilized in the following systems and/or assemblies: wheelchair lift, underbody structure, front and rear axle assemblies, interior and exterior body, wiring and piping, steering, suspension, signage, brakes, fuel system, kneeling system, and air system. The project also includes painting the bus and making any other miscellaneous repairs needed to correct broken or worn components.

The contract defines several terms, but three are especially relevant in this case:

Rehabilitation:

a. Shall mean the restoration of items to new, as new, or reconditioned functionally, as the case may be, to the original manufacturer's recommendations.

b. Shall mean the complete disassembly of an assembly or sub-assembly into its component parts, or, to the degree defined in the individual sections of the Specifications.

c. The cleaning, inspection and qualification for repair or replacement of the component parts.

d. The reassembly of the component parts into complete assemblies

* * *

Remanufacture: To recondition to O.E.M. [original equipment manufacturer] Specifications. The component or system in question does not necessarily need to be replaced with an all new component, but may be replaced with a rebuilt component that meets "as new" OEM specifications, or, the used/old component may be removed and reconditioned itself to meet "as new" OEM specifications.

Repair or Replacement — As Required or As Necessary:

Repair or Replacement of components or subsystems "as required" or "as necessary" requires the contractor bring the part, component or subsystem back to new OEM functional specifications. If the part cannot be repaired and brought back up to OEM specifications it must be replaced. The part may be replaced with either a remanufactured or a new part.

Turning to the section of the contract labeled "Detailed Scope of Work," we note the following examples[1] of the types of work plaintiff was to perform: (1) remove

[1] The "Detailed Scope of Work" section is several pages in length and we have only selected some examples of the types of work plaintiff was expected to perform in satisfaction of the contract.

engine/transmission cradle assembly, and inspect and clean the engine cradle; (2) thoroughly clean air intake system and replace particular parts with new parts; (3) thoroughly steam-clean engine compartment and replace particular parts with new parts; (4) inspect and service OEM fire alarm, check all hard tubing for cracks, dents, and poor solder connections, and replace sensors; (5) inspect and repair the driveshaft assembly to bring to new OEM condition, including rebuilding the propeller shaft with new universal joints, dust cap, and grease fittings; (6) remove, inspect, and clean the air tanks; (7) completely rebuild the air dryer to OEM specifications or replace with a new unit; (8) clean, inspect, and pressure test the radiator and charge air cooler assemblies; (9) remove and clean the front and rear axle assemblies and perform magnaflux or other Authority-approved nondestructive structural testing, and (a) return all front axle components to new OEM specifications, and (b) completely rebuild the differential carrier to new OEM specifications; and (10) rebuild the steering column using new U-joints, horn ring, contacts, tilt steering gears, and all levers, pins and bearings, but if rebuilding could not be preformed to OEM specifications, the steering column was to be replaced with a new one.

Clearly, the contract is not a contract merely for the purchase of bus parts. Rather, the contract provisions make several references, for example, to plaintiff's disassembling, removing, repairing, inspecting, reconditioning, rebuilding, replacing, restoring, painting, servicing, cleaning, testing, and reassembling various components and parts of the buses. Although replacement of certain bus parts was included in the remanufacturing contract, the purchase of bus parts was not an end in and of itself but a means, albeit a partial means, by which to fulfill the contractual objective of plaintiff's

customer to have its buses completely rehabilitated. That is, the sale of the bus parts was incidental to the service of actually performing the rehabilitation of the buses.

Second, we reviewed the SBTA, including the meaning of "business activity" because the SBT is a tax upon business activity. See *Trinova*, 433 Mich at 149. Under MCL 208.3(2), "[b]usiness activity" "means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction."

In this case, it is arguable that even if the sale was a sale of tangible personal property—bus parts—there was "a transfer of legal or equitable title" to the bus parts when they were incorporated into the purchaser's bus, i.e., as each part was installed into the bus, each part was delivered to the purchaser and became an integrated component of the bus. See MCL 208.3(2), 208.52(b). And because each installation occurred in Michigan, each sale was "in this state." See *id*. That the completely rehabilitated buses were then delivered to out-of-state owners, in compliance with the remanufacturing contract, does not change the analysis. Thus, for purposes of the sales factor, the sale would be placed in the numerator whether it was a sale of tangible personal property or the sale of a service. MCL 208.51(1). The situation at issue here—remanufacturing—is not analogous to manufacturing a product as plaintiff had

argued in the Court of Claims. For example, when an automobile manufacturer installs a component part during the manufacture of a vehicle, it is installing the component into its own vehicle. Until it is sold, the automobile, as well as all of its component parts, are owned by the manufacturer. Here, plaintiff is installing its bus parts into used buses that plaintiff does not own. In any case, we conclude that the sale of the bus parts was merely incidental to the service of actually performing the rehabilitation of the buses and that the service was provided in Michigan.

Third, we considered the six-factor incidental-to-service factors set forth in *Catalina Mktg Sales Corp*. With regard to the first factor—what the buyer sought as the object of the transaction—we conclude that the buyer sought the service of having its buses rehabilitated. Plaintiff was to disassemble, remove, repair, inspect, recondition, rebuild, replace, restore, paint, service, clean, test, and reassemble various components and parts of the buses so they were, as the trial court described, "almost like new," or made to meet the standards of a newly manufactured bus. The object of the transaction was not merely to purchase "brand new bus parts" as plaintiff has argued.

With regard to the second factor—what the seller or service provider is in the business of doing—we note that plaintiff is in both the retail business of selling bus parts and the business of remanufacturing buses. However, with regard to the contract at issue, as well as similar types of contracts, plaintiff was not acting as a retailer of bus parts but was actually selling the service of rehabilitating buses, i.e., disassembling, removing, repairing, inspecting, reconditioning, rebuilding, re-

placing, restoring, painting, servicing, cleaning, testing, and reassembling various components and parts of the buses.

The third factor—whether the goods were provided as a retail enterprise with a profit-making motive—may be more applicable in the context of whether a retail sale is taxable under the General Sales Tax Act. But to the extent it is applicable here, we agree with the Court of Claims conclusion that, although the bus parts were available for purchase alone, in the context of a rehabilitation contract, the provision of the bus parts was merely a means to accomplish the contractual objective of rehabilitating the buses. In a sense, plaintiff was acting as a consumer of bus parts, not a retailer of bus parts. The same is true with regard to the fourth factor—whether the tangible goods were available for sale without the service. Plaintiff is in the business of selling bus parts, but it also sells rehabilitation services that require the installation of bus parts as well as the provision of other services to meet its contractual obligations.

Similarly, with regard to the fifth factor—the extent to which intangible services have contributed to the value of the physical item that is transferred—again, we agree with the Court of Claims conclusion that "there would be no remanufacturing but for the service." The value sought by plaintiff's remanufacturing customer includes all aspects of rehabilitation services, not just bus parts. As plaintiff admits, "capital grant funding is available for a rehabilitation project of a fleet of buses and is not available if the transit authority simple buys the parts and replaces them." And we agree with the Court of Claims' conclusion with regard to the sixth factor that no other factors are relevant to the particular transaction. Thus, the Court of Claims properly held that the remanufac-

turing contract at issue, as well as other remanufacturing contracts like it, are predominantly for the provision of a service and are allocated to Michigan, where the service was performed, under MCL 208.53. Accordingly, we affirm the grant of summary disposition in defendants' favor.

Next, plaintiff argues that defendants did not meet their burden of proof that revenue from remanufacturing projects was predominantly from services for projects completed in plaintiff's fiscal years ending in January 2002 through January 2005. But it appears that the Court of Claims, as well as the parties for at least some time, were operating under the understanding that the MBTA contract was representative of other remanufacturing contracts plaintiff was a party to in those years. However, in response to defendants' motion for summary disposition, plaintiff argued that some of the terms of those other contracts were not similar to the MBTA contract. At oral argument, the Court of Claims indicated that it would consider a motion for reconsideration with regard to fiscal years ending in January 2002 through January 2005 if plaintiff provided contracts that were significantly different from the MBTA contract. The Court of Claims also included that proviso in its order, granting plaintiff 21 days to file such a motion. Plaintiff did not file a motion for reconsideration. Accordingly, this issue was not properly preserved for our review. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

Next, plaintiff argues that it is entitled to an award of sanctions under MCR 2.313(C) because defendants failed to admit that plaintiff was entitled to a refund of SBT for the fiscal years ending in January of 2000 and 2001. A trial court's decision on a motion for sanctions

based on the failure to admit is reviewed for an abuse of discretion. See *Phinisee v Rogers*, 229 Mich App 547, 561-562; 582 NW2d 852 (1998).

Pursuant to MCR 2.312(A), a party in a civil case may request certain admissions from the other party before trial. And MCR 2.313(C) provides that "[i]f a party denies . . . the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves . . . the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees." Here, plaintiff requested such sanctions on the ground that defendants failed to admit that plaintiff's SBT returns filed for fiscal years ending in January of 2000 and 2001 were from the sale of bus parts entitling plaintiff to a refund. This was an allegation set forth in plaintiff's amended complaint. However, the parties voluntarily settled this matter before the hearing on the cross-motions for summary disposition and, obviously, before this case was summarily dismissed. Therefore, an award of sanctions under MCR 2.313(C) was not warranted.

In *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413; 551 NW2d 698 (1996), our Supreme Court explained that admissions under MCR 2.312 are more a matter of civil procedure because an admission conclusively establishes the admitted facts " 'and the opposing side need not introduce evidence to prove the facts.' " *Id*. at 420, quoting 2 Jones, Evidence (6th ed), § 13C:14, p 310 (November 1995 supp). "A request for admission is not a typical discovery device, however, because the purpose 'is not to discover facts but rather to establish some of the material facts in a case without the necessity of formal proof at trial . . . so that issues which are disputed might be clearly and succinctly presented to

the trier of facts.' " *Id*. at 420 n 6, quoting 23 Am Jur 2d, Depositions and Discovery, § 314, p 613. The *Radtke* Court further explained that these judicial admissions are formal concessions " 'that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' " *Id.* at 420, quoting 2 McCormick, Evidence (4th ed), § 254, p 142. In this case, because the disputed issue was settled before final judicial disposition, plaintiff was not required to prove the allegation by further litigation and, therefore, was not entitled to "expenses incurred in making that proof" within the contemplation of MCR 2.313(C). Thus, the Court of Claims did not abuse its discretion when it denied plaintiff's request for sanctions under MCR 2.313(C).

Finally, plaintiff argues that "the United States' Constitution prohibits ruling upholding the department's assessments." Although unclear, it appears that plaintiff is claiming (1) a due process violation on the ground that it "has been forced to pay almost $80,000 in taxes and penalties pursuant to irrational and arbitrary assessments," and (2) a violation of the Commerce Clause apparently on the ground that defendants' interpretation of the relevant statutes created an internal and external inconsistency. These claims were not raised before, addressed, or decided by the Court of Claims; therefore, they are not properly preserved for appellate review and we decline to address them. See *Walters*, 481 Mich at 387.

Affirmed.

WOODINGTON v SHOKOOHI

Docket No. 288923. Submitted March 2, 2010, at Lansing. Decided May 4, 2010, at 9:05 a.m.

Cheri L. Woodington brought an action in the Saginaw Circuit Court seeking a judgment of divorce from Kamran Shokoohi. The trial court, Robert L. Kaczmarek, J., entered a judgment of divorce. Plaintiff appealed and defendant cross-appealed.

The Court of Appeals *held*:

1. The trial court failed to provide its analysis or reasoning regarding its decisions to award plaintiff alimony in gross and deny plaintiff's request for spousal support, therefore the Court of Appeals must reverse and remand to the trial court with instructions to make findings of fact appropriate for judicial review.

2. The trial court's determination that the real property that defendant purchased on Sawmill Creek was not a marital asset was not clearly erroneous and must be affirmed.

3. The trial court abused its discretion by denying plaintiff's discovery request for the production of the business records of the professional corporation that employs defendant. The matter must be remanded to the trial court to enable plaintiff to examine the records sought in the subpoena. After examining the records subject to an appropriate protective order, plaintiff may move for appropriate relief on the basis of information in the records that could lead to a different outcome in regard to the determination concerning defendant's interest in the professional corporation as a marital asset.

4. The trial court failed to make relevant findings of fact regarding the value of certain disputed items of marital property. This precludes meaningful review of whether the trial court's findings were clearly erroneous and whether its division of property constituted an abuse of discretion. The trial court failed to make findings regarding a 2007 GMC Yukon, a Saginaw Federal Credit Union account and a Chase Bank account, defendant's 401(k) account with the professional corporation, and a Mercedes vehicle. The trial court did not fail to make relevant findings regarding a Chemical Bank primevest account and did not clearly

err in holding that the account was not a marital asset and belonged primarily to defendant's sister. The trial court's failures to make findings regarding the relevant factors for dividing property and to assign a value to several assets or determine the appropriate date for valuation prevents the Court of Appeals from determining if the marital division was equitable. The matter must be remanded to the trial court for adequate findings of fact.

5. The trial court failed to explain its decision to award plaintiff less than half of the amount of attorney fees she requested, therefore, there is no basis for determining whether the award represented an abuse of discretion. The error was not harmless. The matter must be remanded to the trial court for appropriate findings.

6. There is no merit to defendant's argument that the trial court properly denied plaintiff's request for an expert witness fee because the court gave no credence to the expert's opinion. No authority was presented to support the argument that an award of costs for an expert's fee is in any way to be tied to the party's success regarding the matter on which the expert testified.

7. The prenuptial agreement of the parties is ambiguous. The phrase "the parties specifically agree and state that this Agreement is intended to waive rights upon death and is not made in contemplation of any divorce" does not unambiguously disclaim application of the agreement in the event of a divorce. At least two interpretations of the agreement are possible: (1) the prenuptial agreement was not intended to govern the division of assets in a divorce; and (2) the agreement should govern, or at least guide, the division of assets in a divorce if such provisions are legally enforceable. The matter must be remanded to the trial court to resolve the ambiguity. On remand, if the trial court determines that the parties intended for the agreement to govern division of property in a divorce, it should further consider the meaning of the term "contribution" as used in the agreement in reference to assets acquired during the marriage. The trial court may also address plaintiff's arguments that the prenuptial agreement should be set aside on the basis of changed circumstances.

8. The judgment must be affirmed as it pertains to the Sawmill Creek property and the Chemical Bank primevest account. The case must be remanded to the trial court for further findings and proceedings regarding the decision to award plaintiff alimony in gross in lieu of spousal support, discovery of the business records of defendant's employer, the trial court's overall division of prop-

erty and the valuation of certain specific assets, the award of attorney fees to plaintiff, and the interpretation of the prenuptial agreement with respect to divorce.

Affirmed in part, reversed in part, and remanded.

Braun Kendrick Finkbeiner P.L.C. (by *Jamie Hecht Nisidis*) for plaintiff.

Skinner Professional Law Corporation (by *David R. Skinner*) for defendant.

Before: K. F. KELLY, P.J., and SAAD and WHITBECK, JJ.

SAAD, J. Plaintiff, Cheri Woodington, appeals the trial court's judgment of divorce. She argues that the trial court made inadequate findings of fact in regard to the value of marital property, the date of valuation, and the status of certain assets as marital or separate property. She also raises issues concerning discovery, spousal support, and attorney fees. Defendant, Kamran Shokoohi, cross-appeals and contends that the trial court erred by failing to divide the property in accordance with the parties' prenuptial agreement. We affirm some aspects of the trial court's judgment; however, because the inadequacy of the trial court's findings on several of these matters precludes meaningful appellate review, we remand for further proceedings.

I. SPOUSAL SUPPORT

Plaintiff argues that the trial court erred by awarding her alimony in gross in lieu of the spousal support she sought. She also contends that the trial court failed to make findings of fact in support of this decision. We find that the trial court's failure to make relevant findings precludes review of this decision, and we remand to the trial court for further findings.

This Court reviews a trial court's award of spousal support for an abuse of discretion. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court's findings of fact relating to an award of spousal support are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

" 'In deciding a divorce action, the circuit court must make findings of fact and dispositional rulings.' " *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996) (citations omitted). This Court must first review the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). Findings of fact, such as a trial court's valuation of particular marital assets, will not be reversed unless clearly erroneous. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made. *Id.*; *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007). Special deference is given to the trial court's findings when they are based on the credibility of the witnesses. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). The determination of the proper time for valuation of an asset is in the trial court's discretion. *Gates v Gates*, 256 Mich App 420, 427; 664 NW2d 231 (2003). If the trial court's findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks*, 440 Mich at 151-152. "The court's dispositional ruling should be affirmed unless this Court is left with the firm

conviction that the division was inequitable." *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

Plaintiff sought spousal support in the amount of $55,000 annually (rounded to $4,600 monthly) payable until the parties' youngest child began attending high school, which would enable plaintiff to continue her status as a full-time, stay-at-home mom until the children completed middle school. Defendant stated in his trial brief that he would be willing to pay spousal support in the amount of $55,000 per year for two years.

The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances of the case. *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). Among the factors that a court should consider are (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and the amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay support; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the parties' prior standard of living and whether either is responsible for the support of others; (11) the contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Id.* at 726-727.

Plaintiff says that the trial court abused its discretion because it essentially denied her spousal support, and opted instead to award her alimony in gross, "a

division of property."[1] The trial court did not explain its reasons for awarding alimony in gross, its reasons for awarding the specific amount of alimony in gross, or its reasons for denying plaintiff's request for periodic spousal support subject to modification under MCL 552.28. Accordingly, we are unable to discern why the court believed that this decision was appropriate for the parties' circumstances. The trial court could have ordered spousal support or an award of property called "alimony in gross" but, to support its dispositional ruling, the court was required to make findings of fact that are susceptible to appellate review. Because the trial court failed to provide its analysis or reasoning regarding its decision to award alimony in gross and deny plaintiff's request for spousal support, we must reverse and remand with instructions that the trial court make findings of fact appropriate for judicial review.

II. SAWMILL CREEK PROPERTY

Plaintiff maintains that the trial court erred by finding that the real property defendant purchased on Sawmill Creek was not a marital asset. We disagree.

We review for clear error a trial court's findings of fact regarding whether a particular asset qualifies as marital or separate property. See *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). Findings of fact are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Ackerman v Ackerman*, 197

[1] *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). We note that the holding in *Staple* is inapplicable because *Staple* applies "to judgments entered pursuant to the parties' own negotiated settlement agreements, not to alimony provisions of a judgment entered after an adjudication on the merits." *Id*. at 569.

Mich App 300, 302; 495 NW2d 173 (1992). We accord special deference to a trial court's factual findings that were based on witness credibility. *Draggoo*, 223 Mich App at 429.

A "trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets." *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Marital assets are those that came "to either party by reason of the marriage . . . ." MCL 552.19. Generally, marital assets are subject to being divided between the parties, but separate assets may not be invaded. *McNamara*, 249 Mich App at 183.

Plaintiff presented evidence that the Sawmill Creek property was a marital asset acquired by defendant before she filed for divorce, but defendant presented evidence that he bought the property for and on behalf of his sister, with his sister's money. This issue presented a question of the credibility of the witnesses. Although the trial court might have found that defendant's explanation of his involvement in the Sawmill Creek property purchase was not credible, and that he was concealing the property's true status as a marital asset, it gave credence to his explanation. This finding was not clearly erroneous because it was based on the trial court's findings as to the credibility of witnesses. *Draggoo*, 223 Mich App at 429.

III. DISCOVERY OF BUSINESS RECORDS

Plaintiff argues that the trial court erred by denying her discovery request for production of the business records of the Great Lakes Eye Institute, P.C. (the P.C.). A trial court's decisions regarding discovery are reviewed for abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50; 555 NW2d

871 (1996). In view of the unique circumstances of defendant's relationship to the P.C., we conclude that the trial court abused its discretion by denying the discovery request.

After completing his residency in ophthalmology, defendant practiced medicine with the Great Lakes Eye Institute, P.C., a professional corporation owned by his brother, Farhad Shokoohi. Defendant was allegedly employed pursuant to an employment agreement, but his compensation up to and including 2005 was substantially higher than the amount due under the agreement. In 2006, the year plaintiff filed for divorce, defendant's compensation was reduced to the contractual payment amount. Plaintiff maintained that defendant was a part owner of the P.C., although corporate documents listed Farhad as the sole owner. She sought discovery of the P.C.'s business records to investigate the true nature of defendant's relationship with the P.C., and the method by which his compensation was determined. The trial court reviewed the records in camera and denied the request.

The issue, as framed by plaintiff, is not whether the trial court erred by finding that defendant had no ownership interest in the P.C., but whether the trial court erred by denying plaintiff the discovery materials she says are necessary to assess defendant's status in relation to the P.C. The trial court's comments that the materials were not discoverable because they did not contain information concerning defendant's income reflect a misunderstanding of plaintiff's purpose in seeking the documents. Plaintiff sought the documents to assess whether defendant's compensation was formulaically correlated to the P.C.'s receipts (suggesting an ownership interest), rather than calculated only according to the employment agreement. Plaintiff established

suspicious circumstances warranting further investigation of how defendant's compensation was determined. Defendant's actual compensation from 2000 to 2005 was substantially disparate from the compensation he should have earned under the employment agreement, but in 2006, the year plaintiff filed for divorce, it was reduced to the employment agreement amount. Moreover, although defendant claims that he is and always has been only an employee of the P.C., evidence shows that he bragged to others that he had an ownership interest and corporate documents show that defendant was listed as an officer of the P.C. These circumstances raise questions as to why defendant was paid more than the amount due under the employment agreement, and why the end of the overpayment coincided with the onset of the divorce action. Defendant's self-serving explanation—that his brother paid him generously out of fraternal affection until 2006—does not dispel questions as to Farhad's actual arrangement with regard to defendant's compensation. Additionally, Farhad's conflicting statements regarding defendant's status as a corporate officer merit further discovery to determine whether defendant held any position other than that of a salaried physician. Plaintiff should have been allowed the opportunity to examine the documents to investigate the actual nature of defendant's status with the P.C. The suspicious circumstances surrounding defendant's compensation militate against accepting at face value defendant's assertion that his additional compensation was a decision based on familial favoritism.

Defendant argues that plaintiff's expert, Robert Selley, essentially conceded the ownership issue by stating that ownership status did not enter into his analysis. The pertinent question, however, is whether the financial records contained information that might have enabled Selley to better assess whether defendant

had an ownership interest, and whether that information could have led to a different or stronger analysis.

In *Eyde v Eyde*, 172 Mich App 49; 431 NW2d 459 (1988), the defendant wife, Kathleen Eyde, sought business records from George Eyde, the brother and business partner of her husband, Louis Eyde, in the course of divorce proceedings to determine her husband's net worth. George Eyde brought an action to prevent discovery of the documents. The trial court entered an order compelling discovery but establishing a number of safeguards designed to prevent the disclosure of confidential matters and to prevent discovery of documents that relate only to George Eyde and were not relevant to Kathleen Eyde's determination of Louis Eyde's net worth. *Id*. at 50. The Court stated:

> Michigan has a strong historical commitment to a far-reaching, open and effective discovery practice. *Daniels v Allen Industries*, *Inc*, 391 Mich 398, 403; 216 NW2d 762 (1974). Discovery rules are to be liberally construed in order to further the ends of justice. *Id*. The modern tendency is to broaden the scope of discovery when necessary to facilitate preparation, to guard against surprise, and to expedite justice. *Fassihi v St Mary Hospital of Livonia*, 121 Mich App 11, 15; 328 NW2d 132 (1982).
>
> The general rule is that any document which is relevant and not privileged is freely discoverable upon request. *Davis* [*v O'Brien*, 152 Mich App 495, 502-504; 393 NW2d 914 (1986)]. MCR 2.302(B)(1) provides:
>
> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."
>
> There is no requirement that there be good cause for discovery of relevant and nonprivileged documents. *Davis*, *supra* at 503-504. [*Eyde*, 172 Mich App at 54-55.]

The Court concluded that the defendant wife was entitled to discover Louis Eyde's records. It stated:

> Louis Eyde's business records and banking records were relevant to the subject matter involved in defendant's divorce action. The financial status of defendant's husband is material and relevant to the subject matter of defendant's divorce. . . . Defendant's discovery so far has been inadequate to determine the true value of Louis Eyde's assets; financial statements now in defendant's possession vary widely in their estimate of Louis Eyde's net worth. The documents already in defendant's possession do not include relevant financial information regarding all of Louis Eyde's known business entities. Plaintiff's counsel had effectively blocked any estimate of Louis Eyde's net worth by deposed bank officials. Thus, the documents at issue are relevant and necessary to determine the extent and value of defendant and Louis Eyde's marital estate. [*Id*. at 55.]

Although not directly on point, *Eyde* is instructive with respect to discovery of financial records that are relevant to ascertaining the value of a spouse's assets, but which are in the possession of a closely related third party. In *Eyde*, it was already established that George Eyde and Louis Eyde were partners in several business endeavors, and that the records regarding the endeavors in which Louis was involved were relevant to the determination of Louis's financial status. In the instant case, in contrast, defendant's status in relation to the P.C. is uncertain. The corporate documents indicate that Farhad is the sole shareholder, and defendant's tax returns indicate that he is an employee without an ownership interest, but plaintiff has presented evidence of an inconsistency between these "official" facts and defendant's actual compensation. Under these specific circumstances, plaintiff has established that discovery of the P.C.'s records is relevant to the subject matter, and the records are therefore discoverable.

In granting the P.C.'s motion to quash, the trial court stated that the records were not relevant to proving

defendant's income. We agree with plaintiff that this ruling was off-point. Plaintiff needed the records to investigate the P.C.'s basis for determining defendant's income, and to investigate whether this method reflected any understanding between Farhad and defendant concerning possible ownership status. Such information would have been highly relevant to Selley's analysis of the value of defendant's "holder's interest" in his practice.

Plaintiff has offered concrete, specific reasons why the P.C.'s records might reveal pertinent information concerning defendant's interest in the P.C. Accordingly, we remand to the trial court to enable plaintiff to examine the records sought in the subpoena. After examining the records subject to an appropriate protective order, plaintiff may move for appropriate relief on the basis of information in the records that could lead to a different outcome in regard to defendant's interest in the P.C. as a marital asset.

IV. TRIAL COURT'S FINDINGS OF VALUE OF DISPUTED ASSETS

Absent a prenuptial agreement, a trial court should equitably distribute marital property in light of all the circumstances. *Berger*, 277 Mich App at 716-717. To reach an equitable division of marital property, a trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance. *McDougal*, 451 Mich at 89; *Sparks*, 440 Mich at 158-160. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight. The trial court must make specific

findings regarding the factors it determines to be relevant. *Sparks*, 440 Mich at 159; *Berger*, 277 Mich App at 717.

Generally, marital assets are subject to division between the parties but the parties' separate assets may not be invaded. *McNamara*, 249 Mich App at 183. Generally, assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate. *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009); *McNamara*, 249 Mich App 183-184. The parties' manifestation of intent to lead separate lives, such as by filing a complaint for divorce or maintaining separate homes, can be of crucial significance when apportioning the marital estate. *Byington v Byington*, 224 Mich App 103, 112; 568 NW2d 141 (1997). However, property earned after such a manifestation of intent should still be considered a marital asset, although the presumption of congruence that exists with respect to the distribution of marital assets becomes attenuated and may result in the nonacquiring spouse being entitled to no share or a lesser share of the property in light of all the apportionment factors. *Id.* at 115-116. Separate assets may be invaded if one party demonstrates additional need, or had significantly contributed to the acquisition or growth of the separate asset. *Skelly*, 286 Mich App at 582.

A trial court must make specific findings of fact regarding the value of each disputed piece of marital property awarded to each party in the judgment. *Olson*, 256 Mich App at 627-628. A trial court's findings of fact are inadequate if they are not sufficiently specific to enable the parties to determine the approximate values of their individual awards by consulting the verdict

along with the valuations to which they stipulated. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). For the purposes of dividing property, marital assets are typically valued at the time of trial or the time judgment is entered, although a court may, in its discretion, use a different date. *Byington*, 224 Mich App at 114 n 4.

This Court further reviews whether a trial court's dispositional rulings are fair and equitable in light of the trial court's findings of fact, *Sparks*, 440 Mich at 151-152, but this Court will reverse only if definitely and firmly convinced that the disposition is inequitable. *Pickering*, 268 Mich App at 7. When dividing marital property, a court is not required to award mathematically precise shares. *Byington*, 224 Mich App at 114-115.

Here, the trial court did not divide the marital estate on a percentage basis, nor did it explain its general basis for determining an equitable division of property. It did not make findings regarding the parties' contributions to the marital estate or other relevant factors for dividing property. The trial court awarded defendant the bulk of the marital estate, and awarded plaintiff personal possessions, such as her vehicle, and the children's furniture, and awarded plaintiff one of the parties' homes and a property award in the form of alimony in gross. Plaintiff specifically challenges the trial court's failure to make findings concerning the value of certain assets, and generally challenges the trial court's failure to make findings concerning its overall property division.

We are unable to discern the trial court's general plan in dividing assets. Defendant argues that the division can be explained in reference to the prenuptial agreement, but the trial court determined that the

parties did not make the agreement in contemplation of divorce. (Defendant's argument that the trial court erred in failing to comply with the prenuptial agreement is addressed later in this opinion.) Despite this determination by the trial court, the trial court's division of property was substantially consistent with the prenuptial agreement's requirement that property acquired after the marriage "shall be divided . . . according to the percentage of their respective contributions in acquiring same." It appears that the trial court regarded the marital assets as the product of defendant's contributions and awarded them accordingly, allowing plaintiff only six years of support payments and assets such as the vacation home and a vehicle that could be considered "her" own property. The trial court's failure to make findings in support of its uneven property division raises questions regarding why it ordered a property division in near compliance with a prenuptial agreement that it found to be inapplicable. Furthermore, it appears that the trial court's decision may have been based on the unstated premise that defendant was the primary contributor to the marital estate. Although plaintiff's financial contributions to the marital estate are negligible, it is well established that a non-wage-earning spouse can make substantial contributions to the marital estate by running the household and caring for the parties' children. *Hanaway v Hanaway*, 208 Mich App 278, 293; 527 NW2d 792 (1995). Plaintiff, a lawyer, quit her law practice and suspended her legal career to stay at home with the parties' children. She also testified that she devoted substantial energy and time to serving the needs of defendant and his family. The trial court's failure to make relevant findings on this matter precludes meaningful review of whether the trial court's findings were

clearly erroneous, and of whether its division of property constituted an abuse of discretion.

Additionally, we agree with plaintiff that the trial court failed to make findings regarding the following assets:

2007 GMC Yukon. The parties gave conflicting testimony concerning the value of this vehicle, but the trial court failed to make a finding regarding its value, and failed to explain if or why it considered the vehicle plaintiff's separate property.

*Saginaw Federal Credit Union account and Chase Bank account, No. ****0175*. Defendant withdrew $100,000 from the credit union account in June 2006, the month plaintiff filed for divorce, and deposited this amount into the Chase account. Defendant did not account for how these funds were disseminated after their transfer to the Chase account. In December 2007, defendant deposited his employee bonus, in the amount of $148,875, into the credit union account. The trial court awarded both of these accounts to defendant, without making relevant findings. Given the questionable circumstances of money being withdrawn from the parties' joint account at the time plaintiff filed for divorce, and being transferred to another account that was nearly depleted over the following months, the trial court erred by failing to make findings as to the value of these accounts. The trial court's decision in regard to these accounts is problematic because there are no findings of fact that support the trial court's decision. The court made no findings as to the parties' contributions, and so forth, that would explain why the award is so favorable to defendant. The court's decision appears to conform to the prenuptial agreement, but the court found that the agreement was not made in contemplation of divorce. The trial court's decision to award these

accounts to defendant without making findings regarding the transactions seems to assume that defendant was entitled to dissipate the $100,000 transferred out of the credit union without explanation, and that he was entitled to keep as his separate property the 2007 bonus payment of $148,875. Property acquired after the parties manifest an intent to lead separate lives is not necessarily excluded from the marital estate. The court should consider this matter pursuant to relevant factors, such as the parties' respective contributions to the spouse's compensation package. *Byington*, 224 Mich App at 117. Regarding the credit union withdrawal, when a party has dissipated marital assets without the fault of the other spouse, the value of the dissipated assets may be included in the marital estate. 2 Michigan Family Law (6th ed, 2008 supp), Property Division, § 15.21. But the trial court made no findings to explain its decisions regarding these accounts, or its overall plan for dividing the marital estate.

Defendant's 401(k) account with the P.C. The trial court's minimal findings of fact concerning the marital estate in general, and several specific assets, including this account, leave us unable to determine whether its decisions were an abuse of discretion, or whether they were based on clearly erroneous findings of fact.

Mercedes. Defendant argues that the Mercedes is not marital property because he acquired it through a "reinvestment" of an asset listed as a separate asset in the prenuptial agreement; plaintiff rejects this characterization. The trial court failed to make findings regarding the value of the Mercedes and its status as marital property.

We do not, however, share plaintiff's view that the trial court failed to make relevant findings regarding the Chemical Bank primevest account. Defendant held

this account jointly with his sister. The trial court awarded defendant "the value of potential interest should sister predecease Defendant." This statement indicates that the trial court found that the account belonged primarily to defendant's sister, and was not a marital asset. This finding is not clearly erroneous because it is supported by defendant's testimony, which the trial court was free to find credible.

Notwithstanding the Chemical Bank account, we conclude that the trial court's failure to make findings as to the relevant factors for dividing property, and its failure to assign a value to several assets (or to determine the appropriate date for valuation), leave this Court and the parties unable to assess whether the marital division was equitable. This problem is further complicated by the trial court's issuance of a property division that is substantially compliant with a prenuptial agreement that the trial court found was not made in contemplation of divorce. Consequently, we remand the case to the trial court for adequate findings of fact.

V. COSTS AND ATTORNEY FEES

Plaintiff argues that the trial court erred by awarding her only a fraction of the costs and attorney fees she sought. This Court reviews a trial court's decision to award attorney fees in a divorce action for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The findings of fact on which the trial court bases its decision are reviewed for clear error. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007).

A court in a divorce action may award attorney fees to enable a party to carry on or defend the action. MCR 3.206(C)(1); *Stallworth*, 275 Mich App at 288-289. MCR 3.206(C)(1) provides that a party to a divorce action

may request the trial court to order the other party to pay all or part of the party's attorney fees. The party seeking attorney fees must allege facts sufficient to show either that the party is unable to bear the expense of the action, and that the other party is able to pay, MCR 3.206(C)(2)(a), or that the attorney fees were incurred because the other party refused to comply with a previous court order, despite having the ability to comply, MCR 3.206(C)(2)(b). The party requesting the attorney fees has the burden of showing facts sufficient to justify the award. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007).

Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit. *Gates*, 256 Mich App at 438-439. It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.* The property division and the award of attorney fees " 'function in tandem,' " and a party may be ordered to pay the opposing party's attorney fees if the opposing party was awarded insufficient liquid assets in the property division to pay the fees and costs. *Olson*, 273 Mich App at 354 n 6. In *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999), a wife who received $1.2 million in marital assets could not show that she was unable to bear the expense of the divorce action; consequently, this Court concluded that she was not entitled to attorney fees. However, in *Ozdaglar v Ozdaglar*, 126 Mich App 468, 473; 337 NW2d 361 (1983), this Court held that the plaintiff wife, who was still unemployed, was entitled to attorney fees, notwithstanding her substantial property award, on the ground that she should not be required to pay attorney fees from her share of the marital estate, which she needed to support herself.

Plaintiff submitted a certification of plaintiff's counsel fees and costs to the trial court on June 6, 2008. Plaintiff retained George Snyder of Meyer, Kirk, Snyder & Lynch, PLLC, from Bloomfield Hills, and Timothy Fryhoff of Fryhoff & Lynch, PLLC, from Bloomfield Hills, as well as Christopher Picard of Burkhart, Picard, Tiderington & McLeod, PLLC, from Saginaw, to represent her in the action. Plaintiff submitted billing documentation that purportedly adjusts the Detroit-area attorneys' fees to the prevailing rates for legal services in the Saginaw area, and that also adjusted the fees to eliminate charges for duplicate services. She requested a total of $80,226.11, plus $16,400 for reimbursement of Selley's expert fee. Defendant fails to acknowledge this submission, and argues that plaintiff failed to submit any documentation in support of her request. He also argues that plaintiff was required to present proof of attorney fees in the course of trial, notwithstanding MCR 3.206(C)(1), which provides that a party "may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding."

The trial court failed to explain its decision to award plaintiff only $25,000, less than half of the amount requested. Without adequate findings of fact, there is no basis for determining whether the trial court's award represented an abuse of discretion. Under the circumstances, the error is not harmless. Although defendant questions plaintiff's need for three attorneys, including two from out-of-town, it is not obvious that the fees were unreasonable after they were adjusted for local rates and to eliminate redundancy. Moreover, plaintiff did not receive any liquid assets other than the payment of alimony-in-gross over a six-year period. Plaintiff will presumably need to use these funds for living expenses,

including a home in the Saginaw area. This circumstance raises the question whether plaintiff must invade assets that she needs for living expenses in order to pay her attorney fees. *Ozdaglar*, 126 Mich App at 473. Accordingly, the trial court should make appropriate findings in this regard on remand.

Defendant also argues that the trial court properly denied plaintiff's expert witness fee because the trial court gave no credence to Selley's opinion. We have found no authority for the principle that an award of costs to cover an expert's fee is in any way to be tied to the party's success regarding the matter on which the expert testified. The trial court's rejection of Selley's analysis does not necessarily mean that plaintiff retained him to advance, in defendant's words, "a totally bogus claim." Moreover, our ruling regarding plaintiff's right to discovery of the P.C.'s business records to establish defendant's interest in the P.C. undermines defendant's position regarding expert fees. Accordingly, this argument is without merit.

VI. DEFENDANT'S CROSS-APPEAL: PRENUPTIAL AGREEMENT

On cross-appeal, defendant challenges the trial court's determination that the parties did not intend for the prenuptial agreement to apply to a divorce. A trial court's refusal to enforce a prenuptial agreement is reviewed for an abuse of discretion. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991).

Under Michigan law, trial courts recognize prenuptial agreements governing the division of property in the event of a divorce. *Reed*, 265 Mich App at 141-142. A court should never disregard a valid prenuptial agreement, but should instead enforce its clear and unambiguous terms as written. *Id*. at 144-145. See also MCL 557.28, providing that "[a] contract relating to property

made between persons in contemplation of marriage shall remain in full force after marriage takes place." However, "[a] prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." *Reed*, 265 Mich App at 142-143. To determine if a prenuptial agreement is unenforceable because of a change in circumstances, the focus is on whether the changed circumstances were reasonably foreseeable either before or during the signing of the prenuptial agreement. *Id*. at 144. See also *Lentz v Lentz*, 271 Mich App 465, 471; 721 NW2d 861 (2006), and *Rinvelt* 190 Mich App at 380, holding that an otherwise valid prenuptial agreement could be invalidated on the basis of the nondisclosure of a material fact, or if a change of circumstances since the execution of the agreement makes its enforcement unfair and unreasonable.

This issue raises questions of contract interpretation. Defendant asserts that the prenuptial agreement clearly and unambiguously provided for the division of property in the event of divorce, but he fails to address § 3.1, which states that "the parties specifically agree and state that this Agreement is intended to waive rights upon death and is not made in contemplation of any divorce." The trial court determined, on the basis of this language, that the agreement did not apply to divorce. The trial court did not address the remaining provisions of § 3, which provide for the division of property in a divorce, notwithstanding the disclaimer in § 3.1.

A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App

575, 593; 760 NW2d 300 (2008). A contract is ambiguous if it allows two or more reasonable interpretations, or if the provisions cannot be reconciled with each other. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003); *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). Under ordinary contract principles if contractual language is clear, construction of the contract is a question of law for the court. *Id*. at 721. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Id*. at 722. A court may not rewrite clear and unambiguous language under the guise of interpretation. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, courts must give "effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468.

Here, the prenuptial agreement is ambiguous. The phrase, "the parties specifically agree and state that this Agreement is intended to waive rights upon death and is not made in contemplation of any divorce," does not unambiguously disclaim application of the agreement in the case of divorce. Rather, it could be construed to mean that the contingency of divorce was not the purpose for which the parties entered into the agreement. The inclusion of several provisions for dividing property in the event of divorce militates against the interpretation that the parties intended for the agreement to apply only to dissolution of the marriage by death. Assuming, arguendo, that § 3.1 unambiguously disclaims application of the agreement in the event of divorce, the sections that follow § 3.1 create an irreconcilable conflict that renders the agreement ambiguous. *Klapp*, 468 Mich at 467. Disregarding these

provisions would violate the principle of giving a contract an interpretation that renders some part of the contract surplusage or nugatory. *Id*. at 468.

Moreover, § 3.7 creates multiple options depending upon the enforceability of prenuptial agreements intended to govern property divisions in the event of divorce. This section states as follows:

> Whether or not any section of Paragraph 3 of this Pre-Marital Agreement is valid or enforceable, the parties agree that this paragraph is severable from the balance of the Agreement and shall not effect the validity or enforceability of any other provision of this Agreement. *This Agreement may be introduced as evidence at the time of any divorce or separation proceedings for the court's consideration of the parties' intention at the time of their marriage*. [Emphasis added.]

This section both preserves the prenuptial agreement as an agreement in contemplation of death in the event that it is deemed unenforceable in regard to divorce, and preserves the agreement as evidence of the parties' intent in an action for divorce. Read in conjunction with § 3.1, the parties assert the following: (1) that the agreement was not made in contemplation of divorce; (2) that the agreement lays out a plan for dividing assets in a divorce; (3) that the plan for dividing assets in a divorce is severable from the agreement and would not invalidate the remainder of the agreement; and (4) if the plan for dividing assets in a divorce is not enforceable, it can serve as evidence of the parties' intent. At least two interpretations of this agreement are possible: (1) the prenuptial agreement was not intended to govern the division of assets in a divorce; and (2) the prenuptial agreement should govern, or at least guide, the division of assets in a divorce if such provisions are legally enforceable.

Plaintiff argues that the ambiguities of the agreement should be construed against defendant as the drafter of the agreement. This is an incorrect statement of the law: the rule of *contra proferentem*, i.e., that ambiguities are to be construed against the drafter of the contract, should only be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the finder of fact unable to determine what the parties intended their contract to mean. *Klapp*, 468 Mich at 470-471; *Smith v Smith*, 278 Mich App 198, 200 n 1; 748 NW2d 258 (2008).

We remand this case to the trial court to resolve the ambiguity in the prenuptial agreement. On remand, the trial court " 'must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning.' " *Klapp*, 468 Mich 469 (citation omitted). At trial, neither party presented extrinsic evidence regarding the meaning of the prenuptial agreement. The trial court may consider holding an evidentiary hearing on this matter if necessary to construe the prenuptial agreement. On remand, if the trial court determines that the parties intended for the contract to govern division of property in a divorce, it should further consider the meaning of the term "contribution" as used in the prenuptial agreement in reference to assets acquired during the marriage. It may also address plaintiff's arguments that the prenuptial agreement should be set aside on the basis of changed circumstances.

We affirm the trial court's judgment as it pertains to the Sawmill Creek property and the Chemical Bank primevest account. We remand to the court for further findings and proceedings regarding the following: the

decision to award plaintiff alimony in gross in lieu of spousal support; discovery of the P.C.'s business records; the trial court's overall division of property and the valuation of certain specific assets; the award of attorney fees to plaintiff; and the interpretation of the prenuptial agreement with respect to divorce. We do not retain jurisdiction.

PEOPLE v BAKER

Docket No. 286769. Submitted May 4, 2010, at Detroit. Decided May 11, 2010, at 9:00 a.m.

Richard L. Baker was convicted following a jury trial in the Wayne Circuit Court, James A. Callahan, J., of two counts of first-degree criminal sexual conduct, two counts of first-degree home invasion, and one count of assault with intent to do great bodily harm less than murder, and was sentenced for each conviction. Defendant appealed, alleging that his constitutional protections against double jeopardy were violated by his two convictions of first-degree home invasion arising out of a single home invasion.

The Court of Appeals *held*:

1. It appears that defendant was convicted of one count of first-degree home invasion because he broke into and entered the victim's apartment with the intent to commit larceny and was convicted of another count of first-degree home invasion because he broke into and entered the victim's apartment and, while inside her apartment, actually committed criminal sexual conduct.

2. MCL 750.110a identifies several ways in which first-degree home invasion can be committed by providing alternative elements that must be established, that is, each element of first-degree home invasion can be established by establishing one of two alternatives set forth in the statute. Here, defendant's first-degree home invasion convictions arose from the same offense. The jury, when presented with two counts of first-degree home invasion arising from the same wrongful breaking and entering, was asked to determine whether defendant was guilty under each of the two theories for establishing the second element of the offense. The Legislature did not intend to create a separate offense for home invasion corresponding to each type of actual or intended underlying crime occurring within the dwelling during the same invasion.

3. Defendant should have been convicted and sentenced for one count of first-degree home invasion supported by two theories. The matter must be remanded to the trial court with directions to

vacate one of the defendant's convictions and sentences for first-degree home invasion and modify the judgment of sentence accordingly.

Affirmed in part, reversed in part, and remanded.

CRIMINAL LAW — FIRST-DEGREE HOME INVASION — ELEMENTS — DOUBLE JEOPARDY.

The statute prohibiting first-degree home invasion provides two alternate methods of establishing each of the three elements of the offense; the prohibition against double jeopardy forbids two separate convictions of first-degree home invasion following a single home invasion where each conviction is based on a different alternate method of establishing the same element of first-degree home invasion (US Const, Am V; Const 1963, art 1, § 15; MCL 750.110a[2]).

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 *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for defendant.

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

O'CONNELL, J. After a jury trial, defendant, Richard Lee Baker, was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (during any other felony) and MCL 750.520b(1)(e) (weapon used), two counts of first-degree home invasion, MCL 750.110a(2), and one count of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent sentences of 30 to 50 years' imprisonment for each CSC I conviction, 10 to 20 years' imprisonment for each first-degree home invasion conviction, and 5 to 10 years' imprison-

ment for the assault conviction. Defendant now appeals as of right. We affirm in part, reverse in part, and remand for further proceedings.

In the early morning hours of August 19, 2007, defendant entered the victim's apartment through an open window, took a knife from her kitchen, covered her eyes and bound her limbs, sexually assaulted her, and stole her Bridge card and keys. When the victim managed to free her hands and uncover her eyes, defendant attacked her with the knife. The victim recognized defendant, because she had hired him to install cable television in her apartment a few days before. The victim escaped from defendant and fled into the hallway outside her apartment, where neighbors found her and called the police. Defendant fled, but was apprehended a few days later.

On appeal, defendant does not dispute the validity of his CSC I and assault convictions. He only challenges his convictions of first-degree home invasion, arguing that his two convictions of first-degree home invasion arose from the same offense and, consequently, violated his constitutional protections against double jeopardy. Instead, defendant claims that because "the home invasion was continuous, involving both sexual acts and committed with the intent to commit a larceny, while armed with a knife," his convictions of two separate counts of home invasion constitute a double jeopardy violation. Essentially, defendant argues that he has been punished twice for the same offense.[1] We agree.

The United States and Michigan constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People*

[1] Because defendant failed to preserve this issue, we review it for plain error affecting defendant's substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

v Herron, 464 Mich 593, 599; 628 NW2d 528 (2001). The Double Jeopardy Clause protects a defendant from both multiple prosecutions and multiple punishments for the same offense. *Herron*, 464 Mich at 599. The purpose of this prohibition, in a multiple-punishment context, is to prevent a court from imposing a sentence greater than that intended by the Legislature. *Hawkins v Dep't of Corrections*, 219 Mich App 523, 526; 557 NW2d 138 (1996).

In *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007), our Supreme Court held that the "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is "the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15." The *Smith* Court explained:

> At the time of ratification [of Const 1963, art 1, § 15], we had defined the language "same offense" in the context of successive prosecutions by applying the federal "same elements" test. In interpreting "same offense" in the context of multiple punishments, federal courts first look to determine whether the legislature expressed a clear intention that multiple punishments be imposed. *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983); see also *Wayne Co Prosecutor* [*v Recorder's Court Judge*, 406 Mich 374; 280 NW2d 793 (1979)]. Where the Legislature does clearly intend to impose such multiple punishments, " 'imposition of such sentences does not violate the Constitution,' " regardless of whether the offenses share the "same elements." *Id.* (citation and emphasis deleted). Where the Legislature has not clearly expressed its intention to authorize multiple punishments, federal courts apply the "same elements" test of *Blockburger* to determine whether multiple punishments are permitted. Accordingly, we conclude that the "same elements" test set forth in *Blockburger* best gives effect to the intentions of the ratifiers of our constitution. [*Smith*, 478 Mich at 316.]

The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense. *Id*. at 307; *People v Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004). If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved. *Smith*, 478 Mich at 307.

In this case, defendant was convicted of two counts of first-degree home invasion pursuant to MCL 750.110a(2), which states:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

The parties do not dispute that the two first-degree home invasion charges brought against defendant did not correspond to two separate instances in which defendant wrongfully entered the victim's apartment. Defendant broke into the victim's apartment once, and when he was in her apartment he sexually assaulted her *and* tried to steal from her. Instead, the prosecution argues that defendant's two convictions of first-degree home invasion do not violate double jeopardy protections because each of defendant's convictions of first-degree home invasion contains at least one element that

is not an element of the other first-degree home invasion conviction. Specifically, the prosecution claims:

> [I]n count three,[2] the prosecution was required to prove (a) that Defendant entered the dwelling without permission *with the intent to commit a first-degree criminal sexual conduct* and (b) that Defendant was armed with a knife and/or another person was lawfully present in the dwelling; and in count four,[3] the prosecutor had to prove (a) that Defendant entered the dwelling without permission, *with the intent to commit a larceny*, and (b) that Defendant was armed with a knife and/or another person was lawfully present in the dwelling. [Emphasis in original.]

In making this statement, the prosecution appears to argue that defendant committed two separate acts of first-degree home invasion because he intended to commit two separate crimes while inside the victim's apartment. However, the prosecution's argument on appeal does not comport precisely with the charges that the prosecution actually brought to the jury. In count three, the jury found defendant guilty of "Home Invasion—First Degree while entering, present in, or exiting *did commit* Criminal Sexual Conduct First Degree . . . ," while in count four, the jury found defendant guilty of "Home Invasion—First Degree — *with the intent to commit* a Larceny therein . . . ." (Emphasis added.) Accordingly, it appears that defendant was actually convicted of one count of first-degree home invasion because he broke into and entered the victim's apartment with the intent to commit a larceny, and was convicted

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[2] This count corresponds to defendant's conviction of first-degree home invasion arising from his breaking and entering into the victim's apartment and committing an act of criminal sexual conduct therein.

[3] This count corresponds to defendant's conviction of first-degree home invasion arising from his breaking and entering into the victim's apartment with the intent to commit a larceny therein.

of another count of first-degree home invasion because he broke into and entered the victim's apartment and, while inside her apartment, actually committed criminal sexual conduct.

Yet despite whether defendant was charged with and convicted of two separate counts of first-degree home invasion because he intended to commit two separate underlying crimes or because he intended to commit one underlying crime and actually committed another, neither distinction is sufficient to establish that defendant committed two separate offenses of first-degree home invasion. Instead, as our Supreme Court recently noted in *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010), MCL 750.110a identifies several ways in which first-degree home invasion can be committed by providing "alternative elements" that must be established, i.e., each element of first-degree home invasion can be established by satisfying one of two alternatives set forth in the statute. The *Wilder* Court broke down the alternative elements of first-degree home invasion as follows:

> Element One: The defendant either:
>
> 1. breaks and enters a dwelling or
>
> 2. enters a dwelling without permission.
>
> Element Two: The defendant either:
>
> 1. intends when entering to commit a felony, larceny, or assault in the dwelling or
>
> 2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.
>
> Element Three: While the defendant is entering, present in, or exiting the dwelling, either:
>
> 1. the defendant is armed with a dangerous weapon or
>
> 2. another person is lawfully present in the dwelling. [*Wilder*, 485 Mich. at 43 (emphasis omitted).]

Accordingly, *intending* to commit a felony, larceny, or assault, and *actually* committing a felony, larceny, or assault simply constitute two different methods of establishing the same element of first-degree home invasion. Therefore, the *Blockburger* test is not satisfied because defendant's two first-degree home invasion convictions are not premised on the establishment of different sets of elements. See *Smith*, 478 Mich at 307.

Instead, defendant's first-degree home invasion convictions arose from the same offense. The jury, when presented with two counts of home invasion arising from the same wrongful breaking and entering, was essentially asked to determine whether defendant was guilty of home invasion under each of the theories for establishing the second element of this offense.

To the extent that the prosecution contends that a separate home-invasion charge can be brought corresponding to each felony, larceny, or assault that defendant committed while in the dwelling, it has provided no authority to support this argument and, for this reason, we need not consider this argument. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). Further, the Legislature has not created separate statutes criminalizing home invasion when different underlying wrongful acts committed during the home invasion are at issue, and the statute itself does not support the notion that the Legislature intended to create a separate offense for home invasion corresponding to each type of actual or intended underlying crime occurring within the dwelling during the same invasion. See *Smith*, 478 Mich at 316. Instead, the statute simply indicates that establishing that defendant committed (or intended to commit) at least one felony, larceny, or

assault while in the dwelling is sufficient to satisfy this element. If anything, the claim that defendant intended to commit two predicate offenses while in the victim's apartment simply constitutes two separate theories under which his first-degree home-invasion conviction could be established.

Accordingly, defendant's convictions for two counts of first-degree home invasion constitute plain error. Instead, in light of the jury's verdict, defendant should have been convicted and sentenced for one count of first-degree home invasion supported by two theories. Therefore, following the example set forth in *People v Bigelow*, 229 Mich App 218, 222; 581 NW2d 744 (1998), we direct the trial court to vacate one of defendant's convictions and sentences for first-degree home invasion and modify defendant's judgment of sentence to specify that defendant's relevant conviction and sentence is for one count of first-degree home invasion supported by two theories.[4] Of course, the balance of defendant's judgment of sentence and conviction would remain unaltered, meaning that defendant's convictions and sentences for two counts of CSC I and one count of assault with intent to do great bodily harm less than murder still stand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[4] We note that defendant has raised no additional claims of error.

PEOPLE v HUSTON

Docket No. 288843. Submitted April 13, 2010, at Grand Rapids. Decided May 13, 2010, at 9:00 a.m.

Cecil D. Huston pleaded guilty in the Berrien Circuit Court of armed robbery and was sentenced by the trial court, Dennis M. Wiley, J., to 180 to 600 months in prison. The Court of Appeals denied defendant's delayed application for leave to appeal and motion for reconsideration in unpublished orders, entered December 9, 2008, and January 28, 2009, respectively (Docket No. 288843). 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 defendant's challenge to the scoring of offense variable (OV) 10, MCL 777.40, exploitation of a vulnerable victim, in light of *People v Cannon*, 481 Mich 152 (2008). 485 Mich 885 (2009).

The Court of Appeals *held*:

1. To score OV 10, there had to be evidence of exploitive conduct directed at a vulnerable victim. The factors to be considered in deciding whether a victim was vulnerable, i.e., was susceptible to injury, physical restraint, persuasion, or temptation, include (a) the victim's physical disability, (b) the victim's mental disability, (c) the victim's youth or agedness, (d) the existence of a domestic relationship, (e) whether the offender abused his or her authority status, (f) whether the offender exploited the victim by his or her difference in size or strength or both, (g) whether the victim was intoxicated or under the influence of drugs, or (h) whether the victim was asleep or unconscious. The factors focus on the personal susceptibility of the victim, not the victim's circumstances. The mere existence of any one of the factors does not automatically render the victim vulnerable, and the absence of a factor does not preclude a finding of victim vulnerability. Rather, the evidence must show merely that it was readily apparent that the victim was susceptible to injury, physical restraint, persuasion, or temptation. Subsections (1)(b) and (c) of MCL 777.40 require the sentencing judge to determine if the offender exploited a victim. Subsection (1)(a) of MCL 777.40 does not explicitly require the judge to determine if the offender exploited a victim, but does require the judge to determine if there was preoffense conduct directed at a victim for the primary

purpose of victimization. Because preoffense conduct directed at a victim for the primary purpose of victimization inherently involves some level of exploitation, points may be assessed under OV 10 for exploitation of a vulnerable victim when the offender has engaged in conduct that is considered predatory under the statute.

2. Predatory conduct, for purposes of OV 10, is behavior that precedes the offense and is directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived.

3. In determining whether 15 points may be assessed under MCL 777.40(1)(a) for predatory conduct, a court must consider whether the offender engaged in conduct before the commission of the offense, whether this conduct was directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and whether victimization was the offender's primary purpose for engaging in the preoffense conduct.

4. The purpose of defendant's preoffense conduct of lying in wait was to rob someone. Defendant then chose a specific victim perceived to be weak. However, there was no evidence to indicate that the victim was inherently personally vulnerable. Therefore, OV 10 was improperly scored at 15 points and should have been scored at zero points. The judgment of sentence must be reversed and the case must be remanded for resentencing.

Judgment of sentence reversed; case remanded for resentencing.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

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

PER CURIAM. Defendant appeals the sentence imposed upon him after his plea-based conviction of armed robbery, MCL 750.529. This Court originally denied plaintiff's delayed application for leave to appeal in an unpublished order, entered December 9, 2008 (Docket

No. 288843), but our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted, *People v Huston*, 485 Mich 885 (2009), limited to "the challenge to the scoring of offense variable 10, MCL 777.40, in light of *People v Cannon*, 481 Mich 152 [749 NW2d 257] (2008)." Because offense variable 10 was misscored, we reverse the judgment of sentence and remand for resentencing.

A trial court's findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). This Court reviews a trial court's scoring decision under the sentencing guidelines " 'to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.' " *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005), quoting *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court's scoring decision for which there is any evidence in support will be upheld. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court reviews the interpretation of the statutory sentencing guidelines de novo. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

In February 2005, defendant and another individual approached a woman who had just pulled her vehicle into a parking spot at a shopping mall and robbed her. Defendant and the other individual were armed with BB guns and pointed them at the woman, demanding her purse and other items. They pushed the woman to the ground, cut her purse from her shoulder, and stole her vehicle, leaving the woman in the dark parking lot.

In August 2005, defendant entered a plea of guilty to a charge of armed robbery, MCL 750.529. Defendant's

sentence was thereafter calculated under the Michigan sentencing guidelines, with a score of 15 points being assigned to offense variable (OV) 10. At sentencing, defense counsel challenged the scoring of OV 10 at 15 points, arguing, "This was a random robbery. They drove out there, the first person they found they robbed. I don't know what was predatory about it." The trial court determined that the OV 10 was properly scored, opining: "I think predatory conduct can also constitute lying-in-wait in the parking lot, or wherever it is, which would also constitute predatory conduct, as opposed to disparity in size or victim's vulnerability based upon age and those other factors."

On February 8, 2006, the trial court sentenced defendant to a term of 180 to 600 months in prison. Defendant filed an application for leave to appeal, which this Court denied on December 9, 2008, and a motion for reconsideration, which this Court also denied in an unpublished order, entered January 28, 2009 (Docket No. 288843). As previously indicated, the Supreme Court remanded the case to this Court for our consideration of his challenge to the scoring of OV 10.

On appeal, defendant asserts that OV 10 was scored improperly and that the improper scoring affected the statutory sentencing guidelines range. Defendant thus claims entitlement to resentencing. We agree.

Defendant was assessed 15 points for OV 10. This offense variable, found at MCL 777.40, provides, in pertinent part:

> (1) Offense variable 10 is *exploitation of a vulnerable victim*. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) *Predatory conduct* was involved ..... 15 points

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points

(c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious ..... 5 points

* * *

(3) As used in this section:

(a) *"Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.*

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) *"Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.* [Emphasis added.]

In *Cannon*, 481 Mich at 157-158, our Supreme Court held that to score OV 10 there had to be exploitive conduct directed at a vulnerable victim. Regarding vulnerability, the *Cannon* Court stated, in part:

> Thus, we conclude that points should be assessed under OV 10 only when it is readily apparent that a victim was "vulnerable," i.e., was susceptible to injury, physical restraint, persuasion, or temptation. Factors to be considered[11] in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was

> asleep or unconscious. The mere existence of one of these factors does not automatically render the victim vulnerable.
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>
> [11] The absence of one of these factors does not preclude a finding of victim vulnerability when determining whether it is appropriate to assess 15 points for predatory conduct. Rather, the evidence must show merely that it was readily apparent that the victim was susceptible to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c).
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> ---
>
> [*Id*. at 158-159 (citations omitted).]

Regarding exploitation, the *Cannon* Court stated:

> The subsections of the statute directing the assessment of 5 and 10 points explicitly require the sentencing judge to determine if the offender "exploited a victim." The subsection directing the assessment of points for "predatory conduct," however, does not explicitly require the sentencing judge to determine if the offender exploited a victim. Rather, the sentencing judge must determine if there was "preoffense conduct directed at a victim for the primary purpose of victimization." Nonetheless, preoffense conduct directed at a victim for the primary purpose of victimization inherently involves some level of exploitation. Thus, we conclude that points may be assessed under OV 10 for exploitation of a vulnerable victim when the defendant has engaged in conduct that is considered predatory under the statute. [*Id*. at 159 (citations omitted).]

The *Cannon* Court defined "predatory conduct" as "behavior that precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived." *Id*. at 161. The *Cannon* Court further provided the following guidance:

> To aid lower courts in determining whether 15 points are properly assessed under OV 10 [for predatory conduct], we set forth the following analytical questions:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?
>
> If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. [*Id*. at 161-162].

Here, the trial court found that defendant was lying in wait. Such an inference could be fairly drawn from the evidence. Specifically, it is known that defendant was hiding, that the female victim was alone, and that no one was in the parking lot when the incident occurred. Defendant could have robbed anyone in the parking lot during the course of the evening, but apparently hid until a choice victim appeared. One could infer that he was waiting for such an isolated victim. Accordingly, the trial court's finding that defendant was lying in wait was not clearly erroneous.

Defendant's lying in wait was preoffense conduct. It follows that the purpose of lying in wait was to rob someone. The question therefore becomes whether defendant's lying in wait was sufficiently focused on the victim, Ms. Flanagan, to be deemed directed at a "specific" victim and whether the victim "suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation."

If the trial court made a determination as to whether Ms. Flanagan was a "specific" victim, it is not clear from the record. However, when discussion about the proper scoring of OV 10 was taking place, the prosecutor indicated that "although it may be the first person they

picked at a random pick, still they had a purpose to victimize one particular individual, whether it was Jane Doe or, in this particular case, Miss Flanagan." Defense counsel, disagreed, asserting, "[i]t's stalking, in essence. It's—It is particularly picking out a very particular victim." The trial court responded that stalking was not required. If the trial court was concluding that focus on a "specific" victim was not necessary, then, this conclusion was erroneous. Pursuant to *Cannon*, focus on a specific victim is required. Our Supreme Court stated:

> [T]he conduct must have been "directed at a victim" before the offense was committed. A lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim. However, a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim. Contrast that with an individual who intends to shoplift and watches and waits for the opportunity to commit the act when no one is looking. The individual has not directed any action at a victim. [*Cannon*, 481 Mich at 160.]

Nonetheless, in the instant matter, defendant did choose a "specific" victim. As defendant argued, he was initially looking for any victim fitting his criteria who might have appeared in the parking lot on the night in question. Choosing a lone and isolated victim was akin to focusing on the weakest antelope in the herd. Defendant waited for such a circumstance before he seized the opportunity to attack. In other words, this was not a random attack on just anyone in the parking lot but a planned attack on an individual perceived to be weak.

The remaining question, as set forth in *Cannon*, is whether Flanagan "suffered from a readily apparent susceptibility to injury, physical restraint, persuasion,

or temptation." As previously noted, factors to be considered in deciding the vulnerability of the victim include

> (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious. [*Id*. at 158-159.]

While these factors are not exhaustive, the enumerated factors focus on the *victim*, and the statute suggests that susceptibility has to relate to the *victim*, not the victim's particular circumstances.

Here, there is nothing in the record to indicate that Ms. Flanagan was inherently vulnerable. While the prosecution contends that the timing (at night) and location (an isolated parking lot, outside the victim's locked vehicle) essentially rendered Ms. Flanagan vulnerable, these are not inherent characteristics of Ms. Flanagan, as contemplated by the statute and *Cannon*. Once again, from the record before this Court, it appears Ms. Flanagan was vulnerable only in the sense that she was in a location under circumstances that put her at higher risk,[1] and circumstances such as timing and location are part of a determination of preoffense conduct directed at a specific victim. The cases decided since *Cannon* underscore that these circumstances are more properly aimed at a determination of preoffense conduct and emphasize that the focus on whether a

[1] There is nothing in the record concerning whether defendant and his accomplice were greater in size and strength than Ms. Flanagan. In this regard, defendant was only 15 years old at the time of this offense; such a difference therefore cannot be presumed.

victim "suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation" involves the *personal* vulnerability of the victim.

For example, in *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2010 (Docket No. 287859), p 7, this Court noted that

> the timing and location of the sexual assault are evidence of predatory conduct. . . . [T]he victim went with defendant upon his request, defendant supplied intoxicants to her, and defendant then took her to a separate and isolated location to commit the sexual assault. However, predatory conduct alone is not sufficient to score this offense variable; rather, there must also be evidence that the victim was vulnerable.

The *Miller* Court then went on to conclude that the victim was susceptible to injury or physical restraint because of the age difference between the defendant and the victim (44 and 19 years old, respectively) and the fact that the defendant provided the victim with, and she consumed, two 40-ounce beers before she was sexually assaulted.

Likewise, in *People v Comtois*, unpublished opinion per curiam of the Court of Appeals, issued December 29, 2009 (Docket No. 286965), this Court concluded that a 17-year-old victim met the definition of a readily apparent vulnerable victim where she had suffered a mental impairment to the degree that she functioned as a 12 year old, and further had a speech impediment that made her mental impairment readily apparent. This Court further held that the record substantiated "the trial court's finding that defendant engaged in 'predatory conduct' by luring the obviously vulnerable victim into the woods before the assault." *Id*. at 4. See, also, *People v Murphy*, unpublished opinion per curiam of the Court of Appeals, decided December 22,

2009 (Docket No. 286016), p 4 ("The record supports that [the victim] was vulnerable given his age and feeble state.").[2] While these cases are unpublished and therefore not binding, we find their analyses sound and consistent with *Cannon*.

Notably, MCL 777.40(1)(d) provides that zero points are to be assessed where "[t]he offender did not exploit a victim's vulnerability." Here, defendant did take advantage of the fact that it was dark and no one else was in the parking lot. The darkness and the isolation may have made the robbery easier because the victim was less likely to resist physical restraint and there was no one to come to the victim's aid. However, as stated earlier, the isolation and timing of the offense supported the trial court's finding of preoffense conduct. These factors do not lead to a conclusion that Flanagan had a readily apparent susceptibility to physical restraint, and nothing else in the record suggests that Flanagan was personally vulnerable. It appears, rather, that she responded to the gun at the back of her head rather than any physical restraint. On the basis of the characteristics of vulnerability listed in *Cannon*, the focus being on characteristics of the victim, rather than the victim's circumstances, and on the basis of the record before this Court, we conclude that OV 10 was improperly scored at 15 points. It should have been scored at zero points.

If OV 10 is assigned zero points instead of 15 points, defendant's offense variable score would be reduced to 51. This would change his offense variable level from IV to III, resulting in a recommended minimum sentence

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[2] While plaintiff cites *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), and *People v Witherspoon*, 257 Mich App 329; 670 NW2d 434 (2003), as comparable to the instant case, those cases predate *Cannon*.

range of 108 to 180 months, instead of 126 to 210 months. See MCL 777.62. Defendant's minimum sentence was at the maximum end of the new range. Because there is a different recommended range, and the trial court has not clearly indicated that it would have imposed the same sentence regardless of the scoring error, resentencing is required. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Furthermore, our determination does not preclude the trial court from evaluating the evidence and making findings at resentencing regarding characteristics particular to the victim, consistent with *Cannon*.

Judgment of sentence reversed and case remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

PEOPLE v GLASS

Docket No. 290278. Submitted April 7, 2010, at Detroit. Decided May 13, 2010, at 9:05 a.m.

Brent A. Glass, Jr., pleaded guilty in the Macomb Circuit Court to a charge of larceny from a motor vehicle. He was sentenced in July 2004 to a two-year term of probation. In February 2008, the circuit court, Donald G. Miller, J., determined that defendant was guilty of violating the conditions of his probation and imposed a 25-month to 5-year term of imprisonment for the larceny conviction. Contending that the circuit court lacked jurisdiction to revoke his probation and sentence him to imprisonment because the warrant for the probation violation was issued after his probation term had expired, defendant filed a delayed application for leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

1. A probation revocation must occur, or must at least have been commenced, during the probation period. The "probation period" constitutes the particular term of probation imposed by a sentencing court, not the statutory maximum term of probation that the court has authority to impose. The term "probation period" in MCL 771.4 refers to the specific probation term that the sentencing court has imposed on a particular defendant.

2. The circuit court lacked jurisdiction to revoke defendant's probation and impose a prison sentence because defendant's probation period had already expired before any probation revocation proceedings had commenced. The prison sentence imposed by the circuit court must be vacated and the case must be remanded to the circuit court so that it may discharge defendant from his probation sentence.

Sentence vacated; case remanded.

CRIMINAL LAW — PROBATION — REVOCATION OF PROBATION.

A sentencing court may revoke a defendant's probation if, during the probation period, the court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation; the "probation

> period" constitutes the particular term of probation imposed by a sentencing court, not the statutory maximum term of probation the court has authority to impose; probation revocation must occur, or must at least have been commenced, during the probation period (MCL 771.4).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Lawyer, and *Joshua D. Abbott*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne M. Yantus*) for defendant.

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

GLEICHER, J. In May 2004, defendant pleaded guilty of larceny from a motor vehicle, MCL 750.356a(1). The circuit court sentenced defendant in July 2004 to a two-year term of probation. In February 2008, the circuit court found defendant guilty of violating the conditions of his probation and imposed a 25-month to 5-year term of imprisonment for the larceny conviction. We granted defendant's delayed application for leave to appeal. We vacate defendant's February 2008 sentence and remand for a discharge of defendant from his probation sentence.

Defendant avers that the circuit court lacked jurisdiction to revoke his probation and sentence him to imprisonment because the warrant for the probation violation was issued after his probation term had expired. We consider de novo the legal question whether a circuit court possesses subject-matter jurisdiction and legal issues concerning statutory interpretation. *People v Lowe*, 484 Mich 718, 720; 773 NW2d 1 (2009); *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001).

> The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent. The statute's words are the most reliable indicator of the

> Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. Once the Court discerns the Legislature's intent, no further judicial construction is required or permitted "because the Legislature is presumed to have intended the meaning it plainly expressed." [*Lowe*, 484 Mich at 721-722 (citations omitted).]

The circuit court opined that it had jurisdiction to revoke defendant's probation and impose a prison sentenced on the basis of *People v Marks*, 340 Mich 495, 498-502; 65 NW2d 698 (1954). Our Supreme Court in *Marks* interpreted 1948 CL 771.2, the predecessor to current MCL 771.2. The defendant in *Marks* caused a motor vehicle accident and faced a charge of felonious operation of an automobile. A jury convicted the defendant, and the trial court sentenced him to probation for three years, during which the defendant could not drive a motor vehicle. *Marks*, 340 Mich at 496. The defendant complied with the conditions of his probation over the course of his three-year probation period. After two people who were injured in the accident with the defendant obtained civil judgments against him, and 4 months and 14 days after the expiration of the defendant's three-year probation term, a probation officer filed a petition to extend the defendant's probation term for two more years and requesting that the court order the defendant to pay restitution to the injured parties. *Id*. at 497. Ultimately, the trial court entered an order extending the defendant's probation term for two years and requiring that he pay restitution. *Id*. at 497-498. The defendant challenged on appeal the trial court's jurisdiction to extend his probation period and alter the conditions of probation "after the original period of probation had expired[.]" *Id*. at 498.

In analyzing the issue regarding jurisdiction to modify probation, our Supreme Court quoted the following portion of 1948 CL 771.2:

> "If respondent is convicted of an offense not a felony the period of probation shall not exceed 2 years, and if he is convicted of a felony, it shall not exceed 5 years. The court shall by order, to be filed or entered in the cause as the court may direct by general rule or in each case fix and determine the period and conditions of probation and such order, whether it is filed or entered, shall be considered as part of the record in the cause and shall be at all times alterable and amendable, both in form and in substance, in the court's discretion." [*Marks*, 340 Mich at 498-499.]

Relying on 1948 CL 771.2 and 771.3, and Michigan and United States Supreme Court caselaw, the Michigan Supreme Court held that the trial court had discretion to "alter and amend" the original order of probation:

> [W]e, therefore, hold that defendant's rights were not impinged by the alteration in the probation order made within the statutory 5-year period, even though the conditions of the original order had not been violated and its term had expired.
>
> The trial judge, under the statute hereinbefore cited, was at liberty "at all times" within the 5-year period to alter and amend the order "both in form and in substance." [*Id.* at 501-502.]

The Supreme Court reasoned that because 1948 CL 771.2 authorized a probation term of up to five years and allowed a trial court to alter or amend a probation order "at all times," a trial court had the discretion to amend an original order of probation at any time within the statutory five-year period.

The language currently comprising MCL 771.2 bears similarity to the relevant language of its predecessor statute:

> (1) Except as provided in [MCL 771.2a],[1] if the defendant is convicted for an offense that is not a felony, the probation period shall not exceed 2 years. Except as provided in [MCL 771.2a] of this chapter, if the defendant is convicted of a felony, the probation period shall not exceed 5 years.
>
> (2) The court shall by order, to be filed or entered in the cause as the court may direct by general rule or in each case, fix and determine the period and conditions of probation. The order is part of the record in the cause. The court may amend the order in form or substance at any time. [MCL 771.2.]

Therefore, MCL 771.2 sets forth the same rule as that enacted in 1948 CL 771.2, and analyzed in *Marks*. See *People v Sherman*, 38 Mich App 219, 220-221; 196 NW2d 15 (1972) (relying on MCL 771.2 and *Marks* in holding that the trial court had authority to reinstate the conditions of a defendant's probation after the original probation period ended, but within the five-year statutory period).

In this case, the circuit court misplaced its reliance on *Marks* because the court did not merely alter or amend the conditions contained in defendant's original order of probation, as contemplated in MCL 771.2(2) and *Marks*. Instead, the circuit court revoked altogether defendant's probation. The Michigan statutory scheme governing probation and Michigan caselaw recognize that a probation revocation must occur, or must at least have been commenced, during the probation period. The Legislature in MCL 771.4 outlined that "[i]f *during the probation period* the sentencing court deter-

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[1] MCL 771.2a does not apply to this case because it pertains to convictions of stalking, aggravating stalking, child abuse, offenses listed under MCL 28.722 of the Sex Offenders Registration Act, and juveniles placed on probation and committed to an institution or agency described in the Youth Rehabilitation Services Act, MCL 803.301 to 803.309.

mines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation." (Emphasis added.) Although MCL 771.4 does not specifically define the term "probation period," reference to surrounding, probation-related statutes reflects that the "probation period" constitutes the particular term of probation imposed by a sentencing court. When interpreting statutory language, the language in question "must be read as a whole," and individual words and phrases "should be read in the context of the entire legislative scheme." *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009). "[T]he statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme." *Id*.

Probation-related statutes surrounding MCL 771.4 illustrate that the term "probation period" refers to the particular period of probation that a sentencing court has imposed, not the statutory maximum term of probation that a court has authorization to impose—either two or five years under MCL 771.2(1). For example, MCL 771.5(1) reads:

> When the *probation period* terminates, the probation officer shall report that fact and the probationer's conduct during the *probation period* to the court. Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the *probation period* as the circumstances require, so long as the maximum *probation period* is not exceeded. [Emphasis added.]

Additionally, MCL 771.6 states, "When a probationer is discharged upon the expiration of the *probation period*, or upon its earlier termination by order of the court, entry of the discharge shall be made in the records of

the court, and the probationer shall be entitled to a certified copy thereof." (Emphasis added.) Furthermore, as we previously stated, MCL 771.2(1) authorizes the following "probation period[s]":

> Except as provided in [MCL 771.2a], if the defendant is convicted for an offense that is not a felony, the *probation period* shall not exceed 2 years. Except as provided in [MCL 771.2a], if the defendant is convicted of a felony, the *probation period* shall not exceed 5 years. [Emphasis added.]

A review of the statutory scheme as a whole confirms that the term "probation period" in MCL 771.4 refers to the specific probation term that the sentencing court has imposed on a particular defendant.

In *People v Hodges*, 231 Mich 656, 660-661; 204 NW 801 (1925), the Michigan Supreme Court cautioned that a revocation of probation under 1915 CL 2032, a predecessor to MCL 771.4, could only occur if probation revocation proceedings had commenced before the defendant's probation period concluded. The Supreme Court summarized the following relevant procedural facts, and offered the following analysis of the defendant's contention that "the sentence . . . imposed after the period of probation had expired . . . was, therefore, void":

> On April 9, 1923, Lewis Hodges, who had before that pleaded guilty to a charge of breaking and entering, was placed on probation (1 Comp. Laws 1915, § 2029 *et seq*.). March 16, 1925, the sheriff of the county filed with the clerk an application to have the probation revoked because Hodges had violated the condition of his probation in that he had upon his plea of guilty been convicted of a criminal offense, that of contributing to the delinquency of one Myrtle Miller, a minor under the age of 17 years. On the same day of the filing of this petition, Hodges was in court and . . . it appears that the probation officer was ill and

> unable to appear in court and the hearing on the sheriff's petition was adjourned until April 13 . . . . [Hodges] did appear on the 13th and a hearing was had, and he was sentenced on the original charge. . . .
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> * * *
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> Counsel for defendant stresses the language found in section 2032, 1 Comp. Laws 1915, being section 4 of the act [1913 PA 105], that "at any time during the period of probation" the court may revoke the probation, and points out that the order was not actually made until after the period of probation originally fixed had expired. *If no action had been taken during the period of probation a more serious question would be presented. But here the petition to revoke the probation was filed within the period of probation* and we think it must be held that *the filing of this petition within the period of probation gave the court jurisdiction* which was not lost by a reasonable delay incident to a hearing upon it. [*Id.* at 657-661 (emphasis added).]

This Court repeatedly has reaffirmed the probation revocation principles set forth in *Hodges*, 231 Mich at 660-661. In *People v Wakefield*, 46 Mich App 97, 98; 207 NW2d 461 (1973), the Court confronted a situation in which the defendant was sentenced to a two-year probation period on November 6, 1964, and a "[n]otice of probation violation dated November 4, 1966, [was] apparently filed November 9, 1966 . . . ." The Court concluded that "[a]bsent a showing that revocation proceedings were pending at the end of the [defendant's] two-year period of probation, we are constrained to rule that the trial court lost jurisdiction of the defendant and could not thereafter sentence him to prison." *Id.* at 100.

The defendant in *People v Ritter*, 186 Mich App 701, 704; 464 NW2d 919 (1991), received a three-year term of probation on August 17, 1982, which later "was

extended for an additional two years, until August 13, 1987." The sentencing court issued "a petition and bench warrant for" the defendant's arrest on January 30, 1987, for violating the conditions of his probation, the defendant fled Michigan in July 1987, "an amended petition and bench warrant were filed" on October 26, 1988, and after a December 1988 hearing the sentencing court "found defendant guilty of all counts of probation violation," revoked his probation, and "sentenced him to prison for the underlying conviction" in January 1989. *Id*. at 704-705. This Court rejected the defendant's claim that "when his probation term expired on August 13, 1987, the sentencing court lost its power to revoke his probation . . . ." *Id*. at 705. The Court quoted the version of MCL 771.4 then in effect, *id*., and emphasized the following general rule applicable in Michigan:

> The original petition and bench warrant against defendant alleging violation of the terms of his probation were issued by the sentencing court on January 30, 1987, more than seven months before defendant's probation expired. Michigan courts have traditionally held that the sentencing court retains jurisdiction to revoke a defendant's probation if probation revocation proceedings are commenced within the probation period and are pending when it expires. [*Id*. at 706, citing *Hodges*, 231 Mich 656, and *Wakefield*, 46 Mich App 97.]

The Court further stated:

> [W]e may logically construe the statutory phrase [in MCL 771.4] "[i]f during the period of probation it appears to the sentencing court's satisfaction" to require only that during the probation period the court find that probable cause exists to believe that the defendant has violated his probation in order to justify issuance of a petition to revoke probation and a warrant for the defendant's arrest. . . . [A] petition was filed against defendant on January 30, 1987,

> for violations of the probation order which occurred in November and December 1986. Therefore, we conclude that the trial court had jurisdiction to revoke defendant's probation in October 1988 despite the fact that his probation had expired on August 13, 1987.[2]
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> [2] Under the traditional rule set forth in *Hodges*, *supra*, both the probation violation and the filing of the petition must occur during the probation period. Because the present case meets the requirements of that rule, we need not discuss its validity . . . .
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> [*Id*. at 708.]

See also *People v Valentin*, 220 Mich App 401, 407-408; 559 NW2d 396 (1996) (restating the traditional rule that a sentencing court possesses jurisdiction to revoke probation if the court initiates probation revocation proceedings "before the probation period expired"), aff'd 457 Mich 1 (1998).

The authorities we have examined, MCL 771.4, *Hodges*, 231 Mich at 660-661, *Wakefield*, 46 Mich App at 98-100, *Ritter*, 186 Mich App at 705-708, and *Valentin*, 220 Mich App at 407-408, lead us to the inexorable conclusion in this case that the circuit court lacked jurisdiction to revoke defendant's probation and impose a prison sentence. The circuit court sentenced defendant to a two-year probation period that expired on June 23, 2006. The court did not sign the bench warrant for defendant's arrest for violating the conditions of his probation until February 20, 2007, at the earliest, and the court clerk did not file the warrant until March 2, 2007. Because defendant's probation period had already expired well before any probation revocation proceedings had commenced, the circuit court did not possess jurisdiction to revoke defendant's probation and sentence him to imprisonment. Therefore, we vacate de-

fendant's prison sentence and remand this case to the circuit court so that it may discharge defendant from his probation sentence.[2]

Sentence vacated and case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[2] Given our resolution of this issue, we need not address defendant's remaining argument about the delay in executing the probation violation warrant.

PEOPLE v EVANS

Docket No. 290833. Submitted May 5, 2010, at Detroit. Decided May 13, 2010, at 9:10 a.m.

Lamar Evans was charged in the Wayne Circuit Court with burning other real property, MCL 750.73. The trial court, Deborah A. Thomas, J., granted defendant's motion for a directed verdict and dismissed the case on the basis that the prosecution had failed to produce evidence to establish that the building burned was not a dwelling house. The prosecution appealed, contending that the trial court erroneously granted defendant's motion for a directed verdict because the prosecution was not required to prove that the burned building was not a dwelling house. The prosecution also contended that principles of double jeopardy do not bar a retrial because the trial court's dismissal of the case did not constitute a directed verdict of acquittal for double jeopardy purposes.

The Court of Appeals *held*:

1. The trial court misperceived the elements of the offense of burning other real property. The crime of burning other real property, MCL 750.73, i.e., property that is not a dwelling house, is a lesser included offense of the crime of burning a dwelling house, MCL 750.72. The necessary elements to prove either offense are the same, except that to prove the greater offense it must be shown that the building is a dwelling house, while to prove the lesser offense it is not necessary to prove that the building is not a dwelling house. The trial court incorrectly determined that proof that the burned building was not a dwelling house is an element of the offense of burning other real property, and erred by directing a verdict.

2. An actual acquittal occurs, for double jeopardy purposes, only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of a factual element necessary for a criminal conviction. The directed verdict in this case did not constitute an acquittal for double jeopardy purposes because the trial court failed to address any of the elements that actually must be satisfied to establish the offense of burning other real property. The trial court's ruling did not constitute a resolution of some or all of the factual elements of the offense of burning

other real property and constituted nothing more than a determination that the prosecution had failed to provide sufficient evidence to establish a factor that is not an element of the charged offense, premised on an incorrect legal determination regarding the elements that needed to be established. Double jeopardy principles do not preclude further prosecution of the charged offense.

Reversed and remanded.

1. CRIMINAL LAW — ARSON — BURNING OTHER REAL PROPERTY — BURNING A DWELLING HOUSE.

The crime of burning other real property, i.e., property that is not a dwelling house, is a lesser included offense of the crime of burning a dwelling house; the necessary elements to prove either offense are the same, except that to prove the greater offense it must be shown that the building is a dwelling house, while to prove the lesser offense it is not necessary to prove that the building is not a dwelling house (MCL 750.72, 750.73).

2. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — ACQUITTALS.

An acquittal occurs for double jeopardy purposes only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of a factual element necessary for a criminal conviction.

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

Rose Mary C. Robinson for defendant.

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

O'CONNELL, J. The prosecution appeals as of right the trial court's order granting defendant's motion for a directed verdict and dismissing the case. We reverse and remand.

Defendant was charged with burning other real property. MCL 750.73 provides:

> Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years.

MCL 750.72, which concerns burning a dwelling house, provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 20 years.

Defendant was seen carrying a gasoline can and running away from a burning house. An arson investigator testified that he observed burn patterns that indicated that a flammable liquid had been used to ignite the fire. The investigator noted that the home lacked gas, electricity, and water. The homeowner testified that he was in the process of purchasing the home, which needed repairs, and that he and his family had moved some belongings into the home.

At the close of the prosecution's proofs, defendant moved for a directed verdict. Defendant noted that the crime with which he was charged pertained to the burning of property other than a dwelling house and argued that the prosecution had not established that the building that burned was not a dwelling house. Defendant referred the trial court to CJI2d 31.3, Burning Other Real Property, which provided before its amendment in September 2009:

> (1) [The defendant is charged with the crime of / You may also consider the lesser charge of] burning a building

or any of its contents. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant burned *[describe property alleged]*. The term "burn" in this case means setting fire to or doing anything that results in the starting of a fire, or helping or persuading someone else to set a fire. If any part of the *[describe property]* is burned, [no matter how small,] that is all that is necessary to count as a burning; the property does not have to be completely destroyed. [The *(describe property)* is not burned if it is merely blackened by smoke, but it is burned if it is charred so that any part of it is destroyed.]

(3) Second, that the property that was burned was a building or any of its contents. [It does not matter whether the defendant owned or used the building.]

(4) Third, that when the defendant burned the building or its contents, [he/she] intended to burn the building or contents or intentionally committed an act that created a very high risk of burning the building or contents and that, while committing the act, the defendant knew of that risk and disregarded it.

[(5) Fourth, that the building was not a dwelling house. A dwelling house is a structure that is actually being lived in or that could reasonably be presumed to be capable of being lived in at the time of the fire. (A business that is located very close to and used in connection with a dwelling may be considered to be a dwelling.)][1]

Defendant sought a directed verdict of acquittal on the ground that the prosecution had failed to produce any evidence to establish that the building that burned was not a dwelling house. The trial court made the following determination on the record, reproduced here in its entirety:

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[1] A use note indicates that paragraph (5) "should be used when instructing on the crime as a lesser included offense of burning a building."

The Court: The Court does not have an option of not reading all of the required elements in a jury instruction, and there are no optional elements in [CJI2d] 31.3. All of them are required. And the instructions are not a guide. They are what is required by law.

Looking at the commentary, it refers to a distinction between [CJI2d] 31.2 and 31.3. [CJI2d] 31.2 is the instruction that is required for burning a dwelling house.

The commentary, speaking of CJI 2nd 31.1 [sic, 31.3], Burning Other Real Property, the commentary: "This offense is similar to the one described in CJI 2nd 31.2, except that an essential element is that the structure burned is not"—which is in italicized writing print—"a dwelling house." And then it cites People v Antonelli, A-n-t-o-n-e-l-l-i, 64 Mich App 620, 238 NW 2nd 363 [1975], and notes that it was reversed on other grounds, and gives the citation as 66 Mich App 138, 238 NW 2nd 551 (1975).

And the commentary goes on to say: "As the Court explained on rehearing, common law arson required that the building be a dwelling. In creating the less serious crime of burning buildings other than dwellings, the legislature simply eliminated the element of habitation. Other real property is all real property not included in MCL 750.72."

And the People in this case have relied on MCL 750.73, which specifically says it cannot be a dwelling.

[*The Prosecutor*]: Judge, could I have a moment to go upstairs and pull the statute and make sure that the statute addressed that. Because my understanding of the law is that it doesn't matter whether it's a dwelling or not, it just has to be a structure. And that's the reason for the—

The Court: Other than a house, because the legislature has imposed a higher penalty for one burning a house.

[MCL] 750.73 reads: "Burning of Other Real Property — Any person who willfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony . . . [.]" I won't give the term of punishment.

> And it says: "Other than those specified in the next preceding." Isn't preceding before? The next preceding section of this chapter would be [MCL] 750.72.
>
> [MCL] 750.72 is entitled "Burning Dwelling House," and reads: "Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by him or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony." I will not read the term of punishment, but it is twice that which is specified in [MCL] 750.73.
>
> So reading the language of [MCL] 750.73, which refers back to [MCL] 750.72, a dwelling house, either occupied or unoccupied, is excluded by law.
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> [*The Prosecutor*]: Judge, may I have a moment to go upstairs and consult with my supervisors?
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> *The Court*: You can consult with them when you tell them I've granted the motion.
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> [*Defense Counsel*]: Thank you, Judge.
>
> *The Court*: As a matter of law.
>
> The testimony was this was a dwelling house, paid for for forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter.
>
> Motion granted.

On appeal, the prosecution argues that the trial court erroneously granted defendant's motion for a directed verdict because the prosecution was not required to prove that the burned building was not a dwelling house and that the principles of double jeopardy do not bar a retrial because the trial court's dismissal of the case did not constitute a directed verdict of acquittal for double jeopardy purposes. We agree.

We review a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecution, viewed in a light

most favorable to the prosecution, could persuade a rational fact-finder that the essential elements of the offense were proved beyond a reasonable doubt. *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008). The applicability of the Double Jeopardy Clause presents a question of law that we review de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

It is undisputed that the trial court misperceived the elements of the offense with which defendant was charged and erred by directing a verdict.[2] In *People v Antonelli (On Rehearing)*, 66 Mich App 138, 140; 238 NW2d 551 (1975), this Court concluded that the crime of burning other real property (i.e., property that is not a dwelling) is a lesser included offense of the crime of burning a dwelling. The *Antonelli* Court noted, "The necessary elements to prove either offense are the same, except to prove the greater it must be shown that the building is a dwelling; to prove the lesser it is not necessary to prove that the building is not a dwelling." *Id*. In this case, the trial court examined CJI2d 31.3 and concluded from the language of paragraph (5) that it must be proved that the building is not a dwelling in order to establish the offense of burning other real property.[3] However, as noted, paragraph (5) is read only when the offense of burning other real property is considered as a lesser included offense of the crime of burning a dwelling. The crime of burning other real property was not charged as a lesser included offense in this case.[4]

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[2] Even defendant admitted in his brief on appeal that the trial court's directed verdict of acquittal was "technically incorrect."

[3] Interestingly, paragraph (5) was removed from the latest version of this jury instruction, amended in September 2009.

[4] We note that the trial court's stated belief that it was required by law to rely on the Michigan Criminal Jury Instructions to determine the elements of the offense of burning other real property was incorrect. The

The trial court incorrectly determined that proof that the burned building was not a dwelling is an element of the charged offense and directed a verdict of acquittal on the ground that the prosecution had failed to present evidence of that nonelement. Defendant argues that the trial court's order granting a directed verdict, though erroneous, constituted an acquittal for double jeopardy purposes, barring a retrial. We disagree.

The double jeopardy clauses of the United States and Michigan constitutions prevent a defendant from being prosecuted twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. If a trial court directs a verdict of acquittal on a charge, the double jeopardy provisions prohibit further proceedings on that charge. *People v Nix*, 453 Mich 619, 626-627; 556 NW2d 866 (1996). Specifically, "[a] defendant may not be retried after an acquittal that is granted on the basis of insufficient evidence." *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997). Whether a trial court's decision constitutes a verdict of acquittal depends on ' "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." ' *Nix*, 453 Mich at

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Michigan Criminal Jury Instructions are simply provided as guidance for trial courts for the purpose of instructing a jury. In fact, a trial court is not even required to use the Michigan Criminal Jury Instructions when instructing the jury. In *People v Vaughn*, Justice BRICKLEY explained:

> The Michigan Criminal Jury Instructions do not have the official sanction of this Court, and their use is not mandatory but, instead, remains discretionary with the capable trial judges of this state. . . . Trial judges remain free to use all or part of those standardized instructions that they deem proper for adequately instructing a jury, and should not hesitate to modify or disregard a standard instruction when presented with a clear or more accurate instruction. [*People v Vaughn*, 447 Mich 217, 235 n 13; 524 NW2d 217 (1994) (opinion by BRICKLEY, J.), reh den 447 Mich 1202 (1994), repudiated on other grounds *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999) (citations omitted).]

625, quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). " 'There is an acquittal and retrial is impermissible when the judge "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." ' " *Nix*, 453 Mich at 626, quoting *People v Anderson*, 409 Mich 474, 486; 295 NW2d 482 (1980), quoting *Martin Linen*, 430 US at 572.

In *Nix*, the majority made an additional observation in response to the dissent's concerns that the trial court had improperly determined that the prosecutor had failed to establish that the defendant had a legal duty to aid the murder victim, stating:

> The dissent appears to read the *Martin Linen* standard as if the phrase "correct or not" refers to the factual truth of the prosecution's evidence, a determination completely outside the trial court's purview in a jury trial when considering a defendant's motion for directed verdict. When ruling on a motion for directed verdict, a trial court must, as this trial court did, view the prosecution's evidence in the light most favorable to the prosecution. Accordingly, the trial court cannot make an erroneous factual resolution. The phrase "correct or not" refers to all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense. As discussed below, however, it is not clear that this situation even exists in the case at bar. [*Nix*, 453 Mich at 628.]

Admittedly, the majority's observation indicated that it believed that the Double Jeopardy Clause precludes retrial of a defendant if charges against him are dismissed because the prosecution failed to establish a nonelement of the charged offense. In *People v Howard*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2003 (Docket No. 240915), p 3 n 2, a panel of this Court discussed the illogic of such a position:

> Statements in *Nix*, albeit arguably dicta, could be read to mean that the double jeopardy clause applies to acquittals resulting from "egregiously erroneous" determinations that "a particular factor is an element of the charged offense." *Nix*, [453 Mich] at 625, 628. Thus a double jeopardy bar would prevent retrial of a defendant acquitted by a judge who concluded that the offense charged had as one of its elements that the moon is made of green cheese and that, the prosecutor having failed to prevent [sic] any evidence to that effect, a directed verdict was required. To state such a result is to show the deficiencies of the rule that would even arguably allow it. That rule certainly does not assure that the double jeopardy clause operates in a manner that, while preventing the retrial of factual issues properly determined in favor of a defendant, nonetheless allows the public "its valued right to have one complete opportunity to vindicate its laws." *Id.* at 642. (J Boyle, dissenting).

In addition, we note that the majority in *Nix* recognized that its interpretation of the phrase "correct or not" was dicta, acknowledging that it was unclear whether the situation that concerned the dissent, that dismissal of the case was premised on the prosecution's failure to establish a nonelement of an offense, had even occurred.[5] *Nix*, 453 Mich at 628. See also *People v Case*, 220 Mich 379, 382-383; 190 NW 289 (1922) ("It is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but *obiter dicta* and lack the force of an adjudication.").

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[5] Instead, the majority in *Nix* noted that "in granting defendant's motion for directed verdict, the trial judge considered all the factual evidence proffered by the prosecution and concluded that that factual evidence, as a matter of law, was insufficient to permit the jury to convict defendant of the charges brought . . . ." *Nix*, 453 Mich at 628-629.

Yet, coincidentally, the acknowledgement by the majority in *Nix* that this determination was not intrinsic to its holding in *Nix* frees us to consider the discussion by the dissenters in *Nix* concerning the proper application of the Double Jeopardy Clause in such circumstances. The dissent in *Nix* wrote:

> [A] judicial ruling is an acquittal "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element *necessary for a criminal conviction*." *United States v Maker*, 751 F2d 614, 622 (CA 3, 1984), cert den 472 US 1017 (1985) (emphasis added). Thus, as Professor Wright's treatise has construed the Court's jeopardy jurisprudence, "[s]o long as there has not been a finding against the government on any issue of fact required to establish guilt on the correct legal theory, appeal could easily seem appropriate." 15B Wright, Miller & Cooper, Federal Practice & Procedure (2d ed), § 3919.5, p 662.
>
> In *Maker*, the defendants were charged with a single insurance fraud scheme related to two separate automobile accidents. The district court concluded that the statute required advanced planning of the second accident at the time of the first and dismissed the charge during trial on the basis of the insufficiency of the government's evidence to prove one scheme rather than two. Finding this to be an "element of" the government's case, the trial court decided that the government did not have "sufficient evidence" to prove this "element." *Maker* [751 F2d] at 619. While acknowledging that the United States Supreme Court did not provide significant direction on how the test should be applied, *id.* at 622, the United States Court of Appeals for the Third Circuit read *Martin Linen* and its progeny, [*United States v Scott*, 437 US 82; 98 S Ct 2187; 57 L Ed 2d 65 (1978)], to require an acquittal only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of "*a factual element necessary for a criminal conviction*." *Maker* [751 F2d] at 622. (Emphasis added.) As in the case before us, the trial court had dismissed the charge because the government

> had not alleged facts sufficient to prove all the legal elements that it believed were necessary to sustain conviction. Likewise, as in the case before us, the court then made what is "at least arguably, a factual determination," that the government could not prove the legal element which the trial court thought necessary for conviction. *Id.* at 623.
>
> The court found that the trial court's arguable factual finding did not "actually determine in [the defendant's] favor any of the essential elements of the crime with which he was charged," because the trial court's legal determination about the elements of the charge was incorrect. *Id.* The court reasoned:
>
> "Our conclusion that an appeal is not barred in this case is consistent with the policies underlying the double jeopardy clause. This is not a case in which a second trial is permitted 'for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' *Burks v United States*, 437 US 1, 11; 98 S Ct 2141, 2149; 57 L Ed 2d 1 (1978). Instead, this is a case in which the district court, as the result of a legal error, determined that the government could not prove a fact that is not necessary to support a conviction. To preclude an appeal in this case would deprive the public of 'its valued right to "one complete opportunity to convict those who have violated its laws." ' *Scott*, [437 US] at 100, quoting *Arizona v Washington*, 434 US 497, 509; 98 S Ct 824, 832; 54 L Ed 2d 717 (1975)." [*Maker*, (751 F2d) at 624.]
>
> The district court had come to two conclusions, one legal and the other apparently factual. Appeal and retrial were not barred, however, because neither was relevant to an essential element of the charge. [*Nix*, 453 Mich at 633-636 (BOYLE, J., dissenting).]

We find the analysis provided by the dissent in *Nix*, and the dissent's reliance on *Maker*, to be persuasive and adopt this position. Accordingly, we conclude that an actual acquittal occurs, for double jeopardy purposes, "only when the trial court's action, whatever its form, is

a resolution in the defendant's favor, correct or not, of a factual element necessary for a criminal conviction." *Id.* at 634-635 (emphasis, citation, and quotation marks omitted).

In this case, we conclude that the trial court's order granting a directed verdict in favor of defendant does not constitute an acquittal for double jeopardy purposes, because the trial court failed to resolve any of the elements that actually must be satisfied to establish the offense of burning other real property. Again, the basis for a trial court's grant of a directed verdict is determined by examining "the substance of the decision . . . ." *Mehall*, 454 Mich at 5. The trial court's written order was a standardized form and indicated only that defendant's motion for a directed verdict of acquittal was granted. However, the trial court's remarks made at the time defendant moved for a directed verdict indicated that it granted a directed verdict because the court erroneously believed that an element of the charged offense of burning other real property is that the property burned was not a dwelling. The trial court then improperly concluded that the prosecution did not present evidence to establish this nonelement and granted defendant's motion for a directed verdict of acquittal as a matter of law. The trial court never addressed any of the *actual* elements of burning other real property when granting the directed verdict, instead basing the directed verdict entirely on a determination that the prosecution had failed to establish a nonelement.

The trial court's ruling did *not* constitute a resolution of some or all of the factual elements of the offense of burning other real property. It was premised, instead, on an error of law: the trial court ordered a directed verdict because it believed that the prosecution was

required to establish that the building in question was not a dwelling, when the applicable statute and relevant caselaw make it quite clear that no such element must be satisfied. The trial court's ruling constituted nothing more than a determination that the prosecution had failed to provide sufficient evidence to establish a factor that is *not* an element of the charged offense, premised on an incorrect legal determination regarding the elements that needed to be established. In fact, no resolution regarding the *actual* elements of the charged offense was even made. The trial court never mentioned any actual element of the charged offense in its discussion of the directed verdict, nor did it discuss any evidence presented by either party except that which, in the court's mind, conclusively established that the burned building was a dwelling. Because the trial court never resolved, or even addressed, a factual element necessary to establish a conviction for burning other real property, and instead based the directed verdict solely on the determination that the prosecution had failed to present any evidence establishing a nonelement of the offense, double jeopardy principles do not preclude further prosecution of the charged offense.

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

MILLER v CITIZENS INSURANCE COMPANY

Docket No. 290522. Submitted May 4, 2010, at Detroit. Decided May 13, 2010, at 9:15 a.m.

Gail Miller, guardian and conservator for Ryan S. Miller, a mentally and physically incapacitated adult, brought an action in the Macomb Circuit Court against Citizens Insurance Company and April Buerkel, an employee of Citizens, seeking, in part, no-fault motor vehicle insurance benefits for injuries Ryan received in a motor vehicle accident. Citizens had denied plaintiff's application for such benefits following the accident. The parties reached a settlement, and the trial court, Matthew S. Switalski, J., entered a stipulated order of dismissal that settled the matter except, in part, with regard to the entitlement of plaintiff's attorneys to an attorney lien. The court ordered plaintiff to give notice to Ryan's medical providers to appear at a scheduled conference to settle the attorney fee issue. Thereafter, one of the providers, Detroit Medical Center (DMC), moved to intervene as a plaintiff, which the trial court denied. Following further proceedings, plaintiff filed a motion regarding distribution of the no-fault benefits. The trial court then entered an opinion and order denying plaintiff's request that the DMC be paid only $66,200, which is the amount that it would have received from Medicaid for the services it provided, rather than the total amount of its bill, $150,660.51. The trial court also ordered that plaintiff's attorneys were entitled to a reasonable percentage of the DMC's recovery and that 1/3 of the DMC's recovery was a reasonable percentage as attorney fees. The DMC appealed, alleging that the trial court erred by holding that plaintiff's attorneys were entitled to have attorney fees deducted from the payment the DMC earned by providing services to Ryan. Plaintiff cross-appealed, challenging the DMC's right to appeal as well as the amount that the DMC was allocated from the settlement proceeds for the services it provided.

The Court of Appeals *held*:

1. Plaintiff's attorneys were entitled to fees for the legal services they provided on behalf of plaintiff as a consequence of the contingency fee agreement between plaintiff and the attorneys in which the attorneys agreed to accept as payment for their services

1/3 of the amount of monies recovered on Ryan's behalf. Moreover, pursuant to the contingency fee agreement, plaintiff's attorneys had a right to be paid for their services from the amount recovered from Citizens. The trial court did not abuse its discretion by awarding plaintiff's attorneys the fees provided for in the contingency fee agreement.

2. The "common-fund exception," an equitable, common-law exception to the American rule regarding the payment of attorney fees, applied in this case. The exception is premised on the equitable principle that it is unfair to allow others to benefit at the expense of the prevailing party without contribution to the costs incurred in securing the common fund. Therefore, plaintiff's attorneys rightfully secured a charging lien against the settlement proceeds—or common fund—pursuant to their contingency fee contract.

3. The fact that the DMC's bill for the services it provided to Ryan was not overdue at the time the settlement was reached was of no consequence in this case.

4. The DMC was an "interested person" with regard to the apportionment of its bill for services rendered to Ryan. Because the DMC contested the right of plaintiff's attorneys to have their fees deducted from the amount of the DMC's billed services, the trial court properly required the DMC to appear in court to settle the attorney fee issue. The trial court did not err by providing the DMC a forum in which to contest and resolve the matter. The Court of Appeals did not lack jurisdiction over the appeal by the DMC.

5. The trial court properly denied plaintiff's request that the DMC only receive the amount that it would have received from Medicaid. The DMC's challenge to the apportionment of the common fund was made in good faith and did not warrant punitive action.

Affirmed.

1. ATTORNEY AND CLIENT — CHARGING LIENS FOR ATTORNEY FEES.

An attorney's charging lien is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit; the charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services.

2. ATTORNEY AND CLIENT — ATTORNEY FEES — AMERICAN RULE — COMMON-FUND EXCEPTION.

The common-fund exception is a common-law exception to the American rule, which provides that, generally, each litigant must

> pay its own attorney's fees, even if the party prevails in the lawsuit; the common-fund exception only applies when a prevailing party creates or protects a common fund that benefits the prevailing party and others; the common-fund exception is premised on the equitable principle that it is unfair to allow others to benefit at the expense of the prevailing party without contribution to the costs incurred in securing the common fund.

Thomas, Garvey, Garvey & Sciotti, *P.C.* (by *James McKenna*), for Gail Miller.

Charles N. Raimi and *Miller & Tischler*, *P.C.* (by *Mark Schreier*), for the Detroit Medical Center.

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

CAVANAGH, P.J. The Detroit Medical Center (DMC), an aggrieved party, appeals as of right an order granting attorney fees to plaintiff's attorneys that had the effect of proportionately reducing the amount the DMC recovered for billed services in this no-fault motor vehicle insurance case. We affirm. Plaintiff cross-appeals, challenging the DMC's right to participate in this matter, as well as the amount the DMC was allocated from the settlement proceeds for services it provided. We affirm.

On December 17, 2007, plaintiff Gail Miller, as guardian and conservator for Ryan Scott Miller, a mentally and physically incapacitated adult, filed a lawsuit against defendants, Citizens Insurance Company and April Buerkel, an employee of Citizens. The complaint alleged that on September 5, 2007, Ryan was in a rollover motor vehicle accident from which he sustained severe and permanent injuries, including a spinal cord injury that rendered him a paraplegic, a severe closed head injury, multiple facial fractures, multiple broken ribs, and multiple fractures of vertebrae. The vehicle involved in the accident was owned by Ryan's father

and was insured by Citizens; thus, an application for no-fault benefits dated September 13, 2007, was submitted to Citizens on Ryan's behalf. The application indicated that Ryan had no other medical insurance coverage. On November 7, 2007, Citizens responded to the application for benefits by rescinding the insurance policy, claiming that in May 2002, a representation was made that the vehicle at issue would not be used for business purposes and that the representation was false. By letter dated November 9, 2007, Citizens denied Ryan's application for no-fault benefits.

The complaint was filed after the failed efforts by plaintiff's attorneys to convince Citizens that Ryan—an innocent third party—was entitled to no-fault benefits. Count I was a breach of contract claim, count II was a common-law fraud and misrepresentation claim, count III was a fraudulent concealment claim, count IV was a silent fraud claim, count V alleged a violation of the Consumer Protection Act, MCL 445.901 *et seq*., count VI was an estoppel claim, count VII alleged a violation of the Uniform Trade Practices Act, MCL 500.2001 *et seq*., count VIII was a conspiracy and fraud claim, and count IX requested exemplary damages.

On January 11, 2008, plaintiff filed a motion for a preliminary injunction under MCR 3.310(A), requesting that Citizens be ordered "to immediately begin payment of Plaintiff's no-fault benefits for his care, rehabilitation and recovery that are reasonable, necessary and related to this automobile accident." Attached to the motion was a letter dated January 9, 2008, authored by a nurse case manager from Alpha Case Management who had been appointed on Ryan's behalf, which detailed the severity of Ryan's injuries as well as his future, extensive medical needs. Because of the extent of Ryan's mental and physical injuries, place-

ment in residential rehabilitation was discussed but, the letter indicated, such placement "will not be possible if he does not have insurance coverage as no appropriate TBI/spinal cord injury facility will admit Ryan without proof of payment." Citizens opposed plaintiff's motion.

On January 22, 2008, a stipulated order of dismissal pursuant to settlement was entered by the trial court. The order indicated that jurisdiction was retained only "for the sole limited purpose of settlement of any attorney liens for personal protection benefits accrued to date." The order also provided that count I was dismissed without prejudice with regard to the personal protection insurance benefits payable as alleged in count I, but with prejudice with regard to interest and attorney fees owing under count I. Counts II through IX were dismissed with prejudice. Citizens was ordered to pay all allowable expenses accrued between September 5, 2007, and January 22, 2008, as well as those personal protection insurance benefits that followed to the extent required by the no-fault act. With regard to plaintiff's attorneys' entitlement to an attorney lien, the court ordered plaintiff to provide notice to providers to appear at a scheduled conference to settle the attorney liens.

On February 11, 2008, the conference was held, and legal representation for the DMC was present. The DMC argued that it had not received notice of the litigation until after it was settled. The trial court ordered an evidentiary hearing to be conducted with regard to the issue. The court further ordered Citizens to make payment to the other providers and that those providers were subject to an attorney lien of 1/3 of their invoices.

On February 15, 2008, the DMC moved to intervene as a plaintiff pursuant to MCR 2.209. The DMC averred

that it had provided medical, surgical, and rehabilitative services to Ryan at a cost of approximately $150,651 from December 4, 2007, through January 25, 2008. The DMC averred that plaintiff's attorneys were seeking from the DMC a payment of 1/3 of its charges as attorney fees, but the DMC had no such agreement with plaintiff's attorneys. The DMC also contended that "Plaintiff's counsel did not provide it with appropriate notice of his representation, did not advise it of his intention to pursue Intervening Plaintiff's interests and claim a one-third fee, and did not provide it an opportunity to retain its own counsel." On February 19, 2008, plaintiff responded to the DMC's motion to intervene, primarily arguing that there was no pending action in which to intervene—the matter had been settled by order entered on January 22, 2008. Following a hearing, the trial court denied the motion to intervene.

On March 14, 2008, an evidentiary hearing was conducted. The only witness was Jane Ruppman, the director of patient business services at Rehabilitation Institute of Michigan (RIM), the DMC hospital where Ryan received medical treatment. On direct examination, she testified that patients or third-party payers do not receive a bill for services while still in the hospital, but only after discharge. With regard to Ryan, she had only spoken with an attorney for plaintiff on January 22, 2008, when he called to advise that he had secured insurance proceeds from Citizens and sought 1/3 of the $150,000 outstanding balance as his fee. That was her first contact with plaintiff's attorneys. She then received a letter from plaintiff's attorneys dated January 24, 2008, regarding their legal representation and claim for 1/3 of the bill as their fees. Ryan was discharged on January 25, 2008. On February 12, 2008, a bill was submitted to Citizens, and payment was denied.

On cross-examination, Ruppman testified that she held a supervisory position and had no personal involvement with Ryan's billing or anything else related to his hospitalization. She testified that when Ryan was admitted, a lien was not sought. She knew that if Ryan were eligible for Medicaid, Medicaid would pay approximately $1,324 a day. The actual bill for Ryan's care was $150,000—which is about $3,000 a day for 50 days. If Ryan were not eligible for insurance coverage or Medicaid, he would be billed, and liable, for RIM's medical services. On the back of the Medicaid application, which was signed on the day Ryan was admitted, someone had written the names and telephone numbers of Ryan's two attorneys. Thus, Ruppman admitted, at least as of December 4, 2007, according to the DMC's documents, the DMC was aware of plaintiff's attorneys.

Ruppman also testified that before Ryan was admitted to RIM, a RIM employee, Kathleen Clawson, went to see him to determine if he qualified for care at RIM. Ruppman was aware that Clawson had testified in her deposition that she first had contact with plaintiff's attorneys on November 29, 2007, a week before Ryan was admitted to RIM. As of that date, the DMC was aware that Citizens had denied coverage to Ryan and that attorneys were pursuing this matter on Ryan's behalf. Ruppman admitted that she never interviewed RIM or DMC employees who had direct contact with plaintiff's attorneys, Ryan's family, or Ryan's case manager. There were also documents in Ryan's file, including documents from other medical providers, that identified Ryan's attorneys by name and telephone number. Further, on December 13, 2007, the DMC received a request from plaintiff's attorneys for billing information. Ruppman admitted that the DMC did not contact or send a lien notice to Citizens. And, when the bill was sent to Citizens, the DMC did not advise it to pay the

DMC directly or not to pay plaintiff's attorneys. The DMC also did not contact plaintiff's attorneys or advise them that it did not want them to pursue this matter on its behalf or that their services were not wanted with regard to this matter. Ruppman further testified that the DMC used to send a form letter that advised those persons inquiring about outstanding medical bills not to collect money on its behalf, but the DMC stopped doing that because the postage was expensive and "it didn't work"—liens were still filed and the DMC still had to retain counsel.

On October 1, 2008, the trial court issued an opinion and order, holding that, assuming without deciding that the DMC was entitled to notice, the "DMC had abundant notice that Ryan Miller had counsel who was pursuing these claims." The court noted that the DMC, through its employees, was aware that plaintiff had counsel on November 29, 2007, and was also aware on that date that Citizens had denied insurance coverage. Further, on December 13, 2007, plaintiff's attorneys had requested copies of bills for Ryan's care. In spite of this knowledge, the DMC did not take any measures before plaintiff's attorneys obtained insurance proceeds to inform them to cease and desist any efforts on behalf of the DMC.

On October 6, 2008, plaintiff moved for distribution of no-fault benefits payments. Plaintiff requested that the court order Citizens to pay plaintiff all monies owed to the DMC. Plaintiff further requested that, pursuant to the equitable provisions of MCL 500.3112, the DMC receive only $66,200, which was the same amount that the DMC would have received from Medicaid. Plaintiff argued that the DMC

> should not receive a windfall for contesting a settlement that was agreeable to every other provider of medical care

> and treatment to the Plaintiff and then causing Plaintiff to incur additional expenses, costs and attorney fees as a result of their challenging the settlement that was agreeable to everyone but themselves.

The DMC opposed the motion, arguing that it was a creditor and Ryan a debtor. At the time the case was settled between plaintiff and Citizens, the DMC had not even issued a bill for its services and plaintiff's attorneys were not the DMC's attorneys. Further, the DMC argued, a hearing to determine the reasonableness of the requested attorney fees was required.

On February 3, 2009, the trial court entered an opinion and order denying plaintiff's request that the DMC be paid only $66,200, rather than its bill of $150,660.51, on the ground that it was a good-faith litigation for which the DMC should not be punished. The order also provided that plaintiff's attorneys were entitled to their reasonable percentage of the DMC's recovery, which was 1/3 of that recovery. The court held that no further hearing was necessary, because the fees were reasonable.

On February 12, 2009, the DMC moved to stay payment of the attorney fees or for other relief from the February 3, 2009, order. Plaintiff opposed the motion. On February 23, 2009, the trial court entered an order denying the motion and ordering that Citizens issue a check in the amount of $102,506.94 to the DMC and a check in the amount of $48,153.57 to plaintiff's attorneys.

On February 24, 2009, the DMC filed its claim of appeal in this Court. On February 25, 2009, the DMC filed in this Court a motion for a stay of proceedings, which was denied. *Miller v Citizens Ins Co*, unpublished order of the Court of Appeals, entered February 27,

2009 (Docket No. 290522). On March 17, 2009, plaintiff filed a claim of cross-appeal.

On appeal, the DMC argues that the trial court erred by holding that plaintiff's attorneys were entitled to have attorney fees deducted from the payment the DMC earned by providing services to Ryan. We disagree. Issues of statutory interpretation are reviewed de novo as questions of law. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). We review the amount and the award of attorney fees for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). An abuse of discretion occurs when the decision is outside the range of reasonable and principled outcomes. *Id*.

First, the DMC argues that plaintiff's attorneys were not entitled to fees "from no-fault benefits earned by the DMC when no attorney-client relationship existed between them." This argument is without merit. The dispositive attorney-client relationship that entitled plaintiff's attorneys to fees for representing plaintiff in this no-fault breach of contract action against Citizens was the attorney-client relationship that existed between plaintiff and her attorneys. And plaintiff's attorneys were entitled to fees for legal services provided on behalf of plaintiff as a consequence of the contingency fee agreement that existed between them.

MCL 500.3112 provides that "[p]ersonal protection insurance benefits are payable to or for the benefit of an injured person . . . ." And MCL 500.3142 provides that such benefits are payable as loss accrues. In this case, plaintiff's application to Citizens for no-fault insurance benefits was denied. At that time, Ryan was receiving medical care for extensive injuries he sustained in the automobile accident at issue. In the absence of insurance or other medical coverage, he would be personally

liable for those medical expenses. Thus, attorneys were retained to represent Ryan's interests against Citizens and to challenge the denial of his application for no-fault insurance benefits. It appears that a typical contingency fee contract was entered into by which plaintiff's attorneys agreed to accept as payment for their services 1/3 of the amount of monies, if any, recovered on Ryan's behalf.

Thereafter, a lawsuit was filed, which included a breach of contract action premised on Citizens' refusal to pay personal protection insurance benefits, including to Ryan's health-care providers. From the record evidence it appears that, before Ryan was admitted to RIM, on or about November 29, 2007, RIM was aware that Citizens had refused Ryan's application for no-fault benefits and that Ryan had attorneys who were pursuing legal action in that regard. RIM admitted Ryan as a patient on December 4, 2007, and the lawsuit was filed on December 17, 2007. The record is undisputed that the DMC never advised plaintiff, or plaintiff's attorneys, not to pursue insurance proceeds for the payment of its medical services. And although the DMC in past instances had pursued its own claims against automobile insurance providers, it had not done so in this case.

Consequently, when settlement negotiations commenced between plaintiff's attorneys and Citizens regarding the no-fault case, plaintiff's attorneys sought payment for the medical services RIM provided to Ryan. Although at the time Ryan was still a patient at RIM, he was already liable for the cost of the medical services that RIM had provided and that had accrued to that date. The matter was successfully settled. By settling plaintiff's lawsuit, Citizens was relieved of the risk of having penalty interest and penalty attorney fee sanctions imposed on it for failing to provide personal

protection insurance benefits from the date that Ryan sustained his injuries through the settlement date. Citizens also did not have to defend against the other eight counts contained in plaintiff's complaint. By operation of the settlement, Ryan's medical providers did not have to establish that their charges for services provided to Ryan were reasonable under MCL 500.3157. Apparently, plaintiff's attorneys were able to prove to Citizens' satisfaction that such charges were indeed reasonable.

The settlement that plaintiff's attorneys eventually reached with Citizens created, in effect, a common fund that would benefit not only Ryan, but his medical providers, which had not sought to litigate or pursue their own right to payment through legal action. Under MCL 500.3112, each medical provider could have brought an action or intervened in this action against Citizens. See *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 39; 645 NW2d 59 (2002). None did, and thus they were spared the expense of litigating their own claims. Thus, as is customary, plaintiff's attorneys sought to negotiate with Ryan's medical providers, in effect, a reduction in their bills proportionate to the amount of the fees that plaintiff agreed to pay her attorneys for pursuing the legal action against Citizens. All providers agreed to accept as payment in full $^2/_3$ of the amount of their billed services except the DMC. The DMC claims, in essence, that it does not have to pay for plaintiff's attorneys' fees associated with securing payment for medical services the DMC provided to Ryan—the DMC had no contract to pay such fees. But plaintiff had a contract that provided for such payment.

As this Court noted in *Aetna Cas & Surety Co v Starkey*, 116 Mich App 640; 323 NW2d 325 (1982), the

existence of an attorney's charging lien is recognized in Michigan at common law. *George v Sandor M Gelman, PC*, 201 Mich App 474, 477; 506 NW2d 583 (1993). A charging lien is "an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit." *Id*. at 476. "The attorney's charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services." *Id*.

Specifically, in *Aetna Cas & Surety Co*, medical providers submitted their bills for services provided to an automobile accident victim directly to the insured's insurance company. The insurance company refused payment under the no-fault policy, presumably causing the insured to be personally liable for the bills. The insured retained an attorney under a contingency fee agreement. *Aetna Cas & Surety Co*, 116 Mich App at 642. The matter was successfully resolved. Then the insured's attorney requested that the medical providers receive 2/3 of the amount of their billing and that he receive the remaining 1/3 of their billing. The trial court denied the insured's attorney's request. This Court reversed, holding that the insured's attorney had a valid attorney's charging lien against the fund recovered. In particular, this Court noted that Michigan law creates an attorney's lien—a specific encumbrance—on a judgment or fund, including a personal protection insurance fund that a client has recovered through the professional services of that attorney. *Id*. at 644-645. Although we are not bound by that decision because it was decided before November 1, 1990, MCR 7.215(J), we find its reasoning instructive and persuasive with regard to the circumstances of this case.

Plaintiff's attorneys had a right to be paid for their services from the amount recovered from Citizens pur-

suant to their contingency fee agreement with plaintiff. This may appear at first blush to be unfair to the medical providers, who provided medical care only to be asked—almost required—to reduce their bills to pay, in part, for the expense of litigation. It is not unfair. As a consequence of plaintiff's attorneys' actions, Citizens, which had denied the application for benefits entirely, agreed to pay personal protection insurance benefits on Ryan's behalf. If Citizens had not agreed to do so, it is doubtful that Ryan's medical providers would have received as much in settlement of their bills because Medicaid, or Ryan, would have been the payer. And if plaintiff had not retained attorneys to litigate this case, it might have been incumbent on each medical provider to retain counsel to litigate its claim on Ryan's behalf against Citizens, which would also cause them to incur the expense of litigation.

Further, it appears to us that, with regard to the payment of plaintiff's attorneys' fees, an equitable, common-law exception to the American rule applies. See *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998), citing *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 473-474; 521 NW2d 831 (1994). That exception is the common-fund exception. This exception "only applies when a prevailing party creates or protects a common fund that benefits himself and others." *Nemeth*, 457 Mich at 38 n 11; see, also, *Popma*, 446 Mich at 475. This exception is premised on the equitable principle that it is "unfair to allow others to benefit at the expense of the prevailing party without contribution to the costs incurred in securing the common fund." *Nemeth*, 457 Mich at 38 n 11. Although the common-fund exception usually applies to class actions, litigation against automobile insurers for failure to pay personal protection insurance benefits in breach of their contract with their insured parallels a class action.

See, e.g., *Terra Energy, Ltd v Michigan*, 241 Mich App 393, 401-402; 616 NW2d 691 (2000). An insured plaintiff who prevails in a litigation against the plaintiff's insurer secures payment not only for the plaintiff's benefit, but for the benefit of the plaintiff's medical providers, which were at risk of either not being paid or of receiving a smaller fraction of their billed amounts for their services.

In this case, the DMC was one of several beneficiaries of the settlement that plaintiff's attorneys secured from Citizens, which included payment for the medical services that RIM provided to Ryan from the date of Ryan's admission through January 22, 2008. The DMC is correct that it could have pursued a direct claim for benefits on Ryan's behalf, as discussed above. Before Ryan was admitted to RIM, RIM was aware that Citizens had denied coverage. The DMC could have pursued a claim on Ryan's behalf or intervened in this litigation after it was commenced, but the DMC did not. See *Abston v Aetna Cas & Surety Co*, 131 Mich App 26, 31; 346 NW2d 63 (1983). The DMC could have advised plaintiff's attorneys not to pursue payment for its services or advised Citizens that plaintiff's attorneys did not represent its interests, but the DMC did neither. Instead, the DMC, as well as other medical providers, relied on the efforts of plaintiff's attorneys to enforce claims for payment of services rendered to Ryan. Because plaintiff pursued personal protection insurance benefits through a successful litigation, her attorneys rightfully secured a charging lien against the settlement proceeds—or common fund—pursuant to their contingency fee contract. It would be unfair to allow the DMC, and other medical providers, to benefit from the efforts of plaintiff's attorneys without contributing to the costs incurred in securing insurance proceeds and the common fund.

The DMC relies on *Garcia v Butterworth Hosp*, 226 Mich App 254; 573 NW2d 627 (1997), in support of its position that plaintiff's attorneys' fees should not be deducted from benefits payable to the DMC. That case, however, is clearly distinguishable. The insurer in that case paid benefits without contest, the plaintiff brought the no-fault lawsuit only as a precautionary measure, the lawsuit was dismissed before the complaint was even served, and the insurer and health-care provider actually resolved the matter without the assistance of the plaintiff's attorney. Thus, the attorney's motion for a determination of attorney fees owed to him was properly rejected. In our case, (1) Citizens did contest the payment of Ryan's benefits, (2) a lawsuit was filed, served, and litigated before a settlement was reached, and (3) the medical providers had no involvement in the resolution of the litigation. Similarly, the DMC's reliance on the proposition that it is improper to award attorney fees "solely on the basis of equitable principles" is inapposite because the award of attorney fees here principally arises from the contingency agreement between plaintiff and her attorneys, not merely "equitable principles."

Second, the DMC argues that it should not have to pay for plaintiff's attorneys' fees associated with securing payment for medical services the DMC provided to Ryan because, at the time plaintiff settled the case with Citizens, the DMC had not yet billed Ryan for its services. In other words, the DMC argues, their bill was not "overdue" under MCL 500.3142(2) and MCL 500.3148(1).

MCL 500.3142(2) and (3) provide for payment by the no-fault insurer of penalty interest when personal protection insurance benefits are overdue, after an insurer receives reasonable proof of the fact and of the amount

of loss sustained. See *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 730; 761 NW2d 454 (2008). The statute has no application to the facts of this case. The issue here is whether plaintiff's attorneys were entitled to collect their fees, or charging lien, against the proceeds of the settlement they obtained for plaintiff, not whether the DMC or plaintiff's attorneys were entitled to penalty interest from Citizens. When Ryan was admitted to RIM and began receiving medical services for which he could be personally liable to pay, his loss accrued whether or not a final billing was delivered. That the DMC's bill was not "overdue" at the time a settlement was reached is of no consequence here.

Similarly, the DMC's reliance on MCL 500.3148(1), the no-fault penalty attorney fee provision, is misplaced. MCL 500.3148(1) provides for payment by the no-fault insurer of the insured's overdue personal protection insurance benefits, in addition to the insured's reasonable attorney fees if "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." This statute has no application to the facts of this case. The issue here is whether plaintiff's attorneys were entitled to collect their fees, or charging lien, against the proceeds of the settlement they obtained for plaintiff, not whether Citizens was also liable to pay penalty attorney fees.

Third, the DMC argues that it should not have to pay for plaintiff's attorneys' fees associated with securing payment for medical services the DMC provided to Ryan because plaintiff's attorneys "did not satisfy the legal and ethical predicates for receiving an attorney fee from payment earned by the DMC." The DMC relies on State Bar of Michigan Formal Ethics Opinion C-226 (September 1982) for the proposition that it is unethical

for an attorney to charge a hospital a fee for medical payments involuntarily paid by a client's no-fault insurance carrier unless the hospital is first notified of the attorney's contemplated legal action and the hospital is given a reasonable opportunity to advise the attorney that it wishes to pursue its own interests without that attorney's legal services. To the extent that the DMC argues that Citizens voluntarily paid Ryan's personal protection insurance benefits, including the DMC's bill for services, that claim is without merit. The DMC was aware that Citizens had denied Ryan's application for benefits even before Ryan was admitted to RIM. The subsequent lawsuit was settled and along with it Ryan's claim for personal protection insurance benefits related to his hospitalization at RIM.

Further, the DMC's argument premised on a lack of notice is untenable. The record evidence is clear: RIM had notice that plaintiff's attorneys were in the process of pursuing legal action against Citizens even before Ryan was admitted to RIM. As the trial court held, the DMC was also aware that plaintiff's attorneys were seeking payment for the DMC's services, even before the matter was settled, but did not advise plaintiff's attorneys, or Citizens, that the DMC wished to pursue its own interests. Thus, this issue is without merit.

And we reject the DMC's argument that the claim by plaintiff's attorneys for fees from the payment earned by the DMC is contrary to public policy. Citizens clearly contested the claim that Ryan was entitled to no-fault benefits, including at the time that he was admitted to RIM. The DMC could have pursued this claim through the use of its own attorneys, and thus would also have incurred the expense of litigating such a claim. Under the circumstances presented in this case, it would be unfair to allow the DMC to receive the benefit of the

litigation without shouldering some of its burden. Therefore, we conclude that the trial court did not abuse its discretion when it held that plaintiff's attorneys were entitled to have part of their attorney fees deducted from the payment to be made to the DMC for medical services provided to Ryan.

Next, the DMC argues that even if plaintiff's attorneys were entitled to attorney fees, the trial court abused its discretion by awarding them unreasonable fees without any analysis of the reasonableness factors. We disagree.

Plaintiff's attorneys were retained to represent plaintiff's interests against Citizens and to challenge the denial of Ryan's application for no-fault insurance benefits through a breach of contract claim. It appears that a typical contingency fee contract was entered into by which plaintiff's attorneys agreed to accept as payment for their services 1/3 of the amount of monies, if any, recovered on plaintiff's behalf. Plaintiff is not challenging the reasonableness of the fee to which plaintiff's attorneys claim entitlement through their contract. It is well established that contracts must be enforced as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). The DMC merely argues that the fees that plaintiff's attorneys sought were unreasonable, but the fees sought were agreed to by the parties to the contract and plaintiff is not challenging the contract. The DMC provides no legal support for its unsubstantiated claim that it may contest the amount of attorney fees to which plaintiff's attorneys are entitled pursuant to the contract the attorneys had with plaintiff. We will not search for such authority. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Further, the DMC's reliance on the holdings of *Smith*, 481 Mich 519, and *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), in support of its position is misplaced. *Smith* involved a determination of the reasonableness of the attorney fees requested as case-evaluation sanctions under MCR 2.403(O)(6), and *Wood* involved the determination of the reasonableness of attorney fees requested as penalty attorney fee sanctions under MCL 500.3148(1). Our case does not involve these issues; rather, this case involves plaintiff's obligation to pay her attorneys the fees agreed to pursuant to a contingency fee agreement that plaintiff is not challenging. Thus, the trial court did not abuse its discretion by awarding plaintiff's attorneys the fees provided for in that contingency agreement.

On cross-appeal, plaintiff argues that the trial court erred by allowing the DMC to remain in the case as a "constructive party" when the DMC had no standing. We disagree. Whether a party has legal standing to assert a claim constitutes a question of law that is reviewed de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001).

MCL 500.3112 provides, in relevant part:

> Personal protection insurance benefits are payable to or for the benefit of an injured person . . . . Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant *or any other interested person* may apply to the circuit court for an appropriate order. The court may designate the payees and

> make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. [Emphasis added.]

Thus, the DMC, which had provided medical services to Ryan following the automobile accident, was an "interested person" with regard to the apportionment of its bill for services rendered. Because the DMC contested plaintiff's attorneys' right to have their fees deducted from the amount of the DMC's billed services, the trial court properly required the DMC to appear in court to settle the attorney liens. The trial court did not err by providing the DMC with a forum in which to contest and resolve the matter.

And we reject plaintiff's jurisdictional challenge to the DMC's right to appeal in this Court for similar reasons. To have standing to bring an appeal, one must ordinarily be "aggrieved" by the lower court's decision. MCL 7.203(A). To be aggrieved, one must have suffered a concrete and particularized injury. *Spires v Bergman*, 276 Mich App 432, 441-442; 741 NW2d 523 (2007). In this case, the trial court's ruling regarding plaintiff's attorneys' entitlement to attorney fees resulted in the reduction of the amount of money that the DMC attempted to recover for services that it provided to Ryan. Thus, plaintiff's claim that this Court lacks jurisdiction over this appeal by the DMC is without merit.

Next, plaintiff argues on cross-appeal that the trial court erred by denying plaintiff's request to award the DMC the amount that it would have received from Medicaid, approximately $66,000, rather than its billed amount. We disagree. Plaintiff argues that, but for plaintiff's attorneys' actions in securing insurance benefits from Citizens, the DMC would have accepted as

full payment the amount that Medicaid would have paid. However, the record does not support this claim. Ruppman testified that a Medicaid application was submitted on Ryan's behalf after he was admitted to RIM. However, when asked during the evidentiary hearing whether the DMC would have "been willing to accept from Medicaid $66,200," Ruppman replied: "In this case, no." We agree with the trial court's conclusion that the DMC's challenge to the apportionment was made in good faith and does not warrant such a punitive action. Accordingly, the trial court properly denied plaintiff's request in this regard.

Affirmed.

PEOPLE v FYDA

Docket No. 288421. Submitted April 6, 2010, at Detroit. Decided May 18, 2010, at 9:00 a.m.

Theodore S. Fyda was convicted by a jury in the St. Clair Circuit Court, James P. Adair, J., of solicitation of murder and possession of a firearm during the commission of a felony. Defendant appealed, alleging ineffective assistance of counsel, entrapment, and prosecutorial misconduct.

The Court of Appeals *held*:

1. Solicitation to commit murder is a specific intent crime that requires proof that the defendant intended that a murder would in fact be committed. A defendant cannot be found guilty of solicitation to commit murder without a finding of the necessary specific intent, that is, it is necessary to find that there was an actual intent to kill. Intent to inflict great bodily harm or wanton and willful disregard of the recklessness of one's conduct is insufficient to support a conviction of solicitation to commit murder.

2. When it instructed the jury on the elements of solicitation to commit murder, the trial court erred by instructing the jury with regard to the definition of murder that it requires an intent to kill, an intent to do great bodily harm to another person, or an intent to do an act that would create a very high risk of death or great bodily harm knowing that death or great bodily harm would be the likely outcome. Although defense counsel should have objected to the instruction, the error did not influence the outcome of the trial. The evidence showed a level of prior planning by defendant that connoted premeditation. Therefore, it is not reasonably probable that, but for counsel's error, the result would have been different.

3. The actions of the police were insufficient to induce or instigate the commission of a crime by the average person similarly situated to defendant who was not ready and willing to commit it. The police did nothing more than present defendant with the opportunity to commit the crime of which he was convicted, which was insufficient to support defendant's claim of entrapment.

4. Although the prosecutor repeatedly characterized the defense's arguments as a distraction, the prosecutor was not suggesting that defense counsel did not believe defendant. The prosecutor properly addressed the weaknesses of defendant's theory of defense, that is, its singular focus on discrediting the person who informed the police about defendant's desire to hire someone to commit a murder.

5. The prosecution's comments regarding the weakness of defendant's theory of defense was not an attempt to shift the burden of proof to defendant to demonstrate his innocence and did not constitute prosecutorial misconduct.

Affirmed.

1. CRIMINAL LAW — SOLICITATION TO COMMIT MURDER.

Solicitation to commit murder is a specific intent crime that requires proof that the defendant intended that a murder would in fact be committed; the crime of solicitation to commit murder does not include solicitation to inflict great bodily harm or to act with a wanton and willful disregard of the likelihood that one's behavior is likely to cause death or great bodily harm (MCL 750.157b[2]).

2. CRIMINAL LAW — ENTRAPMENT.

Entrapment occurs if the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or the police engage in conduct so reprehensible that the court cannot tolerate it; reprehensible conduct alone, without police instigation, can constitute entrapment.

3. CRIMINAL LAW — ENTRAPMENT — IMPERMISSIBLY INDUCED CRIMINAL CONDUCT.

A court considering a defendant's claim of entrapment should consider the following factors in determining whether governmental activity impermissibly induced criminal conduct: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he or she was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any governmental pressure existed, (8) whether there were sexual favors, (9) whether there were any threats of arrest, (10) whether

there were any governmental procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted.

4. CRIMINAL LAW — PROSECUTORIAL MISCONDUCT — COMMENTS BY PROSECUTOR — VERACITY OF DEFENSE COUNSEL — PRESUMPTION OF INNOCENCE.

A prosecutor must be afforded great latitude regarding his or her arguments and conduct at trial, but a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury because such an argument undermines the defendant's presumption of innocence by suggesting that defense counsel does not believe the defendant, thereby impermissibly shifting the focus to the defense counsel's personality.

5. CRIMINAL LAW — PROSECUTORIAL MISCONDUCT — COMMENTS BY PROSECUTOR — PRESUMPTION OF INNOCENCE.

A prosecutor may argue to the jury that the inculpatory evidence is undisputed or that the evidence is uncontradicted, even if the defendant is the only person who could have contradicted the evidence; a prosecutor may not imply during closing argument that the defendant must prove something or must present a reasonable explanation for damaging evidence and may not comment on the defendant's failure to present evidence because such arguments tend to shift the burden of proof.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Timothy K. Morris*, Chief of Appeals, for the people.

Robin M. Lerg for defendant.

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

PER CURIAM. Defendant, Theodore Fyda, appeals as of right his jury conviction of solicitation of murder[1] and possession of a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced Fyda

[1] MCL 750.157b(2).

[2] MCL 750.227b.

to serve 7 to 15 years in prison for the solicitation conviction, consecutively to 2 years in prison for the felony-firearm conviction. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

After a 10-year marriage, Fyda and Deborah Cunnellon were divorced in October 2005. Fyda met with his friend, Robert Friederichs, regularly over the course of the subsequent 1½ to 2 years and complained about his divorce. Fyda also often spoke of his desire to kill Cunnellon. Friederichs initially believed that Fyda was just "blowing off steam," but he became concerned when Fyda became more aggressive in his statements after Cunnellon filed a motion seeking to recover $5,900 related to mortgage payments. The motion was scheduled to be heard in October 2007. Friederichs believed that Cunnellon was in danger and contacted local law enforcement officials. Friederichs then worked with the law enforcement officials to arrange a meeting between Fyda and an undercover officer who would be posing as a killer for hire. At this meeting, Fyda asked the officer to "pop" Cunnellon and provided the officer with the following items: a handgun that Fyda portrayed as not traceable, pictures of Cunnellon and her car, Cunnellon's work address, and a $200 down payment on a negotiated contract price of $700. Fyda was arrested at the conclusion of the meeting.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Fyda argues that his trial counsel was ineffective for failing to object to the trial court's jury instructions regarding the solicitation-of-murder charge. We review de novo the constitutional question whether an attor-

ney's ineffective assistance deprived a defendant of his or her Sixth Amendment[3] right to counsel.[4] Because the trial court did not conduct an evidentiary hearing, our review of Fyda's challenge to the effectiveness of defense counsel is limited to mistakes apparent on the record.[5]

B. ANALYSIS

To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.[6] A counsel's performance was deficient if it fell below an objective standard of professional reasonableness.[7] The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different.[8]

The jury found Fyda guilty of solicitation to commit murder pursuant to MCL 750.157b(2), which provides: "A person who solicits another person to commit murder, or who solicits another person to do or omit to do an act which if completed would constitute murder, is guilty of a felony punishable by imprisonment for life or any term of years." The statute defines solicit as "to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation."[9] "Solicitation to commit murder is a specific intent crime that requires proof

[3] US Const, Am VI.

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

[5] *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

[6] *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007).

[7] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[8] *Id.*

[9] MCL 750.157b(1).

that the defendant intended that a murder would in fact be committed."[10] The statute, however, does not define murder or differentiate between degrees of murder.

The trial court's jury instructions regarding the solicitation-of-murder charge were as follows:

> First, that the defendant through words or actions offered, promised, or gave money or anything of value to another person.
>
> Second, that the defendant intended that what he said or did would cause murder to be committed. The crime of murder occurs when:
>
> First, an individual causes the death of another person.
>
> Second, that the individual's state of mind at the time of the killing would have been either, one, an intent to kill, or two, an intent to do great bodily harm to another person, or three, an intent to do an act that would create a very high risk of death or great bodily harm knowing that death or great bodily harm would be the likely outcome.
>
> The prosecutor does not have to prove that . . . the person the defendant solicited actually committed, attempted to commit, or intended to commit murder.

Fyda argues that the trial court's jury instructions defined murder consistently with second-degree murder so that the jury was given the opportunity to convict him without proof that he premeditated and deliberated the solicited murder. More specifically, Fyda argues that because Michigan statutory law does not define the term "murder," it is defined by reference to the common law.[11] And the historical common-law definition of murder is " 'where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or

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[10] *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998).

[11] *People v Aaron*, 409 Mich 672, 713-715; 299 NW2d 304 (1980).

aforethought, either express or implied.' "[12] In other words, "malice aforethought is the 'grand criterion' which elevates a homicide . . . to murder."[13] Fyda asserts that "malice aforethought" is synonymous with premeditation and thus implies first-degree murder only.

Contrary to Fyda's assertion, the Michigan Supreme Court has clearly held that malice aforethought, or simply "malice,"[14] "is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm."[15] These three mental states correspond to three of the four types of murder recognized at common law: "(1) intent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; [and] (3) depraved-heart murder [wanton and willful disregard that the natural tendency of the defendant's behavior is to cause death or great bodily harm]."[16] Thus, Fyda's argument that "malice aforethought" is synonymous with premeditation and thus implies first-degree murder only is without merit.

However, we conclude that the crime of solicitation to commit murder does not include solicitation to inflict

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[12] *Id.* at 713, quoting *People v Potter*, 5 Mich 1, 6 (1858).

[13] *Aaron*, 409 Mich at 714, quoting 4 Blackstone, Commentaries (Hammond ed, 1898), p 198; see also *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).

[14] *Aaron*, 409 Mich at 714 n 101.

[15] *Id.* at 728; see also *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). The *Aaron* Court held "that malice is an essential element of any murder, as that term is judicially defined . . . ." *Aaron*, 409 Mich at 728.

[16] *Aaron*, 409 Mich at 714 (citation and quotation marks omitted; paragraph structure altered). The fourth recognized type of murder at common law was felony murder predicated on the felony-murder doctrine. *Id*. However, *Aaron* abrogated the common-law felony-murder doctrine. *Id*. at 733.

great bodily harm or to act with a wanton and willful disregard of the likelihood that the natural tendency of one's behavior is to cause death or great bodily harm.

In *People v Taylor*,[17] the Michigan Supreme Court considered the intent required to support a finding that a defendant committed assault with intent to commit murder. MCL 750.83 provides that "[a]ny person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years." But like the statute prohibiting solicitation to commit murder, the statute prohibiting assault with intent to commit murder does not define murder. Therefore, the *Taylor* Court first acknowledged that there generally are "several intents which can support a murder conviction. There can be an intent to kill, an intent to inflict great bodily harm, or a wanton and wilful disregard of the likelihood that the natural tendency of the actor's behavior is to cause death or great bodily harm."[18] But citing *Maher v People*,[19] the *Taylor* Court concluded that in the context of assault with intent to commit murder, "it is necessary to find that there was an actual intent to kill."[20]

In *Maher*, the Court considered whether the evidence supported the charge of assault with intent to commit murder and explained that the answer

> must depend upon the question whether the proposed evidence would have tended to reduce the killing—had death ensued—from murder to manslaughter, or rather, to have given it the character of manslaughter instead of murder[.] If the homicide—in case death had ensued—would have been

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[17] *People v Taylor*, 422 Mich 554; 375 NW2d 1 (1985).

[18] *Id*. at 567, citing *Aaron*, 409 Mich at 722.

[19] *Maher v People*, 10 Mich 212 (1862).

[20] *Taylor*, 422 Mich at 567.

> but manslaughter, then defendant could not be guilty of the assault *with intent to murder*, but only of a simple assault and battery. The question therefore involves essentially the same principles as where evidence is offered for a similar purpose in a prosecution for murder; except that, in some cases of murder, an actual intention to kill need not exist; but in a prosecution for an assault *with intent* to murder, the actual intention to kill must be found, and that under circumstances which would make the killing murder.[21]

Citing *Taylor*, this Court in *People v Cochran* clarified that

> [s]pecific intent to kill is the only form of malice which supports the conviction of assault with intent to commit murder. Intent to inflict great bodily harm or wanton and wilful disregard of the recklessness of one's conduct is insufficient to support a conviction for assault with intent to commit murder.[22]

Similarly, this Court in *People v Lipps* stated:

> Because the offense is a specific intent crime, a defendant cannot be found guilty of it if conditions were such as to preclude the forming of the necessary intent. . . . [I]f a defendant would have been guilty of manslaughter had the assault resulted in death (due to an absence of malice), there can be no conviction of assault with intent to murder. [23]

Although these cases dealt with the crime of assault with intent to commit murder, the same rationale applies here. As stated, "[s]olicitation to commit murder is a specific intent crime that requires proof that the defendant intended that a murder would in fact be

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[21] *Maher*, 10 Mich at 216-217.

[22] *People v Cochran*, 155 Mich App 191, 193-194; 399 NW2d 44 (1986) (citations omitted).

[23] *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988) (citations omitted).

committed."[24] Therefore, we conclude that a defendant cannot be found guilty of solicitation to commit murder without a finding of the necessary specific intent. That is, it is necessary to find that there was an actual intent to kill. Intent to inflict great bodily harm or wanton and wilful disregard of the recklessness of one's conduct is insufficient to support a conviction of solicitation to commit murder.[25]

Accordingly, we conclude that the trial court's instructions to the jury on the elements of solicitation to commit murder were incorrect and that defense counsel should have objected. However, we also conclude that this error did not influence the outcome of the trial. There was consistent testimony that Fyda requested that Cunnellon, whom he identified with pictures, be killed with a handgun that Fyda supplied, using time and location information that Fyda supplied, for a price that Fyda partially paid. These events indicate a level of prior planning that connoted premeditation. Thus, it

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[24] *Crawford*, 232 Mich App at 616.

[25] Accord *People v Knasiak*, unpublished opinion per curiam of the Court of Appeals, issued July 2, 1999 (Docket No. 203826), p 5 (concluding that there is no such offense as solicitation to commit second-degree murder).

> Solicitation . . . involves actual advance planning and foreknowledge, as is reflected by the solicitor's deciding to have some criminal act performed by a third party on the solicitor's behest, searching out an individual to engage in a criminal act, and acting to engage the third party to commit the criminal act. Further, the solicitation statute . . . punishes the actual advance planning and the acts taken in preparation for committing the substantive-criminal acts and not the carrying out of the planned criminal acts. . . . [T]he planning involved in solicitation connotes premeditation and deliberation. Accordingly, solicitation of murder shares the elements of premeditation and deliberation with first-degree murder. As such, solicitation of murder is inconsistent with second-degree murder for the same reason that conspiracy is inconsistent with second-degree murder, that being that "one does not 'plan' to commit an 'unplanned' substantive crime." [*Id.* at 5-6 (citations omitted).]

cannot be said that defense counsel's failure to object prejudiced Fyda's case; that is, it is not reasonably probable that, but for counsel's error, the result of the proceeding would have been different.[26]

III. ENTRAPMENT

A. STANDARD OF REVIEW

Fyda argues that the trial court incorrectly concluded that the police did not entrap him. Fyda argues that the police exploited a friendship between Fyda and Friederichs, a longstanding police informant, to induce Fyda into soliciting the officer to kill Cunnellon.

Whether entrapment occurred is determined by considering the facts of each case and is a question of law for this Court to decide de novo.[27] The trial court must make specific findings regarding entrapment, and this Court reviews its findings under the clearly erroneous standard.[28] The findings are clearly erroneous if this Court is left with a firm conviction that a mistake was made.[29]

B. ANALYSIS

Entrapment occurs if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or (2) the police engage in conduct so reprehensible that the court cannot tolerate it.[30] Reprehensible conduct alone, without police instigation, can constitute entrapment.[31]

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[26] See *Taylor*, 275 Mich App at 186.

[27] *People v Milstead*, 250 Mich App 391, 397; 648 NW2d 648 (2002).

[28] *Id.*

[29] *Id.*

[30] *People v Sexton*, 250 Mich App 211, 217; 646 NW2d 875 (2002).

[31] *People v Fabiano*, 192 Mich App 523, 529; 482 NW2d 467 (1992).

In *People v Johnson*,[32] the Michigan Supreme Court enumerated the following factors for a court to consider when examining whether governmental activity would impermissibly induce criminal conduct:

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted.

Friederichs testified that he felt a sense of urgency after Fyda reiterated his desire to kill Cunnellon following her initiation of postjudgment proceedings in October 2007. It was then that he approached the police. The undercover officer who dealt with Friederichs stated that Friederichs told the officer that Fyda "made mention of a stolen gun" and paying $500 to the "would-be murderer," and that Fyda told Friederichs that if the subject was again brought up, Friederichs should inform Fyda that he found someone interested in being hired. Eventually, Friederichs facilitated the scheduling of a meeting between Fyda and the officer.

The officer testified that as he talked with Fyda alone on October 22, 2007, Fyda spoke of preferring a man

[32] *People v Johnson*, 466 Mich 491, 498-499; 647 NW2d 480 (2002).

from Detroit and of a different race to do the job near Cunnellon's work because he wanted it to look like a carjacking to which Fyda did not have any connection. The officer stated that Fyda provided him with photos of Cunnellon and her car, her work address, and a handgun that Fyda stated was untraceable. The officer stated that Fyda also suggested killing Cunnellon after the upcoming court date so it would be less suspicious.

We conclude that the police did not exploit the long-existing friendship between Fyda and Friederichs to manufacture a crime. They were involved only because Friederichs brought to their attention Fyda's threats and desire to hire someone to harm Cunnellon. The police did not approach or use Friederichs because of his friendship with Fyda. Instead, Friederichs approached the police because of his concern that Fyda's threats against Cunnellon had been exacerbated by circumstances. There is no indication that Friederichs appealed to any sense of sympathy Fyda might have had for him or that the police instigated procedures that would have likely escalated Fyda's culpability. While Fyda was the target of the investigation, he was made so by his own actions. Further, the police were only involved with Fyda for five days after Friederichs contacted them, with no lapses in time between the investigation and the arrest.

Fyda argues that he was offered an inducement that would make the commission of this crime unusually attractive to a law-abiding citizen. Specifically, Fyda asserts that an affordable $700 price was his improper inducement. The officer stated that Friederichs told him that Fyda offered to provide a stolen gun and $500 to have Cunnellon murdered. The officer described Fyda as being hesitant at their meeting about the initial $1,000 demand that the officer made, but stated that

they eventually settled on a $700 price. That the officer was willing to negotiate the price cannot be said to be an attractive inducement for an otherwise law-abiding citizen to ask that Cunnellon be murdered.

Fyda also argues that Friederichs was motivated by personal benefit; that is, in return for acting as a confidential informant for the police, Friederichs received favorable resolution of outstanding unpaid traffic tickets that could have resulted in significant jail time for Friederichs. Friederichs acknowledged that his possible jailing coincided with and influenced his concern in reporting Fyda. However, Friederichs also said that he was motivated by his desire to save Cunnellon's life and that he felt a sense of urgency after seeing Fyda's reaction to the postdivorce hearing regarding the mortgage payments. Additionally, no matter what motivated Friederichs or the extent of inducement provided to him, the facts remain that Fyda had been plainly and specifically speaking to him about finding someone to murder Cunnellon and that Fyda had an independent meeting with the officer at which he freely made the same request.

Fyda further argues that a degree of governmental pressure was placed on him through Friederichs, who was motivated to stay out of jail and was not sufficiently supervised by the police. As discussed above, there was no evidence that Friederichs's admitted desire to stay out of jail somehow pressured Fyda to solicit the murder of Cunnellon. The fact that more direct supervision through documenting Fyda's conversations with Friederichs was possible (for example, audio recordings), does not mean that Friederichs was operating without supervision. In fact, the officer involved testified that he gave Friederichs specific instructions on how to approach and talk to Fyda. The officer also

monitored Fyda and Friederichs's conversation through Friederichs's cell phone as they drove in Friederichs's truck on the way to meet with the officer.

In sum, the police actions were "insufficient to induce or instigate the commission of a crime by the average person, similarly situated to [defendant], who [was] not ready and willing to commit it."[33] The record shows that the police did "nothing more than present the defendant with the opportunity to commit the crime of which he was convicted," which is insufficient to support a finding of entrapment.[34]

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Fyda argues that the prosecutor committed misconduct by denigrating the defense and improperly shifting the burden of proof. Fyda preserved his burden-shifting argument when his defense counsel objected on the record;[35] however, he forfeited his "denigrating the defense" argument by failing to object.[36]

We generally review de novo claims of prosecutorial misconduct on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant was denied a fair and impartial trial.[37] This Court, however, reviews forfeited claims of allegedly improper

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[33] *People v Juillet*, 439 Mich 34, 55; 475 NW2d 786 (1991) (opinion by BRICKLEY, J.)(citation, quotation marks, and emphasis omitted).

[34] *Sexton*, 250 Mich App at 220 (citation and quotation marks omitted).

[35] *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004) (stating that to preserve an issue for appeal, it must be raised by a party and addressed by the trial court).

[36] *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000) (stating that defense counsel's failure to object qualifies as a forfeiture).

[37] *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

conduct by the prosecutor for plain error that affected the defendant's substantial rights.[38] Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.[39]

B. DENIGRATING THE DEFENSE

Fyda argues that the prosecutor's remarks characterizing the defense as "a defense of distraction" impermissibly denigrated the defense by suggesting that defense counsel was being disingenuous in questioning Friederichs's credibility.

A prosecutor is afforded great latitude regarding his or her arguments and conduct at trial.[40] But the prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury.[41] This prohibition is based on the negative effect such an argument has on the presumption of innocence:

> When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality.[42]

Fyda argued throughout the trial that Friederichs could not be believed and had manipulated Fyda into

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[38] *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007); *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

[39] *Odom*, 276 Mich App at 413.

[40] *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

[41] *Id*.

[42] *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984) (citation omitted).

soliciting the officer so that Friederichs could avoid jail time for his traffic tickets. When a defendant advances a theory, the prosecutor may argue the inferences flowing from that theory.[43] Although the prosecutor here repeatedly characterized the defense's arguments as a distraction, the prosecutor was not suggesting that defense counsel did not believe Fyda. Rather, the prosecutor's comments properly addressed the weaknesses of Fyda's theory of defense—that is, its singular focus on discrediting Friederichs.[44] Further, the prosecutor's comments were responsive to Fyda's arguments regarding Friederichs that were made throughout the trial.[45] The fact that the prosecutor employed colorful rhetoric does not make the response to Fyda's arguments disproportionate.[46]

Fyda has not demonstrated any plain error that resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.[47]

C. SHIFTING THE BURDEN OF PROOF

Fyda also argues that the prosecutor impermissibly shifted the burden of proof onto Fyda during closing arguments by suggesting that Fyda had to prove a defense to the charges. During rebuttal closing remarks, the prosecutor commented:

> And when you think about the arguments that the defense has raised in this case, these defenses of distraction, ask yourself: How many times, how many times

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[43] *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999).

[44] See *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

[45] See *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

[46] *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003).

[47] *Odom*, 276 Mich App at 413.

> during this case, during this closing argument, how much time was spent criticizing or name-calling Robert Friederichs? How much time did the defense defend what the defendant did? You never heard any argument during closing argument that, gees, defendant never presented a gun. Defendant never asked [the officer] to murder his wife. My client never provided the pictures. You never heard any of that. There's been no defense to the crime itself. Only the defenses of distraction.

The trial court stated that it was "alarmed" by the prosecutor's use of the word "defend," then ruled as follows:

> I felt that it was not in the context of her argument . . . presented in such a way that would be misleading to the jury and/or, or that would do anything more than perhaps compound a possible difficulty in, in instructing the jury . . . when they already have had several references by the court properly, so to point out to them that the defendant does not have any of that burden, that in effect [defense counsel], correctly so in his arguments, suggested . . . he didn't even have to do anything, he could take off and go and have lunch, I don't remember exactly what words, but all of that gives, you know, the court at least the comfort to suggest that the jury has had sufficient instructions to understand that the burden, none of that burden is . . . on the defendant; that the entire burden is on the prosecutor. Although the prosecutor . . . used that word, and I'm—really apologize because I can't remember precisely whether it was defend or defense, but it was, you know, a, a form of the word defend that, that caught my attention, but as I've already indicated in the context, in my resolution in my own mind at that time, I do not find that in the law it creates any error that would cause the court to, to modify or, or, or, or give a different instruction before the jury returns.

A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because

such an argument tends to shift the burden of proof.[48] Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof.[49] However, a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment.[50] A prosecutor may also argue that the evidence was uncontradicted even if the defendant is the only person who could have contradicted the evidence.[51]

Although we conclude that the prosecutor's remarks did not impermissibly shift the burden to Fyda to demonstrate his innocence, we share the trial court's unease with those remarks. The statement, "There's been no defense to the crime itself. Only the defenses of distraction," appears to suggest that Fyda has a burden to provide a "defense to the crime" charged. However, the remark must be considered in the context of the whole closing arguments and in consideration of Fyda's arguments.[52] As discussed above, Fyda's primary theory of defense was that Friederichs had manipulated the system for his own benefit and influenced Fyda to solicit the officer. Even though the prosecutor used the word "defense," the statement in question directly attacks Fyda's theory and highlights that evidence of the interaction between Fyda and the officer was not disputed. Attacking the credibility of the theory advanced by Fyda did not shift the burden of proof.[53] The prosecutor's statements were proper commentary on the weaknesses of Fyda's theory of defense and did not

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[48] *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983).

[49] *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

[50] *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003).

[51] *Green*, 131 Mich App at 237.

[52] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[53] See *Callon*, 256 Mich App at 331.

constitute prosecutorial misconduct.[54] Moreover, the trial court instructed the jury after closing arguments that the burden of proof was on the prosecution to prove each element beyond a reasonable doubt, that Fyda was not required to prove his innocence or do anything, and that the lawyers' statements were not evidence. We must presume that the jury followed these instructions.[55]

We affirm.

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[54] See *McGhee*, 268 Mich App at 634-635.

[55] *Unger*, 278 Mich App at 235.

JONES v DETROIT MEDICAL CENTER

Docket No. 288710. Submitted March 2, 2010, at Detroit. Decided May 20, 2010, at 9:00 a.m.

Trenda, Booker T., and Margaret A. Jones, copersonal representatives of the estate of Jamar C. Jones, deceased, brought a medical malpractice action in the Wayne Circuit Court against Detroit Medical Center and Sinai-Grace Hospital, Danny F. Watson, M.D., and William M. Leuchter, P.C., alleging, in part, that Watson was negligent for prescribing carbamazepine, an anticonvulsant, for Jamar without a sufficient basis to diagnose a seizure disorder and that Watson failed to advise Jamar of the possibility of an allergic reaction to the medication, of the warning signs of such a reaction, and of the need to obtain immediate medical intervention if an allergic reaction occurred. Jamar's death occurred after he developed Stevens-Johnson syndrome from taking the carbamazepine. The trial court, Robert L. Ziolkowski, J., granted plaintiffs' motion for partial summary disposition with regard to the issue of cause in fact, holding that there was no dispute that the carbamazepine taken by Jamar was the cause in fact of Jamar's developing Stevens-Johnson syndrome. The trial court also denied defendants' motion for summary disposition. Defendants appealed the denial of their motion but not the grant of summary disposition in favor of plaintiffs on the issue of cause in fact. The Court of Appeals reversed the order denying defendants' motion for summary disposition and remanded the case to the trial court in an unpublished opinion per curiam, issued January 4, 2007 (Docket Nos. 262343, 262347, and 263259). The Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals, reinstated the trial court's order denying defendants' motion, and remanded the case to the trial court. 480 Mich 980 (2007). On remand, the trial court considered the parties' motions for partial summary disposition with regard to the issue of proximate causation and granted partial summary disposition in favor of plaintiffs with regard to the issue of proximate cause. Detroit Medical Center and Sinai-Grace Hospital sought leave to appeal that order, and the Court of Appeals granted leave to appeal

in an unpublished order, entered December 30, 2008 (Docket No. 288710). The other defendants timely filed a cross-appeal.

The Court of Appeals *held*:

1. It was proper for the trial court to determine proximate causation as a matter of law because the trial court had already decided the cause in fact and the facts bearing on the proximate-cause determination were not in dispute and, therefore, reasonable minds could not differ about the application of the legal concept of proximate causation to those facts.

2. The relevant issue was not whether defendants should have foreseen that Jamar would develop Stevens-Johnson syndrome, but whether defendants should have foreseen the possibility that as a result of taking carbamazepine, Jamar, like any other patient being prescribed the medication, bore a risk of developing the syndrome. Because the prescribing information for carbamazepine contained warnings that Stevens-Johnson syndrome might result from the use of the drug, it was foreseeable that prescribing the drug created a risk that Jamar could contract Stevens-Johnson syndrome. Reasonable minds cannot differ that, if a physician prescribes a medication, it is reasonably foreseeable that doing so could cause the patient to have one of the known reactions to that medication.

3. There was no disagreement that it was Jamar's taking of the carbamazepine prescribed by Watson that caused Jamar to develop Stevens-Johnson syndrome. Because it appears undisputed that Jamar died as a result of contracting Stevens-Johnson syndrome, which he contracted as a result of taking carbamazepine, and he took the carbamazepine only because he was directed to do so by Watson, all the evidence supports the conclusion that Watson's conduct was a proximate cause of Jamar's Stevens-Johnson syndrome and resulting death.

4. With regard to plaintiffs' theory of proximate causation that Watson failed to advise Jamar of the warning signs of Stevens-Johnson syndrome and what action to take should those warning signs occur, there is a direct link between the alleged violation of the standard of care and the injury, and a reasonable juror could not conclude otherwise.

5. With regard to plaintiffs' theory of proximate causation that Watson negligently diagnosed a seizure disorder and, as a result of that misdiagnosis, Jamar was given carbamazepine, a side effect of which led to his death, the trial court properly concluded that a reasonable juror could not find a failure of proximate cause. Summary disposition in favor of plaintiffs on the issue of proximate causation was appropriate because a reasonable juror could

not conclude that an allegedly negligent diagnosis that was the sole cause for prescribing the injury-causing medication was not a proximate cause of the injury.

6. The trial court properly determined the issue of proximate cause as a matter of law and properly decided, as a matter of law, both that Watson's alleged lack of giving advice regarding signs of a reaction was a proximate cause of Jamar's development of Stevens-Johnson syndrome and that the allegedly negligent diagnosis was a proximate cause of Jamar's development of Stevens-Johnson syndrome.

Affirmed.

HOEKSTRA, P.J., dissenting, stated that reasonable persons could differ regarding whether Jamar's injuries were legally caused by the alleged negligence of defendants. Reasonable minds could differ regarding whether Jamar's injuries were the natural and probable result of Watson's alleged negligence of failing to perform additional diagnostic tests to confirm the preliminary diagnosis of a seizure disorder. Given the rarity of Stevens-Johnson syndrome, it was within the province of the jury to determine whether the connection between Watson's alleged negligence of failing to warn Jamar of an allergic reaction to carbamazepine and Jamar's injuries was of such a nature that it is desirable to hold defendants liable. Judge HOEKSTRA would conclude that the trial court erred by granting summary disposition in favor of plaintiffs on the issue of proximate causation. The order of the trial court granting that motion should be reversed.

1. NEGLIGENCE — PROXIMATE CAUSE.

Proximate cause is a factual question for the jury, but the court determines the issue when the facts bearing on proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts.

2. NEGLIGENCE — PROXIMATE CAUSE.

The issue, for purposes of a proximate-cause analysis of foreseeability, is whether the increased risk to the plaintiff is directly linked to the defendant's negligence, not how often the negligence will result in an injury-causing event.

Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (by *Victor S. Valenti* and *Thomas M. Lizza*), for Trenda, Booker T., and Margaret A. Jones.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *Linda M. Garbarino* and *Anita Comorski*), for Detroit Medical Center and Sinai-Grace Hospital.

Saurbier & Siegan, P.C. (by *Debbie K. Taylor*), for Danny F. Watson, M.D., and William M. Leuchter, P.C.

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

SHAPIRO, J. This medical malpractice case returns to this Court a second time, this time for defendants' appeal by leave granted of the trial court's grant of partial summary disposition in favor of plaintiffs on the element of proximate cause. We affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

On September 23, 1999, the decedent, Jamar Jones,[1] was involved in a single-vehicle rollover accident in which he suffered contusions and lacerations. Jamar was transported to the emergency room at defendants Detroit Medical Center/Sinai-Grace Hospital (the hospital) for treatment. Jamar was referred to defendant Danny F. Watson, M.D., a neurologist, who saw Jamar in the emergency room on September 24, 1999. According to Watson's notes, Jamar could not recall how the accident had occurred, and Jamar stated that over the last few months "family members had told him that on approximately three occasions, he was seen staring blankly and that he was not easily aroused from these spells." On the basis of this information, Watson concluded that Jamar had "[p]robable partial complex seizure disorder" and prescribed Tegretol, an anticon-

[1] Because plaintiffs share a last name with the decedent, we will refer to individual plaintiffs and the decedent by their first names.

vulsant. Watson also ordered an electroencephalogram (EEG), which was performed the same day and was reported as normal.

Jamar had the prescription filled with carbamazepine, a generic form of Tegretol,[2] and began taking the medication as prescribed. A subsequent EEG was performed by Watson on October 8, 1999, which, like the first EEG, was reported as normal. However, Watson concluded that he "cannot exclude a seizure disorder" and continued Jamar on the anticonvulsant.

Jamar began to experience a sore throat and had trouble swallowing food around October 9, 1999. On October 11, 1999, Jamar awoke with bloodshot eyes. His father, Booker T. Jones, drove Jamar to work, but returned about an hour later to pick Jamar up because Jamar told his father that he was unable to see. Jamar began to develop a rash and blisters on his face and upper body. Booker took Jamar to the hospital emergency room on October 12, 1999, where Jamar reported the sore throat, inability to eat due to pain, and swollen lips and mouth. Jamar also had a fever.

The hospital kept Jamar overnight and, on October 13, 1999, transferred him to the burn unit at Detroit Receiving Hospital. Doctors there determined that Jamar was suffering a rare allergic reaction to the anticonvulsant and diagnosed him as having Stevens-Johnson syndrome resulting from that reaction. Stevens-Johnson syndrome is a life-threatening dermatological condition in which the top layer of skin dies and is shed. Jamar died of Stevens-Johnson syndrome, complicated by pneumonia, on October 21, 1999.

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[2] Because a difference between Tegretol and carbamazepine has not been alleged to be relevant to this appeal, the term carbamazepine will be used to refer to the drug prescribed for and taken by Jamar.

On August 19, 2003, plaintiffs filed their complaint alleging, among other things, that Watson was negligent for prescribing carbamazepine, given the lack of a sufficient basis to diagnose a seizure disorder, and that Watson failed to advise Jamar of the possibility of an allergic reaction to the medication, of the warning signs of such a reaction, and of the need to obtain immediate medical intervention should such occur. Plaintiffs also filed claims against the hospital and defendant William M. Leuchter, P.C., based on vicarious liability for Watson's alleged malpractice. Attached to their complaint, plaintiffs provided an affidavit of merit from Dr. Jon Glass, in which he opined that Watson breached the standard of care in the two respects just described.

Plaintiffs requested summary disposition on the issue of cause in fact, arguing that there was no dispute that the carbamazepine was the cause in fact of Jamar's developing Stevens-Johnson syndrome. The trial court granted the motion and that order is not at issue in this appeal. In the same motion, plaintiffs also requested summary disposition on the issue of proximate causation. The trial court took that motion under advisement, but before the trial court issued any ruling, defendants moved for summary disposition, arguing that the statute of limitations barred the suit and that the affidavit of plaintiffs' expert had been improperly notarized. The trial court denied the motion, and defendants appealed. This Court reversed the order denying the motion and remanded the case to the trial court. *Jones v Detroit Med Ctr*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket Nos. 262343, 262347, and 263259). Our Supreme Court, in lieu of granting leave to appeal, reversed this Court's opinion, reinstated the trial court's order denying the motion, and remanded the case to the trial court. *Jones v Detroit Med Ctr*, 480 Mich 980 (2007).

On remand, plaintiffs renewed their motion for partial summary disposition as to proximate causation. Defendants filed a countermotion, arguing that they were entitled to summary disposition as to proximate causation. The trial court concluded:

> All the experts here indicated that it's a very rare—Stevens-Johnson Syndrome is a very rare but known reaction to—to this drug in certain people. And, apparently, those people can't be identified prior to the taking of the medication.
>
> The argument here by the—by the defense is that this is not foreseeable. Stevens-Johnson's [sic] is not a foreseeable result of—of taking this medication in that it is so rare, one in a million. I guess, there's been some testimony, you know, from one to one hundred thousand to one in a million people that take this medication would—would develop Stevens-Johnson Syndrome.
>
> And that to agree with the plaintiff would be somehow to impose strict liability in—in prescribing this particular medication.
>
> * * *
>
> . . . The focus by the defense is Stevens-Johnson Syndrom[e] and the fact that it's rare and unpredictable.
>
> But other not so rare and unpredictable results and—and injuries may result from the use of this medication.
>
> And it's the argument here by the plaintiff that the misdiagnosis and the misprescription of this violated the standard of care and the person wouldn't—the plaintiff [sic] here wouldn't otherwise, have taken this medication. But for the—the negligence and the breach of the standard of care by the defendants.
>
> And, therefore, it was foreseeable that an injury could result. The injury, perhaps, being bloodshot eyes, swelling of the lips, which happened. Other swelling. Some rash, which is much more common, indicated by all the doctors.

> And because of his eggshell condition or pre-existing susceptibility to this type of Stevens-Johnson Syndrome that their—that the defendants ought to be responsible under the eggshell plaintiff theory.
>
> And, frankly, it seems to fit in this case. The issue being, you know, whether the prescription was or this medication was appropriate. Whether there was, in fact, negligence.
>
> * * *
>
> [C]ertainly, the argument by the defense that the case ought to be dismissed . . . would be denied on the basis that—that injury was foreseeable.
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> * * *
>
> . . . I—I think the order is then the issue that will be tried in this case is one of whether or not there was a breach in the standard of care in—in—in prescribing this medication.

The trial court then stayed the case to permit defendants to pursue this issue on appeal. The hospital again sought leave to appeal, which this Court granted on December 30, 2008, in an unpublished order (Docket No. 288710). Watson and Leuchter timely filed their cross-appeal.

II. STANDARD OF REVIEW

We review de novo a court's determination of a motion for summary disposition. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). Because the parties and the trial court relied on matters outside the pleadings when arguing and deciding, respectively, the motion for summary disposition, we review under the rules applicable to MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). When reviewing a

motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III. ANALYSIS

The sole question before this Court is whether the trial court properly ruled on the issue of proximate cause. On the basis of our review de novo of the evidence, we conclude that it did.

Generally, proximate cause is a factual question for the jury. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). However, "[w]hen the facts bearing upon proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts, the court determines the issue." *Paddock v Tuscola & S B R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997). Here, the trial court has already decided the cause in fact and defendants have not appealed that ruling, and the facts bearing on proximate cause are not in dispute. Thus, it was proper for the trial court to determine proximate causation as a matter of law if it found that reasonable minds could not differ. *Id.*

"[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). "To establish legal cause, the plaintiff must show that it was foresee-

able that the defendant's conduct 'may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable.' " *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997), quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Defendants argue that the injury in this case, Jamar's development of Stevens-Johnson syndrome, was not foreseeable because it is rare. All the parties and their experts agree that Stevens-Johnson syndrome is rare. However, the issue is not whether defendants should have foreseen that Jamar would develop this syndrome, but whether they should have foreseen the possibility that as a result of taking the medication, Jamar, like any other patient being prescribed the medication, bore a *risk* of developing the syndrome.

The evidence shows that the prescribing information for carbamazepine contained warnings that Stevens-Johnson syndrome may result from the use of the drug. Thus, it was foreseeable that prescribing the drug created a risk, albeit a small one, that Jamar could contract Stevens-Johnson syndrome. *Weymers*, 454 Mich at 648. Indeed, the fact that the drug warnings specifically mention Stevens-Johnson syndrome supports the conclusion that it was a foreseeable risk.

Defendants emphasize that the experts testified that doctors have no way to predict which patients will suffer an allergic reaction to carbamazepine and develop Stevens-Johnson syndrome. However, this is true for all first-time allergic reactions and for many other rare reactions. Indeed, this is true of many more common conditions. Doctors are generally unable to specifically foresee which patients will develop cancer or suffer heart attacks or a stroke, even among those who exhibit some predisposition for the conditions. The

same is true in the context of automobile accidents. While in the great majority of cases, speeding on the highway does not cause an accident, we accept as a matter of course that if the speeding resulted in an accident, the proximate-cause threshold can be met. We are unfamiliar with any body of law that would allow a defendant to argue, let alone a jury to find, that because there are thousands of incidents of speeding that do not result in an auto accident for each incident that does, a defendant's excessive speed in a given case cannot be considered a proximate cause of the given crash. Defendants refer to the standard jury instruction requirement that the resulting injury be a "natural and probable" result of the negligence. Under defendants' view of this instruction, speeding could never be the proximate cause of an accident because it is never "probable" in a specific instance of speeding that it will cause an accident.

We conclude that the question is not whether one can predict which incident of such negligence will cause an accident, but whether there is something innate about the negligence that naturally and probably gives rise to the risk of an accident, i.e., harm. A cause in fact, while related to the ultimate outcome as part of the series of events, need not innately give rise to the risk of the injury-causing event. For example, the fact that a commuter got out of bed in the morning is a cause in fact of any accident that the commuter has on the commute to work that day. However, there is nothing about getting out of bed that innately creates a risk of an automobile accident. By contrast, speeding during the commute, while it may never cause an actual accident, "naturally and probably" gives rise to the risk of an accident and, absent special circumstances, a reasonable juror could not conclude that a speed-related accident was not, at least in part, proximately caused by

the actions of the speeding driver. Similarly, if a driver runs a red light, reasonable minds could not differ that it is reasonably foreseeable that doing so *could* cause a car accident, even if the chances are slim that it will actually do so. The issue, at least for a proximate-cause analysis, is not how often the negligence will result in an injury-causing event, but whether the increased risk is directly linked to the negligence. Therefore, if a physician prescribes a medication, reasonable minds could not differ that it is reasonably foreseeable that doing so could cause the patient to have one of the *known* reactions to that medication.[3]

Thus, the real question is whether the doctor took whatever precautions are necessary to prevent the condition from occurring or to minimize its severity insofar as those precautions are required by the standard of care. As noted above, plaintiffs argue that there was never a sufficient diagnostic basis to conclude that Jamar had a seizure disorder and, therefore, prescribing carbamazepine for him fell outside the standard of care. Plaintiffs also argue that when prescribing carbamazepine, Watson was required to warn about the signs of an allergic reaction and the necessity to obtain immediate medical care if any of those signs should occur and that Watson failed to do so.

Defendants can properly argue that the risk of developing Stevens-Johnson syndrome when taking carbamazepine is so small that it could be prescribed even in the absence of conclusive diagnostic evidence of a seizure disorder. Similarly, defendants can properly argue that the risk is so small that the standard of care did not

[3] If, on the other hand, there is debate in the medical community about whether a certain reaction is linked to the use of the medication, reasonable minds could differ about whether the reaction was foreseeable.

require discussing the possibility of the reaction with the patient or directing the patient what to do in the event signs of a reaction appeared. However, these arguments relate to standard of care, not proximate cause.

Defendants also rely on their experts' testimony regarding the difficulty in determining the cause of Stevens-Johnson syndrome. For example, defendants argue that one of their experts testified that Jamar also took Tylenol and Ancef, an antiobiotic, both of which have also been associated with Stevens-Johnson syndrome. However, this evidence relates to cause in fact; that is, defendants are arguing that something other than the carbamazepine could have caused Jamar's Stevens-Johnson syndrome. Because the trial court already determined that the carbamazepine caused Jamar's Stevens-Johnson syndrome and defendants elected not to appeal that determination, these arguments have no bearing on the instant appeal.

In any event, although defendants identify some testimony indicating that there are other possible causes of Stevens-Johnson syndrome, defendants' expert, Dr. Edward Domino, who is board-certified in clinical pharmacology, indicated that he did not dispute that Jamar developed Stevens-Johnson syndrome as a result of taking carbamazepine or that Jamar's death resulted from his developing Stevens-Johnson syndrome. Dr. Domino also stated that "from all the evidence, it appears that [Jamar's development of Stevens-Johnson syndrome] is due to the [carbamazepine]." Defendants' other expert, Dr. Paul Cullis, a neurologist, similarly testified that he had "no reason to dispute" that Jamar's taking of carbamazepine caused his development of Stevens-Johnson syndrome. Thus, regardless of whether it is generally difficult to deter-

mine the cause of Stevens-Johnson syndrome or whether Jamar took other medications that could cause Stevens-Johnson syndrome, the record does not reveal any real disagreement that it was Jamar's taking of the carbamazepine prescribed by Watson that caused him to develop the syndrome. Because it appears undisputed that Jamar died as a result of Stevens-Johnson syndrome, which he contracted as a result of taking carbamazepine, and he took the carbamazepine only because he was directed to do so by Watson, all the evidence supports the conclusion that Watson's conduct was a proximate cause of Jamar's Stevens-Johnson syndrome and resulting death.

For this reason, we reject defendants' reliance on *Domako v Rowe*, 184 Mich App 137; 457 NW2d 107 (1990), in which the plaintiff wife developed a vesicovaginal fistula following a hysterectomy. In that case, the parties disputed whether her injury was the proximate result of the negligent performance of the hysterectomy or was the proximate "result of [a] fibroid tumor pressing against the surface of the bladder which in turn caused the depletion of the blood supply to the affected area of the bladder wall and a consequent weakening and death of the cell structure on the wall." *Id.* at 141. The *Domako* Court held that summary disposition as to cause in fact was proper because it was agreed that absent the hysterectomy, whether performed properly or not, the weakness of the wall would not have developed into a fistula. However, the plaintiffs did not claim that the surgery was not indicated, only that its performance was technically deficient and that this technical error, rather than simply the removal of the uterus itself, triggered the development of the fistula. The defendants argued that the surgery was performed properly, but the indicated removal of the uterus itself, not any technical error, caused the fistula.

Thus, there was a question of fact whether the alleged negligence, i.e., a technical error in surgery, was responsible for the fistula. As discussed above, no such dispute exists in this case about the cause of Jamar's Stevens-Johnson syndrome. The undisputed facts are that the reaction was caused by the carbamazepine that Watson prescribed.

Defendants also rely on this Court's opinion in *Dooley v St Joseph Mercy Hosp*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 1998 (Docket No. 198024), in which the majority determined that there was a lack of proximate cause in a medical malpractice case. Although we need not consider it because it is nonbinding, MCR 7.215(C)(1), we find that there are several important distinctions between *Dooley* and the present case and do not believe it stands for the proposition suggested by defendants: that the mere fact that a reaction is rare vitiates proximate cause.

In *Dooley*, plaintiff Timothy Dooley suffered from a clotting disorder and was required to take anticoagulants for the rest of his life. The only two available blood-thinning medications were heparin and Coumadin. Timothy had twice been on heparin as an inpatient and took Coumadin as an outpatient and suffered no significant ill effects from either drug. When hospitalized for a third time, he was again switched from Coumadin to heparin during his in-patient stay. This time, however, he suffered an adrenal hemorrhage as a reaction to the heparin and lost adrenal function as a result. Defendants note that the *Dooley* opinion refers to the risk of adrenal hemorrhage as "rare" and suggest that this was why the *Dooley* majority concluded there was no proximate cause. This is inaccurate. The central point in *Dooley*'s proximate-cause analysis was that there was absolutely no difference in the risk of suffer-

ing an adrenal hemorrhage resulting from taking either Coumadin or heparin. Thus, while it was clear that Timothy's adrenal hemorrhage was caused by his taking a blood thinner, there was no evidence that it was connected to the change from Coumadin to heparin. The reaction was just as likely to have occurred if no change in medication had taken place. Thus, the plaintiffs failed to provide any evidence that the defendants could have foreseen that the change from Coumadin to heparin could result in an adrenal hemorrhage. By contrast, in the instant case, the risk of Stevens-Johnson syndrome was a direct result of the allegedly improper prescription of carbamazepine and the increased risk from not seeking immediate medical intervention in the event of experiencing side effects was a direct result of the alleged failure by Watson to properly counsel Jamar about side effects. Moreover, unlike the physician in *Dooley*, Watson did not make a decision resulting in a change from one drug to another, either of which bore the same risk, but made a decision between prescribing a drug that carried the risk and not prescribing it.

The proximate-cause analysis relevant to each of plaintiffs' theories of liability is not, however, identical. As noted above, plaintiffs have argued two distinct theories. First, that Watson failed to advise Jamar of the warning signs of Stevens-Johnson syndrome and what action to take should those warning signs occur. For this theory, the link between the alleged violation of the standard of care and the injury is direct, and we do not believe a reasonable juror could conclude otherwise. Indeed, one could fairly say that under this theory the issues of cause in fact and proximate cause collapse and are essentially indistinguishable. The allegation is that Watson failed to warn of exactly the condition that occurred and failed to advise how to address the exact condition that occurred.

Plaintiffs' other theory is that Watson negligently diagnosed a seizure disorder and that, as a result of that misdiagnosis, Jamar was given carbamazepine, a side effect of which led to Jamar's death. In the context of this theory, cause in fact and proximate cause do not *completely* collapse into each other because the alleged negligence does not necessarily cause injury; the prescribing of the medication constitutes an intermediate step without which the alleged misdiagnosis does not cause injury. Further, this intermediate step, i.e., prescribing the medication, is not alleged to be negligent in and of itself. Indeed, it appears to be undisputed that the prescription of carbamazepine for a seizure disorder is well within the standard of care, except perhaps in special circumstances involving a particular patient, and no such claim is made here. Rather, plaintiffs allege that Watson lacked sufficient diagnostic information to diagnose a seizure disorder and that, as a result of that negligent diagnosis, he prescribed a medication and Jamar had a rare and fatal reaction to that medication. We recognize that as the number of intermediate steps increase, and as those steps grow more attenuated from the final risk-creating event, proximate cause becomes more and more tenuous. There are cases in which that relationship is sufficiently distant that a court may properly hold that a reasonable juror could not find a proximate-cause relationship between the alleged negligence and the injury. And of course, in most cases, proximate cause will remain a question for the jury because reasonable minds may differ.

In this case, however, we conclude that the trial court properly concluded that a reasonable juror could not find a failure of proximate cause under the misdiagnosis theory, just as we concluded in the context of the

failure-to-advise theory. We so conclude because the direct undisputed cause of death was the prescribing of a drug, by Watson, which was a standard treatment in the face of a seizure diagnosis. The diagnosis was not merely an event in a chain of events that eventually led to the prescription; it was the final and apparently sole reason the medication was prescribed. While it is well recognized that an event need not be the sole or final cause of an injury to be a proximate cause of the injury, in this case, the alleged misdiagnosis was the sole cause and, if not the final cause of the injury, the final cause of the injury-causing prescription. In these circumstances, summary disposition on causation was appropriate. We do not see how a reasonable juror could conclude that an allegedly negligent diagnosis that was the sole cause for prescribing the injury-causing medication was not a proximate cause of the injury.

IV. CONCLUSION

Because there was no dispute about causation in fact, no material dispute of fact, and reasonable jurors could not find a lack of proximate cause on the basis of these facts, we conclude that the trial court properly determined the issue of proximate causation as a matter of law. *Paddock*, 225 Mich App at 537. Furthermore, because the evidence is undisputed that, although Stevens-Johnson syndrome is rare, it is well known that it can occur from taking carbamazepine, and in this case did so occur, the trial court properly decided, as a matter of law, that Watson's alleged lack of giving advice regarding signs of a reaction was a proximate cause of Jamar's development of Stevens-Johnson syndrome. Finally, because the sole reason the medication was given was because of a diagnosis that plaintiffs assert was negligent and erroneous, the trial court

properly decided, as a matter of law, that the allegedly negligent misdiagnosis was a proximate cause of Jamar's development of the syndrome.

Although this forecloses causation arguments at trial, it does not mean that the rarity of this reaction to carbamazepine and the difficulty in determining which patients will suffer such reactions is irrelevant. It remains relevant to the issue of standard of care, and at trial defendants may present proofs and argument that these factors militate in favor of a finding that Watson did not violate the standard of care.

Affirmed.

BECKERING, J., concurred.

HOEKSTRA, P.J. (*dissenting*). In this medical malpractice action, this Court granted defendants leave to appeal the trial court's order granting summary disposition to plaintiffs on the issue of proximate or legal cause and denying defendants' cross-motion for summary disposition. Because I would conclude that reasonable persons could differ regarding whether the injuries of plaintiffs' decedent, Jamar Jones (hereafter Jones), were legally caused by the alleged negligence, I respectfully dissent.

In a medical malpractice action the plaintiff must establish proximate cause between the defendant's alleged breach of the standard of care and his or her injuries. *Teal v Prasad*, 283 Mich App 384, 391; 772 NW2d 57 (2009). " 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Proximate cause is generally a question for the jury. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009). However, "[w]hen the facts bearing upon proximate cause are not in dispute and reasonable persons could

not differ about the application of the legal concept of proximate cause to those facts, the court determines the issue." *Paddock v Tuscola & S B R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997).

A court must first find that the defendant's actions were a cause in fact of the plaintiff's injuries before it may find that the actions of the defendant were a proximate or legal cause of the injuries. *Craig*, 471 Mich at 87. Cause in fact requires that "but for" the defendant's actions, the plaintiff's injuries would not have occurred. *Martin v Ledingham*, 282 Mich App 158, 161; 774 NW2d 328 (2009). The trial court granted summary disposition to plaintiffs on the issue of cause in fact. Defendants did not appeal this order in their application for leave to appeal; therefore, the issue of cause in fact is not before us. *Jones v Detroit Med Ctr*, unpublished order of the Court of Appeals, entered December 30, 2008 (Docket No. 288710); see also MCR 7.205(D)(4); *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005).

At issue is legal or proximate cause. Legal causation involves "judg[ing] whether the plaintiff's injuries were too insignificantly related to or too remotely effected by the defendant's negligence." *Davis v Thornton*, 384 Mich 138, 145; 180 NW2d 11 (1970). "To find proximate cause, it must be determined that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable." *Helmus v Dep't of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999). Our Supreme Court has defined a proximate cause as "a foreseeable, natural, and probable cause of the plaintiff's injury and damages." *Kaiser v Allen*, 480 Mich 31, 38; 746 NW2d 92 (2008) (quotation marks and citation omitted).

The concept of foreseeability pervades any discussion of proximate cause. See, e.g., *id*.; *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) ("To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct may create a risk of harm to the victim, and . . . that the result of that conduct and intervening causes were foreseeable.") (quotation marks, citation, and alternation omitted); *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) ("[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences."); *Nielsen v Henry H Stevens, Inc*, 368 Mich 216, 220-221; 118 NW2d 397 (1962) ("To make negligence the proximate cause of an injury, . . . an ordinary prudent person ought reasonably to have foreseen [that the injury] might probably occur as the result of his negligent act.").

However, our Supreme Court has instructed that in a case in which there is no intervening cause, and there is none alleged in the present case, the foreseeability of the plaintiff's injury is not to be used as a test to determine whether proximate cause exists. *McMillian v Vliet*, 422 Mich 570, 576-577; 374 NW2d 679 (1985); *Davis*, 384 Mich at 147.

> "It appears that the modern trend of judicial opinion is in favor of eliminating foreseeable consequences as a test of proximate cause, except where an independent, responsible, intervening cause is involved. The view is that once it is determined that a defendant was negligent, he is to be held responsible for injurious consequences of his negligent act or omission which occur naturally and directly, without reference to whether he anticipated, or reasonably might have foreseen such consequences. . . . There is no need for discussing proximate cause in a case where the negligence

> of the defendant is not established, but when his negligence has been established, the proximate result and amount of recovery depend upon the evidence of direct sequences, and not upon defendant's foresight." [*Davis*, 384 Mich at 147, quoting 38 Am Jur, Negligence, §§ 58, 709, 710.]

Indeed, the Michigan Model Civil Jury Instructions define legal or proximate cause as "a natural and probable result of the negligent conduct." M Civ JI 15.01. The words "natural" and "probable," rather than legal terms of art, are words susceptible of ordinary comprehension and need not be defined for a jury. See *People v Martin*, 271 Mich App 280, 352-353; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). Accordingly, being instructed on proximate cause, jurors would afford the terms "natural" and "probable" their ordinary meanings. In the context of determining proximate cause, "natural" means "in accordance with the nature of things; to be expected," and "probable" means "likely to occur or prove true." *Random House Webster's College Dictionary* (1992).

In the complaint, plaintiffs alleged two distinct acts of negligence. First, plaintiffs claimed that Dr. Danny Watson breached the applicable standard of care by prescribing carbamazepine[1] on the basis of the limited personal medical history provided by Jamar Jones. According to plaintiffs, Watson should not have prescribed carbamazepine without performing additional diagnostic tests to confirm the preliminary diagnosis of a seizure disorder. Second, plaintiffs alleged that Watson breached the applicable standard of care by failing to inform Jones of the possibility of an allergic reaction,

[1] Watson prescribed Tegretol, but the prescription was filled with carbamazepine, the generic form of Tegretol. No allegation has been made, however, that any difference between the drugs is relevant to this case.

the signs of an allergic reaction, and the necessity to immediately seek medical attention for an allergic reaction.

In determining that reasonable minds could not differ that Watson's conduct was a proximate cause of Jones's injuries, the majority focuses on whether the injuries were foreseeable. For example, it reasons that, because Jones died as a result of Stevens-Johnson syndrome, which is a known side effect of taking carbamazepine, and because Jones contracted Stevens-Johnson syndrome from taking carbamazepine, which was prescribed by Watson, the injuries were foreseeable. Respectfully, I disagree with the approach taken by the majority. The issue is not simply whether reasonable minds cannot differ that a straight line can be drawn from point A, the defendant's alleged negligence, to point F, the plaintiff's injuries. Rather, for a plaintiff to prevail on the issue of proximate cause at the summary disposition stage, it must be shown that reasonable minds cannot differ that the injuries were the natural and probable consequence of the defendant's negligence. In other words, reasonable minds could not differ that the injuries were "expected" and "likely to occur" or on whether the injuries were too insignificantly related or too remotely affected by the alleged negligence. *Davis*, 384 Mich at 145. Further, consideration must also be given to whether the connection between the alleged negligence and the injuries is of such a nature that it is socially and economically desirable to hold the defendant liable. *Helmus*, 238 Mich App at 256.

Reviewing the trial court's decision de novo and the evidence in the light most favorable to defendants, *Lee v Detroit Med Ctr*, 285 Mich App 51, 58-59; 775 NW2d 326 (2009), I would conclude that this case presents

issues that must be resolved at trial. It is undisputed that Stevens-Johnson syndrome is a known, but very rare, side effect of taking carbamazepine. One expert testified that only one in a million of those who take carbamazepine develop Stevens-Johnson syndrome. In addition, there is no claim by plaintiffs that carbamazepine is not an anticonvulsant commonly prescribed for a seizure disorder. Under these circumstances, I am of the opinion that reasonable minds could differ regarding whether Jones's injuries were the natural and probable result of Watson's alleged negligence of failing to perform additional diagnostic tests to confirm the preliminary diagnosis of a seizure disorder. Admittedly, the link between Watson's alleged failure to warn Jones of an allergic reaction to carbamazepine and Jones's injuries is much closer than the link between the injuries and Watson's alleged failure to confirm the preliminary diagnosis. However, given the rarity of Stevens-Johnson syndrome, I believe that even on this claim it was within the province of the jury to determine whether the connection between Watson's alleged negligence and Jones's injuries was of such a nature that it is desirable to hold defendants liable. Accordingly, I would conclude that the trial court erred by granting summary disposition to plaintiffs on the issue of proximate cause.

Defendants also argue that it was error for the trial court to deny their cross-motion for summary disposition. They argue that because Stevens-Johnson syndrome is a rare and unpredictable side effect of taking carbamazepine, plaintiffs cannot establish that taking carbamazepine was a foreseeable, natural, and probable cause of Jones's death. Defendants rely primarily on *Dooley v St Joseph Mercy Hosp*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 1998 (Docket No. 198024). I agree with the majority that

Dooley is factually distinguishable. In addition, the record shows that although Stevens-Johnson syndrome is a rare side effect, it is a known side effect. Consequently, reasonable minds could differ regarding whether it is a natural and probable consequence that, if a physician prescribes a medication with a known rare side effect, a patient will suffer the side effect. Therefore, I would also conclude that defendants are not entitled to summary disposition.

FORD MOTOR COMPANY v DEPARTMENT OF TREASURY

Docket No. 283925. Submitted June 10, 2009, at Lansing. Decided May 20, 2010, at 9:05 a.m.

Ford Motor Company brought an action in the Court of Claims against the Department of Treasury, seeking a refund of single business tax and interest that plaintiff paid under protest. Plaintiff had established a voluntary employees' beneficiary association (VEBA) trust from which it received reimbursement for amounts it paid for bills for health-care services submitted by its employees. Plaintiff alleged that defendant improperly classified contributions plaintiff made to the trust as "compensation" under the former Single Business Tax Act (SBTA), MCL 208.1 *et seq*. The court, Paula J. M. Manderfield, J., held that defendant correctly classified the payments as compensation and granted summary disposition in favor of defendant. Plaintiff appealed.

The Court of Appeals *held*:

Plaintiff's contributions to the VEBA trust in the tax years in question did not constitute compensation under the SBTA. MCL 208.4(3) defined taxable "compensation" as including "payments made in the taxable year on behalf of or for the benefit of employees . . . ." Contributions to a VEBA trust created for the purpose of paying future health-care costs were not compensation taxable under the SBTA because the contributions only represent potential compensation to employees. In this context, compensation equates with the payment of actual health-care costs incurred by plaintiff's employees, not the setting aside of money intended to serve as a source of proceeds for the payment of future health-care costs. While the VEBA assets may be held for the benefit of the employees, the employees receive no substantive benefit until plaintiff or the VEBA trust directly pays the costs for the employees' health-care services. Defendant's method of determining that contributions to the VEBA trust were taxable compensation and then, to avoid double-taxation, offsetting that figure by the amounts that the VEBA trust reimbursed plaintiff for payments it made for health-care services rendered to employees was inconsistent with the statute. Nor were contributions to the VEBA trust

akin to the purchase of health insurance. Therefore, defendant improperly taxed the contributions as compensation under the SBTA.

Reversed and remanded.

TAXATION — SINGLE BUSINESS TAX ACT — COMPENSATION — VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUSTS

Contributions by an employer to a voluntary employees' beneficiary association trust created for the purpose of receiving reimbursement for the payment of employees' future health-care costs did not constitute compensation to employees that was taxable under the former Single Business Tax Act (26 USC 501[c][9]; MCL 208.4[3]).

Miller, Canfield, Paddock, and Stone, PLC (by *Samuel J. McKim III*, *Joanne B. Faycurry*, and *Loren M. Opper*), for plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Bruce C. Johnson*, Assistant Attorney General, for defendant.

Before: ZAHRA, P.J., and WHITBECK and M. J. KELLY, JJ.

ZAHRA, P.J. This is a tax case arising under Michigan's repealed Single Business Tax Act (SBTA), MCL 208.1 *et seq*.[1] Defendant the Department of Treasury, conducted an audit of plaintiff Ford Motor Company, to determine the tax due under the SBTA for the years 1997 through 1999. Defendant assessed plaintiff a tax liability of $21,726,713 above the single business taxes already paid by plaintiff. Defendant determined that voluntary contributions made to an irrevocable trust created under a voluntary employees' beneficiary association (VEBA), 26 USC 501(c)(9), amounted to employee compensation that was taxable under the SBTA. Plaintiff

[1] The SBTA was repealed by 2006 PA 325.

paid the additional tax liability under protest and brought suit in the Court of Claims, arguing that contributions made to the VEBA trust were not compensation for purposes of the SBTA. The Court of Claims rejected plaintiff's claim and granted summary disposition to defendant. Plaintiff appeals as of right. We hold that contributions plaintiff made to the VEBA trust in the tax years in question did not constitute compensation under the SBTA. Therefore, these contributions were not subject to the single business tax. We reverse.

I. BASIC FACTS AND PROCEEDINGS

The facts are not in dispute. Under the SBTA in effect during the tax years at issue, employee compensation paid by a business was taxable. MCL 208.9(1) and (5). The SBTA definition of "compensation" during the time at issue included "payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans . . . ." MCL 208.4(3) as amended by 1995 PA 285.[2] Before the creation of the VEBA trust, plaintiff paid for health-care services rendered to employees as required by plaintiff's employee health-care plan. Both litigants treated the payments made for health-care services rendered on behalf of plaintiff's employees as compensation under the SBTA. On June 27, 1997, plaintiff established the VEBA trust and began to make voluntary, periodic contributions into it. Plaintiff made contributions to the VEBA trust in the following amounts: $1.59 billion (1997), $1.7 billion (1998), and $2.287 billion (1999). For the tax years at issue, employees

[2] The definition of "compensation" was revised by 1999 PA 115, effective July 14, 1999. However, the changes were minor and do not affect our analysis.

submitted bills for health-care services covered under the employee health-care plan to plaintiff, and plaintiff would pay the bills and receive reimbursement from the VEBA trust. When calculating its SBTA liability for those years, plaintiff included as compensation the payments it made for health-care services rendered to employees for which it later received reimbursement from the VEBA trust.

Defendant audited plaintiff and concluded that the contributions made into the VEBA trust during the years 1997 through 1999 were taxable compensation and should have been added to plaintiff's tax base and then "offset" by the amounts the VEBA trust reimbursed plaintiff for payments it made for health-care services rendered to employees. Plaintiff paid the additional tax liability under protest and brought suit in the Court of Claims. At the heart of plaintiff's complaint was the assertion that contributions made to the VEBA trust were not compensation for purposes of the SBTA. The Court of Claims rejected plaintiff's assertion. This appeal ensued.

II. STANDARD OF REVIEW

This Court reviews 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). Statutory interpretation is also reviewed de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

III. ANALYSIS

The Court of Claims incorrectly determined that the contributions plaintiff made to the VEBA trust were compensation under the SBTA.

The single business tax " 'is a business activity tax that was enacted "to provide for the imposition, levy, computation, collection, assessment and enforcement . . . of taxes on certain commercial, business, and financial activities . . . ." 1975 PA 228.' " *TMW Enterprises, Inc v Dep't of Treasury*, 285 Mich App 167, 173; 775 NW2d 342 (2009), quoting *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). The SBTA imposes a value added tax. *TMW*, 285 Mich App at 173. A value added tax differs from an income tax because it is a tax on economic activity, whereas an income tax is a tax on what has been received from the economy. *Id*., citing *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 199; 699 NW2d 707 (2005). Before its repeal, any person engaged in business activity in Michigan was subject to the SBTA. MCL 208.31.

Compensation paid to employees was one of the many activities taxed under the SBTA. "Compensation" was defined under MCL 208.4(3), at the relevant time, as follows:

> Except as otherwise provided in this section, "compensation" means all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers and subject to or specifically exempt from withholding under chapter 24, sections 3401 to 3406 of the internal revenue code. Compensation includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, payments to state and federal unemployment compensation funds, payments under the federal insurance contribution act and similar social insurance programs, payments, including self-insurance, for worker's compensation insurance, payments to individuals not currently working, payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals, pay-

> ments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for the administration of health and welfare and noninsured benefit plans.[3]

The controlling question presented in this matter is whether contributions to the VEBA trust were "compensation" within this definition. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Booker v Shannon*, 285 Mich App 573, 575; 776 NW2d 411 (2009). " 'Statutory language should be construed reasonably, keeping in mind the purpose of the act.' " *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006) (citations omitted). The first criterion in determining intent is the specific language of the statute. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). "[E]very word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Priority Health v Office of Fin & Ins Servs Comm'r*, 284 Mich App 40, 43; 770 NW2d 457 (2009) (citations and quotation marks omitted).

For many reasons, we conclude that plaintiff's contributions to the VEBA trust were not "compensation" to employees taxable under the SBTA. Central to this conclusion is the premise that plaintiff's contributions to the VEBA trust represent only potential compensa-

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[3] See footnote 2.

tion to its employees. Thus, the contributions cannot yet reasonably be considered compensation "for the benefit of employees." Defendant directs this Court to the language establishing the VEBA trust, which provides that the assets are held "for the benefit of the employees . . . ." However, this fact actually works against defendant's claim. While the VEBA assets may be held for the benefit of the employees, the employees receive no substantive benefit until plaintiff or the VEBA trust directly pays the costs for the employees' health-care services as required by plaintiff's employee health-care benefit plan. The only benefit plaintiff's employees receive from plaintiff's VEBA trust contributions is the peace of mind associated with knowing that plaintiff's contributions to the VEBA trust are earmarked to address future medical claims under the employee health-care benefit plan. However, this peace of mind does not fall within the statutory definition of "compensation" under the SBTA.

Moreover, there is no dispute that the monies paid into the VEBA trust did not secure any medical care and could be significantly depleted as a result of market forces. In such a case, plaintiff would still be required pursuant to its employee health-care benefit plan to pay for its employees' health-care costs. This scenario demonstrates that the VEBA trust merely serves as a savings fund implemented to facilitate the payment of plaintiff's employees' future health-care services. "Compensation" taxable under the SBTA was defined to include "payments made in the taxable year on behalf of or for the benefit of employees . . . ." MCL 208.4(3). In this context, "compensation" equates with the payment of actual health-care costs incurred by plaintiff's employees, not the setting aside of money intended to serve as a source of proceeds for the payment of future health-care costs.

This conclusion is further supported by the method defendant employed, as maintained at oral argument, to determine the "actual" and "real" tax. As mentioned, defendant determined that contributions made into the VEBA trust were taxable compensation under the SBTA and then "offset" the amounts the VEBA trust reimbursed plaintiff for payments it made for health-care services rendered to employees. However, nothing under the SBTA provided for subtraction from compensation of a payment made to an employer from any fund. Yet, the SBTA did specifically provide for other offsets. For instance, the SBTA expressly allowed for "offsets" of business losses. MCL 208.23b(h). In sharp contrast to this express provision allowing an offset of business losses, the SBTA's silence in regard to the offset of compensation that was taxed but never actually paid is notable. Defendant recognized that payments by plaintiff made directly for health-care services provided to employees pursuant to plaintiff's employee health-care benefit plan were compensation under the SBTA. Defendant further recognized that to include those payments in plaintiff's tax base would have resulted in double taxation. Thus, defendant invented this offset fiction to justify its continued stream of tax revenue based on VEBA trust contributions. Significantly, this method of taxation also reflects that defendant knew that some of the contributions to the VEBA trust were not to be used to pay for health benefits in the tax year in which they were paid. Such a tax policy is irreconcilably inconsistent with the express authority under the statute, which limited compensation subject to the single business tax to payments made on behalf of the employees in the tax year.

We also find significant that plaintiff's contributions to the VEBA trust exceeded the compensation required under the UAW-Ford Motor Company contract. Defen-

dant argues that the contributions to the VEBA trust are akin to purchasing health insurance, which eventually would be used by employees. Again, the payment of proceeds into the VEBA trust was not in any way tantamount to the purchase of health insurance. Significantly, payments into the VEBA trust were not required by a contractual obligation and were not paid in order to procure insurance to cover medical services due to employees under plaintiff's health-care benefit plan.

We conclude that defendant improperly taxed contributions to the VEBA trust as compensation under the SBTA. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

PEOPLE v PARKER

Docket No. 289357. Submitted May 12, 2010, at Lansing. Decided May 20, 2010, at 9:10 a.m.

Benny R. Parker was convicted by a jury in the Saginaw Circuit Court, Darnell Jackson, J., of felonious assault, MCL 750.82, and carrying a dangerous weapon with unlawful intent, MCL 750.226. He appealed, alleging that the prosecution failed to present sufficient evidence to support his conviction of carrying a dangerous weapon with unlawful intent, because it had not proved that the knife in question had a blade of at least three inches in length, and that the prosecution made statements to the jury that were unsupported by the evidence.

The Court of Appeals *held*:

1. MCL 750.226 prohibits carrying a firearm, "dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any dangerous or deadly weapon or instrument" with unlawful intent. The statute expressly targets the combination of an unlawful intent with its list of what are dangerous weapons per se. Therefore, the carrier's intent is not a factor in determining whether an instrument carried is covered by the statute. The phrase "any other dangerous or deadly weapon or instrument," following as it does a list of varied weapons that have in common that they are all dangerous per se, includes only other weapons that are dangerous per se. The specification of knives having blades more than three inches in length indicates that they are dangerous weapons per se, but knives with shorter blades are not included because they are not weapons that are dangerous per se. In specifying unlawful intent, MCL 750.226 does not by its own terms prohibit the carrying of any weapon for purposes of self-defense. In prosecutions under the statute that involve a knife, an element of the crime is that the knife's blade be more than three inches in length. Defendant's conviction of carrying a dangerous weapon with unlawful intent must be vacated.

2. Defendant claimed that the prosecutor's argument concerning the condition of the knife was unsupported by the evidence. The argument was sufficiently reflective of matters in evidence

that it did not constitute plain error. Defendant's conviction of felonious assault must be affirmed.

Vacated in part, affirmed in part, and remanded for correction of the judgment of sentence.

CRIMINAL LAW — CARRYING DANGEROUS WEAPONS WITH UNLAWFUL INTENT — WORDS AND PHRASES — DANGEROUS OR DEADLY WEAPONS OR INSTRUMENTS.

MCL 750.226 prohibits carrying a dangerous weapon with unlawful intent; the carrier's intent is not a factor in determining whether an instrument carried is covered by the statute; the phrase "any other dangerous or deadly weapon or instrument" following the list in the statute of weapons that are dangerous per se includes only other weapons that are dangerous per se within the statute's prohibition; the statute provides that knives with blades of more than three inches in length are dangerous weapons per se, while knives with shorter blades are not weapons that are dangerous per se; a blade length of more than three inches is an element of the crime in a prosecution involving a knife under MCL 750.226.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *J. Thomas Horiszny*, Assistant Prosecuting Attorney, for the people.

Neil C. Szabo for defendant.

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, and carrying a dangerous weapon with unlawful intent, MCL 750.226. Because the prosecution failed to present sufficient evidence to support defendant's conviction of carrying a dangerous weapon with unlawful intent for the reason that it did not present evidence that the knife in question had a blade of at least three inches in length, we vacate that conviction. Because defendant has not established any plain error with regard to his

argument concerning prosecutorial misconduct, we affirm defendant's felonious-assault conviction.

I

Defendant's convictions arise from an incident that took place at the Gibby's Pub in Bridgeport on the evening of December 3, 2006. At trial, the owner of the bar testified that a bartender reported having problems with defendant, in response to which the owner asked defendant to leave the premises. Instead of leaving, defendant cursed and produced a knife in its open position, meaning blade out. The owner yelled that defendant had a knife, struggled with him, and commanded defendant to drop the knife. After others joined the owner in the fracas, defendant was finally disarmed and subdued.

At the close of the prosecution's proofs, defense counsel asked that the charge of carrying a dangerous weapon with unlawful intent be dismissed, on the ground that the prosecution had failed to prove that the knife in question had a blade of at least three inches in length. The prosecutor argued that any dangerous weapon satisfied the requirements of the statute. The trial court adopted the prosecutor's position, explaining, "I believe that the evidence is sufficient to show that it is a dangerous weapon at this point in time, and the jury can determine whether or not what his intention was in terms of carrying it."

Defendant testified that he had owned the knife for three months and carried it daily for such purposes as cutting open boxes. Defendant added that he typically cut open about 10 boxes each day. Describing the incident underlying this case, defendant said of the knife, "I felt stupid having it out because I wasn't going to use it, so, you know, I felt ridiculous. They called my bluff."

The trial court instructed the jury that, among the elements necessary to find defendant guilty of carrying a dangerous weapon with unlawful intent, the prosecution had to prove that defendant was "armed with a knife" and "intended to use this weapon illegally against someone else." The trial court further stated:

> A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death. Some objects, such as guns or bombs, are dangerous because they are specifically designed to be dangerous. Other objects are designed for peaceful purposes but may be used as dangerous weapons.
>
> The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in any way that is likely to cause serious physical injury or death, it is a dangerous weapon. You must decide from all of the facts and circumstances whether the evidence showed that the defendant in question here had a dangerous weapon.

The trial court additionally instructed the jury to decide the facts solely on the basis of the evidence and that the statements of counsel were not evidence. The jury found defendant guilty as charged.

II

On appeal, defendant argues that the trial court erred by denying his motion to dismiss the charge of carrying a dangerous weapon with unlawful intent because the prosecution presented absolutely no evidence with regard to the length of the knife, contrary to the statutory language, which requires that a knife have a blade of at least three inches in length in order to qualify as a dangerous weapon. The prosecution responds that the trial court correctly focused on the potential dangerousness of the knife, rather than the

length of its blade, and that, in any event, the knife was admitted into evidence, the jury saw it, and one witness testified that it was roughly the size of a hand.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). Statutory interpretation presents a question of law, calling for review de novo. *People v Denio*, 454 Mich 691, 698-699; 564 NW2d 13 (1997).

Defendant was convicted of violating MCL 750.226, which provides, in pertinent part:

> Any person who, with intent to use the same unlawfully against the person of another, goes armed with a pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous or deadly weapon or instrument, shall be guilty of a felony . . . .

In this case, the knife in question was admitted into evidence and apparently displayed to the jury, but was not given to the jurors to inspect. There was no testimony, discussion, or argument presented to the jury concerning the length of its blade. One witness described the weapon as "a hand-sized knife" with the blade open, but given that the size of that witness's hand was not in evidence and that she did not indicate precisely how the knife might align with her hand, that description does not answer the question. As a result, on this record, we are left with simply no basis for ascertaining whether the knife's blade was longer than three inches.

In 1945, our Supreme Court held that it was error to apply the three-inch specification found in the version of the statute prohibiting carrying a dangerous weapon then in effect to determine the dangerousness of a knife for purposes of the concealed-weapons statute then in effect. *People v Vaines*, 310 Mich 500, 502-504; 17 NW2d 729 (1945). The Court, further construing the concealed-weapons statute, noted that many cutting tools are manufactured and used for peaceful purposes and opined that "[w]hether or not such articles are dangerous weapons . . . would depend upon the use which the carrier made of them." *Id*. at 505. The Court thus called for distinguishing between items "designed for the purpose of bodily assault or defense," which are thus "dangerous weapons *per se*," and items that "become dangerous weapons only when they are used or carried for use as weapons." *Id*. The Court concluded that "[t]he legislature certainly did not intend to include as a dangerous weapon the ordinary type of jackknife commonly carried by many people, unless there was evidence establishing that it was used, or was carried for the purpose of use, as a weapon." *Id*. at 506.

In *People v Brown*, 406 Mich 215, 222; 277 NW2d 155 (1979), the Supreme Court reiterated that

> where a defendant is charged with carrying a "dangerous weapon" contrary to MCL 750.227 . . . , the burden is on the prosecution to prove that the instrument . . . is a dangerous weapon per se or that the instrument was used, or intended for use, as a weapon for bodily assault or defense.

Because they construed the concealed-weapons statute, MCL 750.227, not the statute prohibiting carrying a dangerous weapon with unlawful intent, MCL 750.226, or an earlier version thereof, *Brown* and *Vaines* are instructive, but not dispositive.

But in *Acrey v Dep't of Corrections*, 152 Mich App 554, 558; 394 NW2d 415 (1986), this Court, quoting the trial court's decision that cited *Brown*, 406 Mich at 222-223, stated, " 'To support the weapon element of either of these charges requires finding that an article or instrument not included in the statute's list of per se weapons must have been used or carried for use as a weapon or for purposes of assault or defense.' " *Acrey* thus stated that, for both MCL 750.226 and MCL 750.227, the statutorily specified weapons were dangerous per se and that any other potentially dangerous item carried for assaultive or defensive use likewise satisfied those respective statutes. But *Brown*, in fact, was not construing MCL 750.226, and so *Acrey*'s statement that *Brown*'s dictates covered it was overreaching.

Brown quoted MCL 750.227 to present its list of prohibited weapons: " 'dagger, dirk, stiletto or other dangerous weapon except hunting knives adapted and carried as such . . . .' " *Brown*, 406 Mich at 219. *Brown* then quoted approvingly from *Vaines* in listing several examples, beyond those set forth in MCL 750.227, of instruments " 'generally recognized' " as dangerous weapons per se: " 'Daggers, dirks, stilettos, metallic knuckles, slungshots, pistols, and similar articles, designed for the purpose of bodily assault or defense . . . .' " *Brown*, 406 Mich at 220-221, quoting *Vaines*, 310 Mich at 505. By including in the list items other than those set forth in MCL 750.227 that were also dangerous weapons per se, *Vaines*, and thus *Brown*, treated the statutory list as merely instructive.

In *People v Smith*, 393 Mich 432, 436; 225 NW2d 165 (1975), our Supreme Court refined the list by applying the principle of *ejusdem generis*,

> whereby in a statute in which general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.

Accordingly, the phrase "or other dangerous weapon except hunting knives adapted and carried as such" after a list of stabbing weapons is limited to only additional stabbing weapons. *Id*., citing MCL 750.227.

We are therefore of the opinion that because, as *Smith* noted, MCL 750.226 expressly requires proof of intent to use a weapon unlawfully, *Smith*, 393 Mich at 437, but MCL 750.227 does not, their respective lists of weapons should be interpreted differently.

Because MCL 750.227 presents an incomplete list of instruments generally recognized as dangerous weapons per se, along with the etcetera "any other dangerous weapon," some inquiry into intent is needed to determine whether an instrument that is not a dangerous weapon per se nonetheless constitutes a dangerous weapon for purposes of that statute. See *Brown*, 406 Mich at 222-223; *Acrey*, 152 Mich App at 558. Concealed carrying of weapons that are dangerous per se, then, is prohibited without regard to intent, while concealed carrying of other weapons is prohibited only when carried with assaultive or defensive intent.

In contrast, MCL 750.226 begins with an unlawful intent element, followed by a list of what are dangerous weapons per se, and thus, no separate consideration of intent should inform the general provision "any other dangerous or deadly weapon or instrument . . . ." Because MCL 750.227 sets forth dangerous weapons, in specific and then general terms, but no intent element, a person's intent in possessing a potential weapon that is not dangerous per se is a factor in determining

whether that object qualifies for purposes of that statute. But because MCL 750.226 expressly targets the combination of an unlawful intent with its list of what are dangerous weapons per se, the carrier's intent is not a factor in determining whether an instrument carried is covered by that statute. For purposes of the latter, then, the principle of *ejusdem generis* suggests that the phrase "any other dangerous or deadly weapon or instrument," following as it does a list of varied weapons that have in common that they are all dangerous per se, includes only other dangerous weapons per se. The specification of knives with blades more than three inches in length, then, indicates that they are included as dangerous weapons per se, but knives with shorter blades are not included because they are not dangerous weapons per se.

MCL 750.227 makes an exception for a "hunting knife adapted and carried as such" in apparent recognition that hunting knives are dangerous per se but nonetheless manufactured and normally used for purposes other than aggression against humans. MCL 750.226 needs to set forth no such exception, because it specifically prohibits the carrying of dangerous weapons, no doubt including hunting knives, with unlawful intent. Further, in specifying unlawful intent, MCL 750.226 does not by its own terms prohibit the carrying of any weapon for purposes of self-defense.

The prosecution, citing *Vaines*, argues that the length of a knife's blade is not dispositive of the question of its dangerousness. The prosecution, in fact, seems to suggest that the length of the blade is of no consequence. But when construing a statute, a court should presume that every word has some meaning. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Accordingly, a construction rendering some part

nugatory or surplusage should be avoided. *Id*. Further, when a specific statutory provision conflicts with a related general one, the specific one controls. *People v Houston*, 237 Mich App 707, 714; 604 NW2d 706 (1999). Hence, the statute's specification of three-inch knife blades must be given force. But that force is wholly lacking if the statute criminalizes the carrying of *any* knife when carried for unlawful reasons. To put it another way, reading the statute as targeting any knife carried for an unlawful purpose would render the three-inch specification surplusage or nugatory. See *Seiders*, 262 Mich App at 705.

For these reasons, we hold that in prosecutions under MCL 750.226 involving a knife, an element of the crime is that the knife's blade be more than three inches in length. The lack of such proof in this instance invalidates the conviction. Acquittal, not retrial, is the proper remedy, as dictated by double jeopardy principles. *People v Thompson*, 424 Mich 118, 130; 379 NW2d 49 (1985).

III

Defendant also argued that the prosecutor committed misconduct and denied defendant a fair trial by going outside the scope of the evidence and arguing matters not on record about the knife. Defendant did not object to the prosecutor's comments during trial; thus, his argument on appeal is not preserved. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In closing argument, the prosecutor stated:

> [W]ell, why did you have the knife? Well, now I got to come up with a reason. Some people carry a knife and use it every day.
>
> This knife's never been used for anything. The blade is as pristine—there's not a wear of paint off the blade anywhere. That's as sharp as the day it was sold. Ninety days, 10 boxes a day, there would be tape—sticky tape all over the outside of this knife. And we don't clean the evidence when we get it. We don't buff it up. We present it to you the way it was taken that night. There's not a fleck on that knife. That knife is as sharp as the day it came out of the manufacturer's warehouse, and there's not so much as a scratch or a wear of paint from the 90 days times 10. I didn't do my math. You guys can do that in the jury room. How many boxes has this thing supposedly opened?

Defendant specifically makes issue of the prosecutor's comments admonishing the jury that the knife was too sharp, or otherwise unworn, to have been used in the benign ways defendant had described. "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

When defendant took the stand in his own defense, the prosecutor elicited from him that he had owned the knife for about three months, that he carried it for such purposes as cutting boxes open, and that he typically cut open about 10 boxes a day. The exchange continued as follows:

> *Q*. So three months, that's 90 days, times 10; lot a [sic] boxes you've cut open with that knife?

A. Yeah.

Q. I'm looking at this knife, and you show me one mark on this knife shows me any wear.

A. Right here, whole knife.

Q. You're saying that knife's all worn?

A. No.

Q. Well, when you're cutting—but when you're cutting boxes, you're going to dull the knife over three months?

A. Tape.

Q. Huh?

A. Cutting tape on boxes. You know, I ain't cutting boxes I'm cutting tape.

Q. Well, I mean 90 days of 10 boxes a day, this knife's going to show some wear, something; right?

A. Mm-hmm.

Q. Are you telling me this knife shows a fleck of wear on it anywhere?

A. Let me see.

Q. I'm not going to hand it to you. If I'm not going to hand it to the jury, I'm sure not going to hand it to you. Do you see any wear on it?

A. No.

Q. None.

This exchange thus did put into evidence the degree of wear the knife displayed. Further, eliciting that the knife displayed no signs of wear could reasonably be taken as eliciting that the knife appeared sharp. Although the best way to ascertain a knife's sharpness is to try to cut with it, sharpness may also be adjudged by feeling the blade or, even if to a lesser extent, by visual observation—the latter of which was available in court to defendant, and apparently also to the jury. The prosecutorial argument with which defendant takes

issue, then, was sufficiently reflective of matters in evidence as to not constitute plain error. See *Schutte*, 240 Mich App at 721.

Moreover, to the extent that the prosecutor may have stepped into argument beyond what the evidence properly allowed, the trial court's instructions that the jury decide the case solely on the basis of the evidence and that the statements of counsel were not evidence should have cured any prejudice. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these reasons, we reject this claim of error.

IV

In conclusion, we hold that by failing to present evidence that the knife in question had a blade of at least three inches in length, the prosecution did not present sufficient evidence to support defendant's conviction of carrying a dangerous weapon with unlawful intent, MCL 750.226. With regard to his prosecutorial misconduct argument, defendant failed to establish any plain error.

Vacated in part, affirmed in part, and remanded for correction of the judgment of sentence with respect to the vacated conviction. We do not retain jurisdiction.

PEOPLE v KERN

Docket No. 289478. Submitted May 6, 2010, at Detroit. Decided May 25, 2010, at 9:00 a.m.

Sean M. Kern pleaded guilty in the Macomb Circuit Court of second-degree criminal sexual conduct involving a victim under 13 years of age. The trial court, Donald G. Miller, J., sentenced him to five years' probation, with 365 days to be served in jail, and ordered defendant to register as required by the Sex Offenders Registration Act, MCL 28.721 *et seq*. The probation officer assigned to defendant then requested that the trial court amend the judgment of sentence to require lifetime electronic monitoring. Following a resentencing hearing, the trial court denied the request, concluding that such monitoring applies only to persons who have been released on parole or from prison, or both. The Court of Appeals granted the prosecution's delayed application for leave to appeal the trial court's refusal to sentence defendant to lifetime electronic monitoring.

The Court of Appeals *held*:

1. Standing alone, MCL 750.520c and MCL 750.520n both indicate that all defendants convicted of second-degree criminal sexual conduct for conduct committed by an individual 17 years of age or older against an individual less than 13 years old are subject to lifetime electronic monitoring. MCL 750.520c(2)(b) states that defendants shall be sentenced to lifetime electronic monitoring under MCL 750.520n, however, and MCL 750.520n(1) states that defendants shall be sentenced to lifetime monitoring as provided under MCL 791.285. Therefore, the scope of the requirement of lifetime electronic monitoring is limited to the dictates of MCL 791.285.

2. MCL 791.285(1) requires the Department of Corrections, through the lifetime electronic monitoring program, to implement a system of monitoring individuals released on parole or from prison, or both, who are sentenced to lifetime electronic monitoring. And MCL 791.285(1)(a) provides that the monitoring is to occur from the time the individual is released on parole or from prison until the time of the individual's death. Therefore, under MCL 791.285, the department must implement the program only

for those persons who are released on parole or from prison, or both. Because only persons who are sentenced to prison can be released from prison or released on parole, such monitoring does not apply to persons placed on probation or sent to jail. The trial court properly determined defendant is not subject to lifetime electronic monitoring.

Affirmed.

CRIMINAL LAW — SECOND-DEGREE CRIMINAL SEXUAL CONDUCT — SENTENCES — LIFETIME ELECTRONIC MONITORING.

A defendant who is convicted of second-degree criminal sexual conduct for conduct committed while the defendant was 17 years of age or older against an individual less than 13 years old and who is sentenced to probation or a jail term, or both, may not be sentenced to lifetime electronic monitoring; only persons who are released on parole or from prison, or both, may be sentenced to lifetime electronic monitoring (MCL 750.520c, 750.520n, 791.285).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, and *Jean M. Femminineo*, Assistant Prosecuting Attorney, for the people.

Donald R. Cook for defendant.

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

PER CURIAM. This case involves the interplay of provisions in the Michigan Penal Code, MCL 750.1 *et seq*., and the Corrections Code, MCL 791.201 *et seq*., pertaining to lifetime electronic monitoring. Defendant pleaded guilty of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) (victim under 13 years of age), arising out of a January 13, 2008, incident. The trial court sentenced him to five years' probation, with 365 days to be served in jail. Defendant was also ordered to register as required by the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. We granted the prosecution's delayed application for leave to appeal the trial court's refusal to sentence defendant to lifetime

electronic monitoring and, more specifically, the court's conclusion that such monitoring applies only to persons who have been released on parole or from prison, or both. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant pleaded guilty to one count of second-degree CSC pursuant to a plea agreement under which the prosecution agreed to dismiss a second count of second-degree CSC and an additional count of selling or furnishing alcohol to a minor, MCL 436.1701(1), and to recommend that defendant receive a five-year probationary sentence with no more than one year to be served in jail. The trial court also granted the prosecution's motion to amend the information to state that a second-degree CSC conviction carries an additional penalty of lifetime electronic monitoring. At the sentencing hearing, the court adopted the prosecution's recommended sentence of five years' probation, with 365 days to be served in jail.

The probation officer assigned to defendant subsequently requested that the trial court amend the judgment of sentence to require lifetime electronic monitoring. At a resentencing hearing, the court denied the request. The court considered the statutes at issue, an opinion by Kent Circuit Court Judge Dennis Kolenda in an unrelated case, which held that lifetime electronic monitoring does not apply to probationers under the current statutory scheme, and the legislative analysis undertaken by the prosecution. The trial court took note of the severity of the offense by commenting that "I think we can all agree that the, we find any sexual attack on a child 13 years or younger is an abhorrent attack against not only the child, but against society and needs to be punished severely. There's no question

about that." The court expressed concerns, however, about funding the monitoring and the issue of lifetime sanctions. In conclusion, the court stated:

> I think the whole thing is in a tremendous state of flux. Certainly we appreciate your efforts to get through this cloud, but I have to balance your analysis against Judge Kolenda's analysis.
>
> I don't think, I don't think anybody in the state at this point is prepared to either affirm or deny, absent another look at these various positions. It is very clouded at this point.
>
> So at this point I'm going to deny the motion to install this lifetime tether without prejudice, and we'll take another look at it and you can bring it later as well.

The trial court subsequently entered a sentence disposition specifying that defendant is not subject to lifetime electronic monitoring.

II. STANDARD OF REVIEW AND RULES FOR STATUTORY CONSTRUCTION

Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed de novo. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008).

"[T]he primary goal of statutory construction is to give effect to the Legislature's intent." *Id*. (quotation marks and citation omitted). "The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute." *People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009). An unambiguous statute is enforced as written. *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009). It is only when statutory language is ambiguous that a court may look outside the statute to ascertain legislative in-

tent. *Id*. A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008).

In general, "[s]tatutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). No one provision may be viewed in a vacuum. See *Jansson v Dep't of Corrections*, 147 Mich App 774, 777; 383 NW2d 152 (1985). "The object of the in pari materia rule is to give effect to the legislative purpose as found in harmonious statutes." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

III. APPLICABLE LAW

The Michigan Penal Code expressly provides for its provisions to be "construed according to the fair import of their terms, to promote justice and to effect the objects of the law." MCL 750.2. Before August 2006, MCL 750.520c(2) provided that a second-degree CSC conviction was punishable by "imprisonment for not more than 15 years." As amended by 2006 PA 171, effective August 28, 2006, subsection (2) provides:

> Criminal sexual conduct in the second degree is a felony punishable as follows:
>
> (a) By imprisonment for not more than 15 years.
>
> (b) In addition to the penalty specified in subdivision (a), the court *shall sentence the defendant to lifetime electronic monitoring under section 520n* if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.[1] [MCL 750.520c(2) (emphasis added).]

[1] A similar provision was added by 2006 PA 169 to MCL 750.520b, the statute governing first-degree CSC. MCL 750.520b(2)(d). Because a defendant convicted of first-degree CSC may not be sentenced to proba-

Section 520n of the Michigan Penal Code, MCL 750.520n, was added by 2006 PA 171, effective August 28, 2006. MCL 750.520n(1) provides:

> A person convicted under [MCL 750.520b or 750.520c] for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age *shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285*. [Emphasis added.]

The Department of Corrections was created under the Corrections Code. MCL 791.201. Its exclusive jurisdiction includes, but is not limited to, probation officers, the administration of probation orders, paroles, penal institutions, and the "lifetime electronic monitoring program established under [MCL 791.285]." MCL 791.204. The lifetime electronic monitoring program was established by 2006 PA 172, effective August 28, 2006. MCL 791.285 provides:

> (1) The lifetime electronic monitoring program is established in the department. The lifetime electronic monitoring program shall implement a system of monitoring individuals released from *parole, prison, or both parole and prison* who are sentenced by the court to lifetime electronic monitoring. The lifetime electronic monitoring program shall accomplish all of the following:
>
> (a) By electronic means, track the movement and location of each individual from the time the individual is released on *parole* or from *prison* until the time of the individual's death.
>
> (b) Develop methods by which the individual's movement and location may be determined, both in real time and recorded time, and recorded information retrieved upon request by the court or a law enforcement agency.

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tion, however, the concerns addressed herein do not apply to that statute. See *People v Nyx*, 479 Mich 112, 117 n 8; 734 NW2d 548 (2007); *People v Wells*, 138 Mich App 450, 451; 360 NW2d 219 (1984).

(2) An individual who is sentenced to lifetime electronic monitoring shall wear or otherwise carry an electronic monitoring device as determined by the department under the lifetime electronic monitoring program in the manner prescribed by that program and shall reimburse the department or its agent for the actual cost of electronically monitoring the individual.

(3) As used in this section, "electronic monitoring" means a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded. [Emphasis added.]

IV. ANALYSIS

Considering MCL 750.520c, MCL 750.520n, and MCL 791.285 together, we agree with the trial court that lifetime electronic monitoring applies only to persons who have been released on parole or from prison, or both, and, therefore, does not apply to defendant, who was sentenced to five years' probation, with 365 days to be served in jail.

Standing alone, the terms of MCL 750.520c and MCL 750.520n indicate that all defendants convicted of second-degree CSC for conduct committed by an individual 17 years of age or older against an individual less than 13 years old are subject to lifetime electronic monitoring, without exception. Both statutes unambiguously state that such defendants *shall* be sentenced to lifetime electronic monitoring. MCL 750.520c(2)(b); MCL 750.520n(1). The term "shall" in a statute generally indicates a mandatory, rather than permissive, duty. *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006).

But MCL 750.520c(2)(b) and 750.520n(1) are only portions of longer statutes. When one statute explicitly refers to provisions of another statute, those provisions are applicable and binding as though they had been

incorporated and reenacted in the statute under consideration. *Attorney General ex rel Dep't of Natural Resources v Sanilac Co Drain Comm'r*, 173 Mich App 526, 531; 434 NW2d 181 (1988). The referenced provisions must be treated as though they are part of the statute at issue. *Id*. MCL 750.520c(2)(b) states that defendants shall be sentenced to lifetime electronic monitoring "under section 520n," and MCL 750.520n(1) states that defendants "shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285." Those phrases define the scope of the requirement of lifetime electronic monitoring, meaning that the requirement is limited to the dictates of MCL 791.285. See *People v Perks (On Remand)*, 259 Mich App 100, 106; 672 NW2d 902 (2003); *Sanilac Co Drain Comm'r*, 173 Mich App at 531.

MCL 791.285(1) requires the Department of Corrections, through the lifetime electronic monitoring program, to "implement a system of monitoring individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring." Likewise, MCL 791.285(1)(a) provides that the monitoring is to occur "from the time the individual is released on parole or from prison until the time of the individual's death." Under MCL 791.285, the Department of Corrections must implement a lifetime electronic monitoring program only for those persons who are released on parole or from prison, or both. Only persons who are sentenced to prison can be released from prison or released on parole. Accordingly, as will be explained further, such monitoring does not apply to persons put on probation or sent to jail.

The Legislature often uses the term "imprisonment" to mean confinement in jail or confinement in prison.

People v Spann, 469 Mich 904 (2003). But it is clear that the terms "jail" and "prison" have distinct legal meanings. See *Kent Co Prosecutor v Kent Co Sheriff*, 425 Mich 718, 730 n 10; 391 NW2d 341 (1986). A "jail" is defined in the Corrections Code as "a facility that is operated by a local unit of government . . . ." MCL 791.262(1)(c). "Prison" is synonymous with a penitentiary, not a city or county jail. See *People v Harper*, 83 Mich App 390, 398; 269 NW2d 470 (1978).

Similarly, the terms "probation" and "parole" have distinct legal meanings. Probation is, by definition, a matter of grace imposed by a sentencing court. *Harper*, 479 Mich at 626. Under the Code of Criminal Procedure, MCL 760.1 *et seq*., probation is available in

> all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law . . . . [MCL 771.1(1).]

It is treated as an intermediate sanction for purposes of the sentencing guidelines, with "intermediate sanction" defined in MCL 769.31(b) as "probation or any sanction, other than imprisonment in a state prison or state reformatory . . . ." Parole matters, by contrast, fall within the Department of Corrections' exclusive jurisdiction, subject to limited judicial review. *Hopkins v Parole Bd*, 237 Mich App 629, 646; 604 NW2d 686 (1999). "Parole is a conditional release; a paroled prisoner is technically still in the custody of the Department of Corrections, which is executing the sentence imposed by the court." *People v Raihala*, 199 Mich App 577, 579; 502 NW2d 755 (1993).

Further, the Legislature has repeatedly demonstrated its ability to use the terms "probation" and "parole" when it intends that a statute apply to both. This is evident from the Legislature's grant of exclusive jurisdiction to the Department of Corrections in the Corrections Code with respect to both "paroles" and the "administration of all orders of probation." MCL 791.204(a) and (b). See also MCL 333.5129(11) (providing for the allocation of payments if "an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction"); MCL 750.110a(4)(b)(*i*) and (*ii*) (providing that the elements of one form of third-degree home invasion include violation of a "probation term or condition" or "parole term or condition"); MCL 769.1a(11) (stating that "[i]f the defendant is placed on probation or paroled or the court imposes a conditional sentence under [MCL 769.3], any restitution ordered under this section shall be a condition of that probation, parole, or sentence").

In MCL 791.285, the Legislature used the terms "parole" and "prison" and did not use the terms "probation" or "jail." A court may not engraft on a statutory provision a term that the Legislature might have added to a statute but did not. *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989). The Legislature's distinction between "parole" and "probation," and "prison" and "jail," must be respected. Cf. *People v Poole*, 218 Mich App 702, 712; 555 NW2d 485 (1996) (explaining that the legislative distinction between "conviction" and terms such as "commit" or "violation" in repeat offender statutes must be respected). MCL 750.520n(1) of the Michigan Penal Code directs that defendants shall be sentenced to lifetime electronic monitoring as provided under MCL 791.285 of the Corrections Code. Because the latter statute only provides for the imple-

mentation of a lifetime electronic monitoring program for those defendants who are released on parole or from prison, or both, defendants given probation or sent to jail are not subject to such monitoring.

Because there is no ambiguity in the statutes at issue, we must decline to consider the legislative analysis on which the prosecution relies on appeal. A "resort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist." *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). In any event, "not all legislative history is of equal value . . . ." *Id*. As explained in *Gardner*, 482 Mich at 58:

> Some historical facts may allow courts to draw reasonable inferences about the Legislature's intent because the facts shed light on the Legislature's affirmative acts. For instance, we may consider that an enactment was intended to repudiate the judicial construction of a statute, or we may find it helpful to compare multiple drafts debated by the Legislature before settling on the language actually enacted. Other facts, however, such as staff analyses of legislation, are significantly less useful because they do not necessarily reflect the intent of the Legislature as a body.

The prosecution relies on a staff analysis of four House bills to amend provisions of the Michigan Penal Code and the Corrections Code, Senate Legislative Analysis, HB 5421 (Substitute H-2), HB 5422 (Substitute H-2), HB 5531 (Substitute H-3), and HB 5532 (Substitute H-1), May 9, 2006. The analysis states that it "was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent." *Id.* at 5. Arguably, the analysis assumes that lifetime electronic monitoring would apply to probationers convicted of second-degree CSC. It states, in part:

> In the case of an offender convicted of second-degree CSC and sentenced to a term of probation, it is unclear whether the lifetime electronic monitoring sentence would run concurrently with the term of probation, or consecutively to the term of probation. The minimum probation term for an offender convicted of second degree CSC is five years. If the lifetime electronic monitoring sentence ran after imprisonment and probation sentences, the DOC would not incur the cost of operating the monitoring program until the first offender convicted after the effective date of the bills was released from imprisonment or probation. [*Id.* at 4.]

Examined in the context of the statutory scheme, the lack of clarity noted in the analysis appears to reflect nothing more than that the lifetime electronic monitoring program established by MCL 791.285 contains no provision for probationers and, hence, no startup date for monitoring.

The prosecution persuasively argues that persons convicted of second-degree CSC for conduct committed by an individual 17 years of age or older against an individual less than 13 years old and sentenced to probation or jail time present a similar, if not the same, risk to the public as those sentenced to time in prison and, therefore, should be subject to lifetime electronic monitoring. But "arguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). Whether the Legislature's actions are due to concerns about taxing county resources, a strategic decision that crimes resulting in sentences to jail or probation[2] do not merit the time and expense involved with lifetime electronic monitoring in addition to maintaining the defendant's listing on the Michigan

[2] As stated earlier, a trial court may grant probation if the court determines that the defendant is "not likely again to engage in an

public sex offender registry, or a mere drafting oversight is not for us to decide. While the Legislature may deem it necessary to make changes to the statutory scheme to provide for the monitoring of persons sentenced to probation or jail time, such changes are not within the province of the judicial branch. Because this is a particularly important matter of public interest, we urge the Legislature to review whether it was indeed the intent of that body to exclude from lifetime electronic monitoring individuals convicted of second-degree criminal sexual conduct who are sentenced to probation or jail time.

V. CONCLUSION

Because MCL 791.285 only provides for the implementation of lifetime electronic monitoring of persons who have been released on parole or from prison, or both, defendant, who was sentenced to five years' probation, with 365 days to be served in jail, is not subject to lifetime electronic monitoring.

Affirmed.

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offensive or criminal course of conduct" and "the public good does not require that the defendant suffer the penalty imposed by law . . . ." MCL 771.1(1).

PATTERSON v CITIFINANCIAL MORTGAGE CORPORATION

Docket No. 287370. Submitted April 14, 2010, at Detroit. Decided May 25, 2010, at 9:05 a.m.

Jacqueline Patterson and others brought an action in the Genesee Circuit Court against CitiFinancial Mortgage Corporation and others, including ABN AMRO and several of its subsidiaries. CitiFinancial was dismissed by stipulation. With regard to ABN AMRO and its subsidiaries (collectively defendant), plaintiffs alleged that defendant benefited from misrepresentations and fraudulent statements made to plaintiffs by Concept One Mortgage Corporation when plaintiffs entered into mortgage transactions with defendant in which the loans were originated and brokered by Concept One. Plaintiffs alleged that Concept One was not licensed or registered under, and failed to comply with, a number of state statutes and that defendant failed to properly oversee Concept One and was unjustly enriched because of the transactions. The court, Archie L. Hayman, J., granted defendant's motion for summary disposition, ruling that plaintiffs' claims were preempted by federal law. Plaintiffs appealed.

The Court of Appeals *held*:

1. Federal law may expressly or impliedly preempt state law, and federal regulations have the same preemptive effect as federal statutes. Express preemption occurs when federal law explicitly indicates that a specific state law is preempted. The fact that plaintiffs' allegations against defendant were based on the conduct of a third party working for defendant did not alter the preemptive effect of the federal regulations at issue. The focus of the preemption inquiry is on the activity being regulated rather than the actor that is being regulated. Defendant's use of Concept One's services was authorized by a federal regulation, 12 CFR 7.1004, and Concept One's conduct was done in furtherance of defendant's power as a national bank to make real estate loans. Defendant is entitled to the protection afforded by the preemption doctrine regardless of the fact that plaintiffs' claims are based on alleged misconduct by Concept One.

2. Under 12 CFR 34.4(a)(1) and (10), defendant was broadly permitted to make real estate loans without regard to state laws

governing licensing or registration or the manner in which its mortgages are originated or processed. To the extent that plaintiffs' claims were based on Concept One's failure to observe Michigan licensing and registration statutes in the initiation and processing of the mortgages at issue, they were expressly preempted. Plaintiffs' claims based on the common law, including fraud, misrepresentation, and unjust enrichment, were similarly preempted under 12 CFR 34.4(b)(1), (2), and (9) because if successfully pursued, they would have more than an incidental effect on the exercise of defendant's federally granted real estate lending powers.

Affirmed.

1. BANKS AND BANKING — FEDERAL PREEMPTION — NATIONAL BANKS — AFFILIATES AND SUBSIDIARIES OF NATIONAL BANKS — STATE AND FEDERAL REGULATION.

A state law action against a national bank and its affiliates may be preempted by federal law even though the allegations against the national bank and its affiliates are based on the actions of a third party working for the national bank; the focus of the preemption inquiry is on the activity being regulated rather than the actor that is being regulated.

2. BANKS AND BANKING — FEDERAL PREEMPTION — NATIONAL BANKS — AFFILIATES AND SUBSIDIARIES OF NATIONAL BANKS — MORTGAGE LENDING — STATE AND FEDERAL REGULATION.

Federal law permits a national bank to make real estate loans without regard to state laws governing licensing and registration or the manner in which its mortgages are originated or processed; an action based on the failure of independent agents working for a national bank to observe Michigan licensing and registration statutes in the initiation and processing of mortgages is expressly preempted (12 CFR 34.4[a][1], [10]).

3. BANKS AND BANKING — FEDERAL PREEMPTION — NATIONAL BANKS — AFFILIATES AND SUBSIDIARIES OF NATIONAL BANKS — MORTGAGE LENDING — FRAUD — MISREPRESENTATION — UNJUST ENRICHMENT.

A common-law action for fraud, misrepresentation, or unjust enrichment based on the actions of independent agents working for a national bank is preempted by federal law (12 CFR 34.4[b][1], [2], [9]).

Constitutional Litigation Associates, P.C. (by *Hugh M. Davis, Jr.*), and *Attorneys Against Predatory Lending, PLC* (by *Robert C. Horvath*), for Jacqueline Patterson and others.

RJ Landau Partners PLLC (by *Richard J. Landau* and *Kristen M. Tsangaris*) for ABN AMRO, Standard Federal Bank, LaSalle Bank, and Interfirst Wholesale Mortgage Lending.

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

BANDSTRA, P.J. Plaintiffs brought this action against ABN AMRO (a national bank) and its subsidiaries (defendant), seeking damages arising out of mortgages that were allegedly initiated by independent agents working for defendant who were not properly licensed under state law.[1] The trial court granted summary disposition to defendant, concluding that this action is preempted by federal law, the National Bank Act, and attendant regulations. We agree with that conclusion, and we affirm.

Defendant brought its motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' claim is barred under the preemption doctrine. We review de novo the trial court's decision granting that motion. *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). Defendant's motion was also brought under MCR 2.116(C)(8), which bars claims for which no relief can be granted, in this case because of federal preemption. Our review of the trial court's decision granting summary disposition under this rule is also de novo. *Teel v Meredith*, 284 Mich App 660, 662; 774 NW2d 527 (2009). With respect to either basis for summary disposition, we accept plaintiffs' allegations as true and must determine whether the claims based on those allegations are barred under the federal preemption doctrine. *Adair v Michigan*,

[1] Defendant CitiFinancial Mortgage was dismissed from this action by stipulation. References in this opinion to "defendant" are to ABN AMRO and its subsidiaries.

470 Mich 105, 119; 680 NW2d 386 (2004); *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

The allegations necessary for consideration of the preemption question can be briefly stated. Plaintiffs alleged that they entered into mortgage transactions with defendant in which the loans were originated and brokered by Concept One Mortgage Corporation and affiliated entities (collectively Concept One). Plaintiffs alleged that Concept One was not licensed or registered under, and failed to comply with, a number of state statutes. Plaintiffs alleged that defendant failed to properly oversee Concept One and that defendant benefited from misrepresentations and fraudulent statements made to plaintiffs by Concept One in initiating and processing loan and mortgage applications. As a result, plaintiffs sought damages from defendant, claiming that defendant was unjustly enriched because of the transactions.

The doctrine of preemption "is rooted in the Supremacy Clause of the United States Constitution," and to determine whether federal law preempts a state law claim, we examine federal law. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). Federal law may expressly or impliedly preempt state laws; express preemption occurs when federal law explicitly indicates that a specific state law is preempted. *Fidelity Fed S&L Ass'n v de la Cuesta*, 458 US 141, 152-153; 102 S Ct 3014; 73 L Ed 2d 664 (1982). Further, "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Id*. at 153.

Administration of the federal statute at issue here, the National Bank Act, 12 USC 21 *et seq*., has been granted to the Office of the Comptroller of the Currency (OCC). In pertinent part, regulations promulgated by the OCC provide that

> state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans . . . without regard to state law limitations concerning:
>
> (1) Licensing, registration, . . . [or the]
>
> * * *
>
> (10) Processing [or] origination . . . of . . . mortgages[.] [12 CFR 34.4(a)(1) and (10).]

Further, the Code of Federal Regulations provides that:

> State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks *to the extent that they only incidentally affect the exercise of national banks' real estate lending powers*:
>
> (1) Contracts;
>
> (2) Torts;
>
> * * *
>
> (9) Any other law the effect of which the *OCC determines to be incidental to the real estate lending operations of national banks* . . . . [12 CFR 34.4(b) (emphasis added).]

Virtually identical regulations, promulgated by the Office of Thrift Supervision (OTS) with respect to federal savings associations, were recently considered by the United States Court of Appeals for the Sixth Circuit in *State Farm Bank, FSB v Reardon*, 539 F3d 336 (CA6, 2008). The Superintendent of the Ohio Division of Financial Institutions challenged the system by which State Farm Bank marketed its mortgage products and services, through an existing network of insurance agents, because those agents were not licensed and did not otherwise submit to regulation under a state statute.

Initially, the superintendent claimed that, while the federal regulatory scheme might preempt application of the Ohio statute to "State Farm Bank, its employees, and its subsidiaries who engage in the solicitation and marketing of mortgage products, the regulation does not apply to State Farm Bank's exclusive agents who perform the same tasks on behalf of the bank." *Id*. at 344-345. The *Reardon* court rejected that argument:

> First, nothing in the text of [the regulation] indicates that it only preempts state laws that directly regulate federal savings associations. Rather, the regulation provides that it preempts laws "affecting the operations of federal savings associations," which indicates that the scope of the regulation is much broader than the Superintendent would have it. Second, the Superintendent's position is inconsistent with the Supreme Court's decision in *Watters* [*v Wachovia Bank, NA*, 550 US 1; 127 S Ct 1559; 167 L Ed 2d 389 (2007)].
>
> The Court in *Watters* recently rejected an argument similar to that advanced by the Superintendent today. *See Watters*, [550 US at 17-18] 127 S.Ct. at 1570. The precise issue in *Watters* was whether the National Banking Act and regulations promulgated by the OCC preempted state regulation of a national bank's mortgage lending activities where those activities were performed by a bank's operating subsidiary. *Id*. at [7; 127 S Ct at] 1564. The Commissioner of Insurance and Financial Services for the State of Michigan argued in *Watters* that Wachovia Mortgage, a Wachovia Bank operating subsidiary, was subject to Michigan's licensing and registration requirements. *Id*. at [9-10; 127 S Ct at] 1565. The Commissioner reasoned that federal law did not preempt the application of the Michigan requirements to Wachovia Mortgage because it was not a national bank. *Id*. at [15; 127 S Ct at] 1569.
>
> The *Watters* Court was unpersuaded by the Commissioner's narrow interpretation of federal banking law, and we are likewise unpersuaded by the Superintendent's interpretation of [the regulation] in this case. According to

the Court in *Watters*, federal banking law preempted the application of Michigan's requirements to Wachovia Mortgage because "[w]e have never held that the preemptive reach of [federal banking laws] extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*, not on its corporate structure." *Id*. at [18; 127 S Ct at] 1570. Further illustrating that, for preemption purposes, it is the activity being regulated rather than the actor who is being regulated that matters, the Court stated that federal law protects "from state hindrance a national bank's engagement in the 'business of banking' whether conducted by the bank itself or by an operating subsidiary, empowered to do only what the bank itself could do." *Id*. at [21; 127 S Ct at] 1572.

Continuing with the theme of interpreting things in an overly narrow fashion, the Superintendent says *Watters* is inapposite because the Court's opinion only addressed preemption of state laws that regulate operating subsidiaries of a national bank, not exclusive agents of a federal savings association. The Superintendent is correct that *Watters* involved an operating subsidiary soliciting and marketing mortgages on behalf of a national bank, and this case involves an exclusive agent soliciting and marketing mortgages on behalf of a federal savings association. The distinction, however, is one without a difference and fails to appreciate the principle set forth by the Court in *Watters*. Properly understood, *Watters* stands for the proposition that when considering whether a state law is preempted by federal banking law, the courts should focus on whether the state law is regulating "the exercise of a national bank's power" not on whether the entity exercising that power is the bank itself. *Id*. at [18; 127 S Ct at] 1570. The Superintendent urges us to do the inverse; his argument focuses on the fact that the individuals being regulated are State Farm Bank's exclusive agents while ignoring the fact that the power being exercised is clearly that of a federal savings association. [*Id*. at 345-346.]

Plaintiffs here make an argument similar to that of the superintendent rejected in *Reardon*. They claim that any preemption protection that might otherwise be afforded to defendant would not be available because their allegations against defendant are based on the actions of a third party, Concept One, which worked for defendant. For reasons similar to those employed by *Reardon*, we reject plaintiffs' claim in this regard. The OCC regulations at issue here provide that defendant may make real estate loans "without regard to" state laws governing licensing or registration or the manner in which its mortgages are originated or processed. 12 CFR 34.4(a)(1) and (10). Thus, the scope of the regulation is much broader than plaintiffs would have it. Following *Watters*, we focus on the exercise of defendant's power, granted by federal law, to make real estate transactions, not on defendant's corporate or agency structure. "[I]t is the activity being regulated rather than the actor who is being regulated that matters . . . ." *Id*. at 345. As we consider whether state law is preempted by federal banking law, we must focus on "whether the state law is regulating 'the exercise of a national bank's power' not on whether the entity exercising that power is the bank itself." *Id*., quoting *Watters*, 550 US at 18. Plaintiffs' argument ignores the fact that the complained-of conduct by Concept One was done in furtherance of defendant's power, as a national bank, to make real estate loans. Defendant's use of Concept One's services was specifically authorized by an OCC regulation. 12 CFR 7.1004. As did the court in *Reardon*, we conclude that defendant here is entitled to whatever protection might be afforded by the preemption doctrine, regardless of the fact that plaintiffs' action is based on alleged misconduct by Concept One.

With respect to the protection provided by the preemption doctrine, we again find guidance in *Reardon*, in which the court reasoned that the statute requiring the state licensing and regulation of State Farm Bank's agents was preempted by the OTS regulations at issue:

> [T]he Ohio Act's licensing and certification requirements fall within the category of state laws that [the regulation] specifically says are preempted; not only does the Ohio Act constitute a law regarding "licensing" or "registration", . . . it also affects—in more than an incidental manner—the "processing" and "origination" of mortgages . . . . Even if the Ohio Act were held not to fall within the class of state laws preempted [by those provisions], preemption would still be appropriate here because the Ohio Act does not fit into any of the categories that [the regulation] excludes from preemption, and the Ohio Act has more than an "incidental effect" . . . on State Farm Bank's mortgage lending operations. [*Reardon*, 539 F3d at 347-348.]

Construing the virtually identical language of the OCC regulation at issue here, we come to the same conclusion. As a national bank, defendant "may make real estate loans . . . without regard to state law limitations concerning . . . [l]icensing [or] registration" or the "[p]rocessing" or "origination" of mortgages. 12 CFR 34.4(a)(1) and (10). To the extent that plaintiffs' claims against defendant are based on Concept One's failure to observe licensing and registration provisions of Michigan statutes in the initiation and processing of the mortgages at issue, they are expressly and directly preempted; defendant was free to proceed "without regard" to the Michigan statutory scheme. Further, defendant can be subject to suit under common-law theories arising out of contracts or torts or "any other law" only if such claims merely "incidentally affect the exercise of [defendant's] real estate lending pow-

ers . . . ." 12 CFR 34.4(b)(1), (2), and (9). To the extent that plaintiffs' claims are based on common-law theories of fraud, misrepresentation, or unjust enrichment or other theories, they would, if successfully pursued, have far more than an "incidental" effect on defendant's exercise of the real estate lending powers granted under the federal scheme. In this regard, the *Reardon* court made a number of observations that are equally apposite here:

> Were this court to agree with the Superintendent that the Ohio Act may be applied to State Farm Bank's exclusive agents, we would be opening the door to subjecting State Farm Bank and its exclusive agents to fifty separate and distinct licensing and regulatory schemes, all with their own requirements and procedural hurdles. Subjecting State Farm Bank and its exclusive agents to such a veritable "hodgepodge" of state regulation would not only be unduly burdensome, it would also be at odds with the very purpose behind federal regulation of federal savings associations. . . .
>
> . . . Regardless of the gloss that the Superintendent attempts to place on the issue, the practical effect of the Ohio Act is that State Farm Bank must either change its structure or forego mortgage lending in Ohio. . . . The state of Ohio is not—nor is any state for that matter—entitled to impose such regulations on the powers of a federal savings association. [*Reardon*, 539 F 3d at 348-349.]

The same analysis requires preemption here.

The trial court properly concluded that plaintiffs' claims against defendant were preempted under federal law. Having made that determination, we need not consider the other issues raised on appeal. We affirm. Defendant, the prevailing party, may tax costs. MCR 7.219.

HOFFMAN v BARRETT

Docket No. 289011. Submitted April 7, 2010, at Lansing. Decided June 3, 2010, at 9:00 a.m.

Beth Hoffman was appointed personal representative of the estate of Edgar Brown, deceased, on July 27, 2001. Hoffman provided defendants, Peter Barrett, M.D., and Battle Creek Health Systems, a notice of intent to file a medical malpractice action on March 3, 2003, and filed the action on October 16, 2003. On August 27, 2004, the trial court, James C. Kingsley, J., granted summary disposition in favor of defendants because, at the time, the Court of Appeals had held in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503 (2006) (*Mullins I*), that the Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), applied retroactively. Under the retroactive application of *Waltz*, plaintiff's action had been filed after the wrongful death saving period had expired. The Court of Appeals, METER, P.J., and K. F. KELLY and FORT HOOD, JJ., affirmed the trial court's determination in an unpublished opinion per curiam, issued May 22, 2007 (Docket No. 258982). The Supreme Court held plaintiff's application for leave to appeal in abeyance pending the outcome of an appeal in the Supreme Court of the *Mullins* action. The Supreme Court subsequently reversed the judgment of the Court of Appeals in *Mullins*, concluding that *Waltz* "does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*." *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins II*). Subsequently, the Supreme Court, in lieu of granting plaintiff's application for leave to appeal in this case, reversed the judgment of the Court of Appeals and remanded the case to the trial court for the entry of an order denying defendants' motion for summary disposition and for further proceedings. 480 Mich 981 (2007). On remand in the trial court, Battle Creek Health Systems was dismissed as a defendant. Barrett moved for summary disposition, asserting that plaintiff's notice of intent and affidavit of merit were deficient. Plaintiff conceded that the affidavit of merit was

defective. The trial court found the notice of intent to be adequate and granted summary disposition without prejudice in favor of Barrett. Barrett appealed, contending that the dismissal should have been with prejudice.

The Court of Appeals *held*:

1. The trial court properly held that plaintiff's notice of intent was sufficient. Read as a whole, it provided all the information required by MCL 600.2912b.

2. The two-year statutory limitations period had already expired and could not thereafter be tolled when this suit was filed on October 16, 2003. The saving period of MCL 600.5852, which provides an additional two years for filing after the appointment of a personal representative, would have expired on July 27, 2003, if it had not been tolled by the application of *Mullins II*. Because *Mullins II* applied, plaintiff's notice of intent, which was filed on March 3, 2003, and was valid, tolled the running of the saving period. The action was timely filed.

3. *Waltz* did not apply in this case because this case was filed after *Omelenchuk* was decided and the saving period expired within 182 days after *Waltz* was decided. Because *Waltz* did not apply but *Omelenchuk* did, plaintiff's filing of the notice of intent tolled the saving period.

4. Filing a complaint and an affidavit of merit, even a defective one, tolls the limitations period until the affidavit is successfully challenged. The filing of the notice of intent on March 3, 2003, tolled the saving period for 182 days, but there were 146 days remaining in the saving period at that time. Therefore, when this suit was filed on October 16, 2003, there remained 101 days within which plaintiff could have filed. Plaintiff still had this time available upon the successful challenge to the affidavit of merit, and, therefore, the dismissal was properly without prejudice.

5. Plaintiff's expert was qualified to sign the affidavit of merit. Although Barrett is a board-certified general surgeon and a board-certified thoracic surgeon and plaintiff's expert is only board-certified in general surgery, the claims against Barrett, when viewed on the basis of the affidavit of merit, do not appear to require any specialized testimony pertaining to thoracic surgery.

Affirmed.

Charfoos & Christensen, P.C. (by *David R. Parker, J. Douglas Peters,* and *Ann K. Mandt*), for Beth Hoffman.

Aardema, Whitelaw & Sears-Ewald, PLLC (by *Dolores Sears-Ewald* and *Timothy P. Buchalski*), for Peter Barrett, M.D.

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

DAVIS, P.J. Defendant appeals as of right the dismissal without prejudice of plaintiff's medical malpractice action. Defendant moved for summary disposition, asserting that plaintiff's notice of intent to file her claim and affidavit of merit were deficient. Plaintiff conceded that the affidavit of merit was defective. The trial court found that the notice of intent "could be better, but [is] adequate," and therefore granted summary disposition without prejudice. This Court reviews de novo a trial court's interpretation of a statute and decision on a motion for summary disposition. *Esselman v Garden City Hosp*, 284 Mich App 209, 215-216; 772 NW2d 438 (2009). Defendant contends that dismissal should have been with prejudice. We disagree, and we affirm.

The decedent, Edgar Brown, fell from the roof of his house onto a cement driveway on January 13, 2001, and he was taken to the emergency room at Battle Creek Health Systems[1] (BCHS). Defendant, Dr. Peter Barrett, was assigned to care for the decedent. The decedent's treatment entailed, among other things, insertion of a chest tube to reinflate a lung. He was discharged from BCHS and returned to his home on January 24, 2001. The decedent developed problems at home the next day. Emergency medical services were summoned, and the decedent went into full arrest in the ambulance. He was pronounced dead at the hospital.

[1] Battle Creek Health Systems was originally a named defendant, but was dismissed before the summary disposition order at issue in this appeal.

This matter has been before this Court previously, in Docket No. 258982. Plaintiff was appointed personal representative on July 27, 2001. Plaintiff provided defendants[2] with a notice of intent to sue, pursuant to MCL 600.2912b(1), on March 3, 2003. Plaintiff commenced the instant suit on October 16, 2003. On August 27, 2004, the trial court granted a prior summary disposition motion in favor of defendants because, at the time, this Court had held that our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), applied retroactively. *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006) (*Mullins I*), rev'd *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins II*). Under a retroactive application of *Waltz*, plaintiff's suit had been filed after the wrongful death saving period had expired. The Court of Appeals affirmed the trial court's determination. *Hoffman v Barrett*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2007 (Docket No. 258982). Plaintiff applied for leave to appeal in our Supreme Court, which held the application for leave to appeal in abeyance pending the outcome of the appeal in *Mullins*. After *Mullins II* was decided, our Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court Appeals and remanded the case to the trial court for the entry of an order denying defendants' motion for summary disposition and for further proceedings. *Hoffman v Barrett*, 480 Mich 981 (2007).[3]

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[2] Battle Creek Health Systems was still a defendant at the time of the prior appeal.

[3] In *Mullins II*, our Supreme Court held that *Waltz* did not apply to any actions filed after the decision in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), and before 182 days after the decision in *Waltz*. *Omelenchuk* was decided on March 28, 2000, and *Waltz* was decided on April 14, 2004; the date 182 days later would be October 13,

Defendant's first argument is that this matter should have been dismissed with prejudice, rather than without prejudice, because plaintiff no longer has time to refile. While this might be true for some cases, it is not true here.

The malpractice presumably happened on or before January 24, 2001. There is a two-year statutory limitations period, and an additional possible three years under the "saving provision." The limitations period is tolled if a complaint is filed with a defective affidavit of merit, but the saving period is not. The limitations period would have expired on, at the latest, January 24, 2003. Suit was filed on October 16, 2003, so the limitations period had already expired and could not thereafter be tolled. The saving period,[4] MCL 600.5852, provides an additional two years after the appointment of a personal representative; plaintiff was appointed personal representative on July 27, 2001, so the saving period would have expired on July 27, 2003, see, generally, *Ligons v Crittenton Hosp*, 285 Mich App 337, 351-355; 776 NW2d 361 (2009),[5] if it had not been tolled by the application of *Mullins II*. Because *Mullins II* applies, plaintiff's notice of intent, which was filed on March 3, 2003, and which we conclude is valid, tolled the running of the saving period. This action was therefore timely filed.

2004. This matter was filed between those dates, so *Waltz* does not apply.

[4] "Saving period" or "saving provision" is a term created by our Supreme Court. See, e.g., Justice CAVANAGH's dissenting opinion in *Waltz*, 469 Mich at 662-672.

[5] While we cite this case for several legal propositions conveniently summarized therein, we offer no opinion as to the correctness of *Ligons*. *Ligons* is not controlling in this matter because the action in *Ligons* was filed on April 7, 2006, which, unlike the filing in the instant matter, was more than 182 days after *Waltz* was decided. Therefore, *Waltz* was applicable in *Ligons* but is not applicable here. See footnote 3 of this opinion.

We observe that the legal framework established by *Waltz* and *Ligons* affirmatively encourages defendants—who would obviously know whether an affidavit of merit is insufficient simply by casually reading it and determining that they do not see therein all the required elements—to engage in delaying tactics until the saving period expires and then simply arrange to have the matter dismissed on a procedural technicality instead of any substantive basis. Therefore, this framework runs directly and poisonously contrary to the longstanding policy in this state and its predecessor legal systems of resolving controversies on substantive grounds, not procedural gamesmanship and trickery. See, e.g., *Walters v Arenac Circuit Judge*, 377 Mich 37, 47; 138 NW2d 751 (1966) (opinion by O'HARA, J.) ("The trend of our jurisprudence is toward meritorious determination of issues."); *White v Mich Consol Gas Co*, 352 Mich 201, 213; 89 NW2d 439 (1958) (" 'The courts have construed [statutes of journey's accounts, longstanding statutes enabling plaintiffs to obtain a new writ within some number of days after an original writ is abated] liberally in furtherance of their purpose—to enable controversies to be decided upon substantive questions rather than upon procedural technicalities.' "), disapproved of on other grounds in *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 637; (1976), quoting with approval *Wilt v Smack*, 147 F Supp 700 (ED Pa, 1957); *Crowther v Ross Chem & Mfg Co*, 42 Mich App 426, 430; 202 NW2d 577 (1972) (observing, albeit in a different context, that "the policy under modern rules of procedure to dispose of cases according to their merits, rather than by applying technical rules formalistically to bar meritorious claims").

But, as observed, this case was filed after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), was decided, and the saving period expired

before 182 days after *Waltz* was decided. Therefore, *Waltz* does not apply to this case. *Mullins II*, 480 Mich at 948. Before the decision in *Waltz*, the saving period was understood to be tolled by filing a notice of intent exactly the same way in which the period of limitations would be tolled. *Waltz*, 469 Mich at 653-654; see also Judge O'CONNELL's dissenting opinion in *McLean v McElhaney*, 269 Mich App 196, 206-207; 711 NW2d 775 (2005). Indeed, "it was *the Court, and not the Legislature*, that labeled [MCL 600.5852] a 'saving statute' " instead of a special-purpose limitations period. *Mullins I*, 271 Mich App at 527 (MURPHY, J., dissenting) (emphasis in original). Because *Waltz* does not apply, but *Omelenchuk* does, plaintiff's filing of the notice of intent tolled the saving period. As we discuss, the trial court correctly found the notice of intent to be sufficient, so dismissal without prejudice was proper.

Plaintiff conceded that the affidavit of merit was defective. Nevertheless, filing a complaint and an affidavit of merit—even a defective one—tolls the limitations period until the affidavit is successfully challenged. *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007). After our Supreme Court's transmutation of the extended limitations period in MCL 600.5852 into a "saving period," see *Waltz*, 469 Mich at 662-672 (CAVANAGH, J., dissenting), the saving period would not be so tolled. *Ligons*, 285 Mich App at 353-354. However, again, *Waltz* does not apply to this matter. Pursuant to *Omelenchuk*, *Mullins II*, and a rational reading of MCL 600.5852 as providing a limitations period, the running of the additional time provided by that statute would have been tolled here by the filing of the complaint and affidavit of merit. Filing the notice of intent on March 3, 2003, tolled the saving period for 182 days, but there were in addition 146 days remaining in the saving period at that time. When this

suit was filed on October 16, 2003, there remained 101 days within which plaintiff could have filed. Plaintiff still had this time available upon the successful challenge to the affidavit of merit, and therefore dismissal was properly without prejudice.

Defendant next argues that the notice of intent was insufficient because it failed to contain a statement explaining the manner in which defendant's alleged breach of the standard of care resulted in plaintiff's decedent's injuries.[6] We agree with the trial court that the notice of intent could have been better, but was sufficient.

Under MCL 600.2912b, commencement of a medical malpractice claim requires a plaintiff to provide an advance "notice of intent" to the intended defendant; that notice must provide certain specific pieces of information, although no particular format is required. *Ligons*, 285 Mich App at 343. The information in the notice of intent must be provided in good faith, but it need not eventually be proven to be completely accurate. *Boodt v Borgess Med Ctr*, 481 Mich 558, 561; 751 NW2d 44 (2008). Furthermore, the information need only be detailed enough to "allow the potential defendants to understand the claimed basis of the impending malpractice action," particularly given that it is being provided before discovery would ordinarily have begun. *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 691, 692 n 7; 684 NW2d 711 (2004). A bare statement that the alleged negligence caused the harm is insufficient, *Boodt*, 481 Mich at 560, but the entire

[6] Defendant also argues that the notice of intent failed to separate the standards of care applicable to the different defendants, but because there were only two named defendants, one of which is no longer a party, and because the only articulated failures pertain to Dr. Barrett, we do not believe that the notice is deficient on this basis.

notice must be read and considered as a whole, rather than piecemeal, *Ligons*, 285 Mich App at 344.

Plaintiff's notice of intent provided,[7] in relevant part, as follows:

> SECTION 2912b NOTICE OF INTENT TO FILE CLAIM
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> RE: EDGAR BROWN, DECEASED
>
> This Notice is intended to apply to the following health-care professionals, entities and/or facilities as well as their employees or agents, actual or ostensible, who were involved in the evaluation, care and/or treatment of EDGAR BROWN, DECEASED.
>
> DR. PETER BARRETT, BATTLE CREEK HEALTH SYSTEMS, AND ANY AND ALL PROFESSIONAL CORPORATIONS AND ALL AGENTS AND EMPLOYEES, ACTUAL OR OSTENSIBLE, THEREOF.
>
> I. FACTUAL BASIS OF THE CLAIM
>
> On January 13, 2001, Edgar Brown fell from a ladder and was brought to Battle Creek Health Systems Emergency Room. He was found to have multiple rib fractures and a right pneumothorax.[8] Dr. Peter Barrett was assigned to care for Mr. Brown and he was admitted to the hospital.
>
> A chest tube was inserted and was removed on January 19, 2001. Mr. Brown developed an ileus[9] and a nasogastric tube[10] was inserted. Between the time of his admission and his discharge, Mr. Brown continued to have diminished breath sounds. His last chest x-ray was

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[7] We have added footnotes explaining medical terms used. These definitions have been culled from *Stedman's Medical Dictionary* (26th ed); 1 Schmidt, *Attorneys' Dictionary of Medicine* (2000 rev); and <http://emedicine.medscape.com> (accessed May 5, 2010).

[8] Abnormal presence of air inside the pleural cavity, which is the membrane-lined cavity in the thorax surrounding the lungs.

[9] An obstruction or blockage of the intestine or bowel.

[10] A tube inserted into the stomach through the nose, used for feeding or for removing fluids.

taken on January 20, 2001 and his last abdominal x-ray was taken on January 19, 2001. Mr. Brown was discharged home on January 24, 2001. He had a distended abdomen and was still having difficulty breathing.

Within 24 hours of discharge, Mr. Brown became short of breath while talking, his abdomen remained distended and his daughter called for an ambulance. Mr. Brown went into full arrest in the ambulance. The cause of death was determined to be complications of multiple injuries from [sic]. On autopsy, Mr. Brown was found to have right pulmonary atelectasis[11] and right empyema/pleuritis,[12] as well as an intestinal ileus.[13]

II. APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

A reasonable and prudent physician and/or hospital staff would have:

a. Monitored a patient such as Mr. Brown carefully and regularly, including, but not limited to, having performed full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

b. Performed full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.

c. Adequately assessed and intervened for respiratory compromise in a patient such as Edgar Brown.

d. Refrained from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

e. Refrained from discharging a patient in the condition of Edgar Brown.

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[11] A collapsed lung.

[12] Empyema is an accumulation of pus in the body cavity. Pleuritis is an inflammation of the lining around the lungs.

[13] Again, an obstruction or blockage of the intestine.

f. Refrained from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

g. Provided appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continued to have respiratory distress and gastrointestinal problems.

III. THE MANNER IN WHICH IT IS CLAIMED THAT THE STANDARDS OF PRACTICE OR CARE WERE BREACHED

The defendant physician and/or hospital staff did not:

a. Monitor a patient such as Mr. Brown carefully and regularly, including, but not limited to, perform full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

b. Perform full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.

c. Adequately assess and intervene for respiratory compromise in a patient such as Edgar Brown.

d. Refrain from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

e. Refrain from discharging a patient in the condition of Edgar Brown.

f. Refrain from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

g. Provide appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continuing [sic] to have respiratory distress and gastrointestinal problems.

IV. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE

A reasonable and prudent physician and/or hospital staff should have:

a. Monitored a patient such as Mr. Brown carefully and regularly, including, but not limited to, having performed full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

b. Performed full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.

c. Adequately assessed and intervened for respiratory compromise in a patient such as Edgar Brown.

d. Refrained from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

e. Refrained from discharging a patient in the condition of Edgar Brown.

f. Refrained from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

g. Provided appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continued to have respiratory distress and gastrointestinal problems.

V. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY

As a proximate result of the defendants' conduct, Edgar Brown died prematurely from his injuries.

When the final statement is viewed *in isolation*, it does in fact amount to no more than a bare statement that the alleged negligence caused the decedent's injuries.

However, the proper way to review the notice of intent is as a whole, rather than viewing one part in isolation. *Ligons*, 285 Mich App at 344. Significantly, a notice of intent is insufficient if it "*only* provides notice or *only* provides 'a statement.' It must do both." *Esselman*, 284 Mich App at 220. The required notification need only to be set forth with the same level of specificity as "would be required of allegations in a complaint or other pleading: [the statement] must only give fair notice to the other party." *Id*. at 219.

As was the situation in *Esselman*, the statement here is not sufficient to provide the requisite notice all by itself, but it is also not a tautology. See *id*. at 217. A plain reading of plaintiff's notice of intent *as a whole* does not leave the reader guessing about how the decedent died as a proximate result of defendant's alleged inaction, at least when some of the technical medical terms are explained. The decedent, while under defendant's care, was suffering from readily diagnosable life-threatening conditions that inevitably became fatal because defendant simply failed to do anything about those conditions. The manner in which the breach of the standard of care proximately caused the harm is just that simple and straightforward: defendant did not investigate the significance of the decedent's symptoms and did not discover or properly deal with the causes of those symptoms, and because those causes are fatal if not dealt with, the decedent died. All the required information is plainly apparent from reading the notice of intent as a whole.

Defendant finally argues that plaintiff's expert was not qualified to sign the affidavit of merit or render standard-of-care testimony against him.[14] Defendant

[14] This issue is moot in the instant appeal, given plaintiff's concession that the affidavit of merit was otherwise defective, but we address the

bases this argument on the fact that he is a board-certified general surgeon and a board-certified thoracic surgeon, whereas plaintiff's expert is only board-certified in general surgery. We decline to address whether plaintiff's expert is qualified to render standard-of-care testimony at trial, such considerations being premature at the affidavit-of-merit stage of proceedings. *Grossman v Brown*, 470 Mich 593, 600; 685 NW2d 198 (2004). We conclude that plaintiff's expert was qualified to sign the affidavit of merit.

Pursuant to MCL 600.2912d(1) and MCL 600.2169, a plaintiff must "file an affidavit of merit signed by a physician who counsel reasonably believes specializes in the same specialty as the defendant physician," including a reasonable belief that the expert holds an identical board certification as the defendant physician, if the defendant physician is so certified. *Grossman*, 470 Mich at 596. Dr. Barrett is board-certified by the American Board of Thoracic Surgery, which defines its specialty as "the operative, perioperative, and surgical critical care of patients with acquired and congenital pathologic conditions within the chest," including the heart, lungs, airways, and chest injuries.[15] Plaintiff's expert is not.

However, "not *all* specialties and board certificates must match." *Woodard v Custer*, 476 Mich 545, 558; 719 NW2d 842 (2006). Because irrelevant testimony is generally inadmissible, *id*. at 568-572, the plaintiff's expert need only specialize or be certified in subfields relevant to the expert's intended testimony, *id*. at 559. Therefore, a plaintiff's expert need only match "the specialty engaged in by the defendant physician during the

matter because it will become relevant upon plaintiff's refiling the action.

[15] <http://www.abts.org/sections/Definition_of_Thorac/index.html> (accessed May 5, 2010).

course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." *Id*. at 560; see also *Gonzalez v St John Hosp & Med Ctr* (*On Reconsideration*), 275 Mich App 290, 302-303; 739 NW2d 392 (2007). The mere fact that defendant has a specialty that plaintiff's expert lacks does not automatically disqualify plaintiff's expert from properly signing plaintiff's affidavit of merit.

Defendant's position seems superficially meritorious, because the decedent did suffer injuries to his ribs, the decedent was later determined to have a collapsed lung, and the pleural cavity, from which 850 milliters[16] of brown pus was removed, surrounds the lungs. A significant portion of the decedent's injuries were indeed located in a part of the body that would fall in the "thoracic" category. However, the decedent was also found to have a lacerated spleen, a necrotic[17] gallbladder, a necrotic liver, intestinal ileus, and acalculous cholecystitis.[18] Clearly, a significant portion of the decedent's injuries did *not* fall under the thoracic category. Moreover, the obvious import of the affidavit of merit is not that defendant failed to do anything particularly relevant to thoracic surgery or medicine, but that defendant failed *generally* to treat the decedent properly.

At least on the basis of the affidavit of merit, the claims against defendant do not appear to require any

[16] Slightly less than $3^2/_3$ cups.

[17] Necrosis refers to localized death of cells or tissue because of injury or disease, rather than as a result of natural causes.

[18] Cholecystitis is an inflammation of the gallbladder; "acalculous" refers to the absence of stones. Acalculous cholecystitis apparently has a relatively high mortality rate and is commonly observed in patients who have suffered trauma.

specialized testimony pertaining to thoracic surgery. Therefore, plaintiff's expert was qualified to sign the affidavit of merit.

Affirmed.

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION
v OFFICE OF FINANCIAL AND INSURANCE REGULATION

Docket No. 293766. Submitted May 4, 2010, at Lansing. Decided June 8, 2010, at 9:00 a.m.

The Michigan Basic Property Insurance Association filed a petition for review in the Ingham Circuit Court against the Office of Financial and Insurance Regulation and the Commissioner of the Office of Financial and Insurance Regulation. Petitioner alleged that the commissioner exceeded his authority by rejecting its requested rate increase of 18.9 percent for some of its lines of home insurance and that the commissioner's order was contrary to law and not supported by the record. The court, Joyce Draganchuk, J., agreed with petitioner and reversed the commissioner's order of disapproval. Respondents appealed.

The Court of Appeals *held*:

1. MCL 500.2930a(1) addresses how petitioner must calculate the rates it charges for home insurance. It provides that the rates charged in each territory "shall be equal to the weighted average of the 10 voluntary market insurer groups with the largest premium volume in this state." The statutory language is ambiguous because it fails to specify the subject matter of the weighted average and is equally susceptible to more than one meaning.

2. In his expertise, the commissioner concluded that petitioner's rate calculation under MCL 500.2930a(1) was improper because it was premised on a weighted average of "base rates." The commissioner acknowledged that base rates had been used in the past, but noted that in recent years base rates had become inflated to account for discounts that ultimately led to the premium actually charged to the insured. Therefore, when individuals sought insurance from petitioner, as a last resort, the use of base rates to calculate their premiums was no longer fair, reasonable, equitable, and nondiscriminatory, as required by MCL 500.2920(2), and the commissioner ordered petitioner to calculate its rates using a weighted average of premiums charged. Respondents' construction of the statute was in accordance with the intent of the Legislature, and no cogent reasons existed for

overruling respondents' interpretation. The circuit court erred by reversing the commissioner's decision.

Reversed.

BANDSTRA, P.J., concurred with the majority and wrote separately to note that while the statutory language of MCL 500.2930a(1) is ambiguous, a close reading of that language suggests that the subject matter of the weighted average is the "rates charged," i.e., the actual premiums that result from base rates reduced by applicable discounts, referred to earlier in the same clause of the statute.

INSURANCE — INSURANCE COMMISSIONER — BASIC PROPERTY INSURANCE ASSOCIATION — HOME INSURANCE — RATES — CALCULATION.

The rates charged by the Michigan Basic Property Insurance Association for home insurance generally must be equal to the weighted average of the 10 voluntary market insurer groups with the largest premium volume in Michigan; the weighted average must be based on premiums charged rather than base rates (MCL 500.2930a[1]).

Dykema Gossett PLLC (by *Lori McAllister*) for petitioner.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Christopher L. Kerr* and *M. Elizabeth Lippitt*, Assistant Attorneys General, for respondents.

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

FORT HOOD, J. Respondents appeal by leave granted the circuit court's order concluding that the insurance commissioner exceeded his authority by disapproving petitioner's requested rate increase. We reverse.

Petitioner, the Michigan Basic Property Association, is a legislative creation. MCL 500.2920. It provides property insurance to qualified persons who have been unable to obtain insurance in the regular market. MCL 500.2901 *et seq*. Respondent Commissioner of the Office of Financial and Insurance Regulation (insurance com-

missioner) must approve petitioner's plan of operation and any changes to that plan. MCL 500.2920(2).

On March 11, 2008, petitioner submitted a rate level adjustment for its home insurance program addressing rate levels for its HO-2 (home), HO-4 (apartment), and HO-6 (condominium) lines of insurance. Specifically, petitioner requested a rate increase of 18.9 percent based on a report prepared by its actuary. The report stated that the rate increase was premised on the actuarial method employed and that the use of a different accepted actuarial method would have resulted in a rate decrease:

> The Association respectfully wishes to advise your office that further investigation and research by our actuaries has determined that had the Association followed other actuarially accepted methods for determining its rate levels (like the Form 3 methodology currently in the statute), the change now being requested would have been, in fact, an overall statewide decrease in rates.

An analyst for respondents contacted petitioner's president, noting that the calculation of rates was premised on the weighted base rate average of the top 10 insurer groups, when the appropriate computation would use the "weighted average of actual charged premium [sic] which would include discounts." Consequently, petitioner was asked to submit actuarial data to determine the rate levels based on the "weighted average of charged, fully discounted premium rates." Petitioner responded that its rate increase was in accordance with the statutory language for computing the appropriate rate. Petitioner also asserted that the application of discounts was a voluntary method of product marketing, and some insurance companies offered discounts premised on the sale of multiple forms of insurance, but petitioner only dealt in home insurance, not automobile insurance.

The insurance commissioner issued an order disapproving the proposed rate increase. The rejection of the rate increase was premised on multiple considerations. First, the commissioner rejected the assertion that the rate increase was consistent with the weighted-average language of MCL 500.2930a:

> In determining the "weighted average," [petitioner] has traditionally averaged the base rates of the top 10 insurer groups. This is reflected in the rates filed by [petitioner] on March 12, 2008 for HO-2 (traditional home), HO-4 (apartment), and HO-6 (condominium) lines of insurance. However, rates calculated in this manner are no longer appropriate or lawful.
>
> An insurer begins calculating an individual's premium with the base rate and then applies factors that it has determined relate to the frequency or severity of losses, such as age of dwelling, type of construction, and safety devices. Several years ago, final premiums charged were not, on average, greatly disparate from the base rates.
>
> This is no longer true. New rating factors, especially the use of insurance credit scoring, have greatly influenced the calculation of premiums. Base rates have been driven up so that insurers may deeply discount the rates of persons with high insurance credit scores. Base rates, which once had some meaningful correlation with expected losses, have now become just a starting point in a methodology that arrives at expected losses.

Next, the commissioner held that petitioner was required to conform to the requirements of MCL 500.2109(1)(c), which provides that rates may not be unfairly discriminatory in relation to another rate for the same coverage. A rate was not unfairly discriminatory if supported by a reasonable justification for any disparity, a reasonable classification system, sound actuarial principles, and loss and expense statistics. The insurance commissioner held that a reasonable justification had not been established:

> With regard to the current rate filing, because of its reliance on base rates, the differential between the rates is not reasonably justified by differences in losses. There is not a reasonable justification because there is not a reasonable classification system or support by actual and credible loss statistics. According to information from [petitioner], actual and credible loss statistics would support a reduction in rates by 6% rather than the proposed increase of 18.9%.

Because the justification was deficient, the insurance commissioner ordered petitioner to bring its rates in conformity with MCL 500.2109(1)(c).

Lastly, the insurance commissioner held that the rates, as computed by petitioner, did not conform to the requirement that the insurance pool adopt a plan of operation that ensured "the fair, reasonable, equitable, and nondiscriminatory manner of administering the pool . . . ."[1] MCL 500.2920(2). Consequently, the insurance commissioner ordered amendment of the plan of operation to provide that home insurance rates in the future would be calculated using the average premium charged by the top 10 insurer groups rather than the base rates of the top 10 insurer groups.

On July 10, 2008, petitioner filed its petition for review in the circuit court, alleging that the insurance commissioner's order was contrary to law, exceeded his statutory authority, and was not supported by the record and competent evidence. The circuit court concluded that MCL 500.2930a(1) was ambiguous and, following a review of other statutory provisions including those concerning automobile insurance rates, concluded that the Legislature understood the difference between "premiums" and "base rates." The circuit

[1] Petitioner is composed of most insurers authorized to transact basic property and home insurance business in Michigan and is also known as "the pool." MCL 500.2920(1).

court also held that the insurance commissioner was unable to alter a longstanding interpretation premised on changed circumstances in order to avoid "any perceived excessiveness or unfair discrimination." Therefore, the circuit court reversed the insurance commissioner's disapproval of the 18.9 percent rate increase. We granted respondents' application for leave to appeal.

I. STANDARD OF REVIEW AND ADMINISTRATIVE AGENCIES

The Michigan Constitution provides for judicial review of administrative decisions, providing in relevant part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law. [Const 1963, art 6, § 28.]

However, the application of the standard of review is contingent on the type of challenge at issue and must be in accordance with separation-of-power principles. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97-100; 754 NW2d 259 (2008). If a rulemaking function is at issue, the reviewing court must first determine whether the Legislature properly delegated authority to the agency to promulgate the rule at issue. The legality of the delegation is subject to review de novo. If the delegation was proper, the reviewing court must examine whether the agency exceeded the authority granted

by the statute. *Id*. If the examining court is asked to review the agency's fact-finding function in contested cases, the court examines whether the findings were supported by competent, material, and substantial evidence on the entire record. The factual findings, particularly the review of credibility of witnesses and the weight of the evidence, are entitled to deference by the reviewing court. *Id*.

However, the agency's interpretation of a statute "is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id*. Rather, a reviewing court must give "respectful consideration" to the agency's construction of the statute and provide "cogent reasons" for overruling an agency's interpretation. *Id*. However, "when the law is 'doubtful or obscure,' the agency's interpretation is an aid in discerning the Legislature's intent." *Id*. (citation omitted). Thus, when a reviewing court examines an agency interpretation of a statute, "the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute." *Id*. Respectful consideration is not equal to deference. Statutory construction is the domain of the judiciary, and therefore, the agency's interpretation is not entitled to more weight. *Id*. Rather, "the agency's interpretation can be particularly helpful for 'doubtful or obscure' provisions." *Id*. (citation omitted).

The rules regarding judicial review of statutory language are well established. Statutory interpretation presents questions of law subject to review de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). "The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature." *Amburgey v Sauder*, 238

Mich App 228, 231-232; 605 NW2d 84 (1999). Once the intent of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *In re Certified Question*, 433 Mich 710, 722; 449 MW2d 660 (1989). The language of the statute expresses the legislative intent. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). A clear and unambiguous statute is not subject to judicial construction or interpretation. *Id*. Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id*. Yet "a dogged literalism should not be employed to defeat the Legislature's intent." *Goodridge v Ypsilanti Twp Bd*, 451 Mich 446, 453 n 8; 547 NW2d 668 (1996).

A statutory provision is ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007). A statutory provision should be viewed as ambiguous only after all other conventional means of interpretation have been applied and found wanting. *Id*. at 178 n 3. If a statute is ambiguous, judicial construction is appropriate. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 434; 770 NW2d 105 (2009). "Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). When construing statutes, the terms of statutory provisions with a common purpose should be read *in pari materia*. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416;

590 NW2d 293 (1999). The objective of this rule is to give effect to the legislative purpose as found in statutes addressing a particular subject. *Id*. "Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *Id*.

When construing a statute, "a court should not abandon the canons of common sense." *Marquis*, 444 Mich at 644. "We may not read into the law a requirement that the lawmaking body has seen fit to omit." *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951). When the Legislature fails to address a concern in the statute with a specific provision, the courts "cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142; 662 NW2d 758 (2003). Therefore, when necessary to interpret an ambiguous statute, the appellate courts must determine the reasonable construction that best effects the Legislature's intent. *Id*. The insurance industry is of great public interest, and insurance laws are to be liberally construed in the interests of the public, policyholders, and creditors. *Attorney General v Mich Surety Co*, 364 Mich 299, 325, 337; 110 NW2d 677 (1961); *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009); *Mich Life Ins Co v Comm'r of Ins*, 120 Mich App 552, 558; 328 NW2d 82 (1982). "To that end we are bound to give full effect to legislative efforts to regulate the business of insurance." *Mich Surety*, 364 Mich at 337.

Administrative agencies are created by the Legislature as " 'repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field.' " *Travelers Ins*

Co v Detroit Edison Co, 465 Mich 185, 198; 631 NW2d 733 (2001) (citation omitted). "[A]dministrative agencies possess specialized and expert knowledge to address issues of a regulatory nature. Use of an agency's expertise is necessary in regulatory matters in which judges and juries have little familiarity." *Id*. at 198-199. The relationship between the courts and administrative agencies is one of restraint, and courts must exercise caution when called upon to interfere with the jurisdiction of an administrative agency. *74th Judicial Dist Judges v Bay Co*, 385 Mich 710, 727; 190 NW2d 219 (1971). "Judicial restraint tends to permit the fullest utilization of the technical fact-finding expertise of the administrative agency and permits the fullest expression of the policy of the statute, while minimizing the burden on court resources." *Id*. at 728. "Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions that mode must be followed and none other, and such parties only may act." *Taylor v Pub Utilities Comm*, 217 Mich 400, 403; 186 NW 485 (1922).

II. INSURANCE COMMISSIONER

A separate and distinct state department was established in 1956 and charged with the execution of the laws regarding insurance and surety business. MCL 500.200. It succeeded the insurance bureau, and is now within the Office of Financial and Insurance Regulation. See MCL 500.102(2). The chief officer of the department was originally known as the Commissioner of Insurance and is now the Commissioner of the Office of Financial and Insurance Regulation, and the commissioner personally superintends the duties of the office. MCL 500.202. The purpose of the office is to supervise the business of insurance, and the Legislature

gave the insurance commissioner very large powers and assumed that the commissioner had the qualifications to assess issues affecting the industry. See *Mich Mut Life-Ins Co v Hartz*, 129 Mich 104, 109; 88 NW 405 (1901). "Orders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in this act shall be made or reached in the reasonable exercise of discretion." MCL 500.205. "In the reasonable exercise of discretion" is defined to mean "that an order, decision, determination, finding, ruling, opinion, action, or inaction was based upon facts reasonably found to exist and was not inconsistent with generally acceptable standards and practices of those knowledgeable in the field in question." MCL 500.116(c). The commissioner or the commissioner's representative "may examine any or all of the books, records, documents, and papers of any insurer at any time after its articles of incorporation have been executed and filed, or after it has been authorized to do business in this state." MCL 500.222(1). In his discretion, the commissioner may examine the affairs of any domestic insurer. *Id*. The commissioner shall supervise and regulate the actions of petitioner. MCL 500.2941. The commissioner has the power to visit and examine the affairs of petitioner with free access to all documentation maintained by petitioner. *Id*.

III. THE INSURANCE CODE

The Insurance Code was enacted, in part, "to provide for the continued availability and affordability of automobile insurance and homeowners insurance in this state and to facilitate the purchase of that insurance by all residents of this state at fair and reasonable rates . . . ." Title of 1956 PA 218, the Insurance Code, MCL 500.100 *et seq*. As noted earlier, petitioner "was

created to provide property insurance to qualified persons who cannot get insurance in the regular market."[2] Petitioner's membership consists of most insurers authorized to transact basic property and home insurance in Michigan. MCL 500.2920(1). Petitioner is also known as the "pool." *Id*. The pool shall adopt a plan of operation designed to ensure "the fair, reasonable, equitable, and nondiscriminatory manner of administering the pool . . . ." MCL 500.2920(2). The plan of operation and any amendments to the plan must be submitted to the commissioner for approval. MCL 500.2920(2). The commissioner is charged with monitoring the pool and its plan of operation:

> If for any reason the pool fails to adopt suitable needed amendments to the plan, the commissioner shall adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this chapter, which rules shall continue in force until modified by the commissioner or superseded by a plan of operation adopted by the pool and approved by the commissioner. [MCL 500.2920(4).]

Any person with an insurable interest in real or tangible personal property may apply to the pool for basic property insurance, MCL 500.2925(1), and any qualified applicant may apply to the pool for home insurance, MCL 500.2925a(1). If the pool concludes that it is unable to accept the risk of insuring the property, the applicant is entitled to a written statement setting forth the features or conditions of the property that prevent it from being insured. Further, the applicant is entitled to a statement regarding the measures that must be taken in order to qualify for the insurance. MCL

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[2] Insurance Counselor, Insurance Consumer Information Sheet, *The Michigan Basic Property Insurance Association* <www.michigan.gov/documents/cis_ofis_ip209_24995_7.pdf> (accessed June 7, 2010).

500.2925(3); MCL 500.2925a(3). A person aggrieved by an action or decision by the pool may appeal to the commissioner within 30 days. MCL 500.2943.

As part of its plan of operation, the pool shall adopt reasonable underwriting standards to determine whether a risk is acceptable for basic property insurance by the pool. MCL 500.2924(1). The standards for determining an acceptable risk include, but are not limited to, "protective devices, deductibles, coinsurance provisions, appropriate record keeping and limitations, not inconsistent with this chapter, on the amount of insurance that may be provided with respect to any 1 risk." *Id*. However, "[t]he standards shall be relevant to the perils insured against and shall be consistent with the definition of qualified property, for basic property insurance, contained in [MCL 500.2901]." *Id*.

IV. MCL 500.2930a

MCL 500.2930a addresses home insurance policies issued by the pool and provides in relevant part:

> (1) Except as otherwise provided in subsection (4)(c), rates charged in each territory by the pool for home insurance shall be equal to the weighted average of the 10 voluntary market insurer groups with the largest premium volume in this state. Rating territories for home insurance established by the pool shall be the same as those utilized by the largest number of insurers by premium volume writing home insurance in this state. Any change in the rates for an HO-2 form replacement cost policy by those insurers that would produce a change in excess of 5% in the HO-2 pool rates for any territory shall be reflected as soon as reasonably practicable in the HO-2 pool rates. HO-2 pool rates shall be reviewed at least annually, but shall not be revised more often than quarterly.
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> * * *

(4) The pool shall offer at least the following home insurance policy forms:

(a) An HO-2 form replacement cost policy equivalent to the HO-2 form replacement cost policy filed and in effect in this state for a licensed rating organization.

(b) A repair cost policy providing the deductibles, terms and conditions, perils insured against, and types and amounts of coverage equivalent to those provided by the HO-2 replacement cost policy filed and in effect for a licensed rating organization.

(c) An HO-3 form replacement cost policy equivalent to the HO-3 form replacement cost policy filed and in effect in this state for a licensed rating organization. The rates established by the pool for the HO-3 form replacement cost policy offered pursuant to this subdivision shall be calculated to generate a total premium sufficient to cover the expected losses and expenses of the pool related to the HO-3 replacement cost policy that the pool will likely incur during the period for which the premium is applicable. The premium shall include an amount to cover incurred but not reported losses for the period and shall be adjusted for any excess or deficient premiums from previous periods. Excesses or deficiencies from previous periods shall be fully adjusted in a single period or over several periods in a manner provided for in the plan of operation. Rates established by the pool under this subdivision shall not be based upon the weighted average methodology provided for in subsection (1).

The present dispute arises from the language of the first sentence of MCL 500.2930a(1), addressing how to calculate the rates charged in each territory. Petitioner contends that historically the commissioner has approved a calculation using "base rates" and the base rate is the starting point for the final premium after factors are applied to increase or decrease the ultimate premium. Respondents, however, contend that the statutory language is ambiguous because it omits any reference to the subject matter of the weighted average

and the commissioner has the statutory authority to interpret the provision consistently with the Legislature's intent to provide affordable insurance with petitioner as a last resort.

The sentence at issue identifies that an average is obtained, but does not identify the subject matter of the weighted average. It states, "Except as otherwise provided in subsection (4)(c), rates charged in each territory by the pool for home insurance shall be equal to the weighted average of the 10 voluntary market insurer groups with the largest premium volume in this state." MCL 500.2930a(1). Although petitioner contends that the weighted average of "base rates," a term of art employed in the insurance industry, is to be utilized, the statute at issue does not expressly use that term. In fact, the statute at issue does not define "base rates," "rates charged," or "premium." Moreover, the statute does not define the types of insurance that are available.[3] We conclude that the language at issue is ambiguous because it is equally susceptible to more than one meaning. *Fluor Enterprises*, 477 Mich at 177-178 n 3.

As previously stated, when construing a statute, this Court cannot insert a provision because it would have been wise of the Legislature to have done so in order to effectuate the statute's purpose. *Houghton Lake*, 255 Mich App at 142. Rather, an ambiguous statute must be given a construction that best effects the Legislature's intent. *Id*. We conclude that the statute at issue is ambiguous because it fails to specify the subject matter of the weighted average. As a result of the ambiguity, we must effect the Legislature's intent by examining the

[3] Although petitioner submitted a rate increase for its HO-2, HO-4, and HO-6 lines of insurance, MCL 500.2930a only refers to HO-2 insurance and HO-3 insurance. The statute does not define the types of insurance that are available.

object of the statute in light of the harm it is designed to remedy, apply a reasonable construction to accomplish the Legislature's purpose, and read *in pari materia* statutes to produce a harmonious whole and reconcile inconsistencies. *World Book*, 459 Mich at 416; *Marquis*, 444 Mich at 644. Additionally, as a result of the ambiguity, we must give respectful consideration to the agency's construction of the statute and provide cogent reasons for overruling the agency's interpretation. *Rovas*, 482 Mich at 103. The agency's interpretation will be particularly helpful when examining this doubtful provision. *Id.* at 108.

As noted earlier, the Insurance Code was enacted to ensure that automobile owners and homeowners could purchase insurance at reasonable and fair rates. To ensure that the public is protected, the insurance commissioner was created to examine issues affecting the industry. MCL 500.202. The commissioner has broad authority to examine the books of any insurer and ensure that the companies operate under acceptable standards and practices. *Mich Mut Life*, 129 Mich at 109; MCL 500.116(c); MCL 500.205; MCL 500.222(1). Petitioner was created to provide property insurance to qualified individuals who were unable to obtain insurance in the regular market. See MCL 500.2901 *et seq*. Petitioner's plan of operation must ensure "the fair, reasonable, equitable, and nondiscriminatory manner of administering the pool . . . ." MCL 500.2920(2). The insurance commissioner has the authority to supervise and regulate the actions taken by petitioner. MCL 500.2941.

Reading the insurance statutes *in pari materia*, we conclude that the insurance commissioner had the authority to review the proposed rate increase and to determine that petitioner's interpretation did not con-

form to the legislative intent. The purpose of the Insurance Code is to provide fair and reasonable rates of insurance. The actuary's report in this case noted that a decrease would have occurred using other acceptable actuarial methods. However, when applying base rates without any discounts to calculate the rates charged by the pool, an increase of 18.9 percent was proposed to the commissioner. The insurance commissioner was entitled to determine that this method was contrary to petitioner's plan of operation because it failed to ensure the fair, reasonable, equitable, and nondiscriminatory manner of administering the pool. When respondents' analyst requested a different method of calculation consistent with the actuary's report, petitioner did not demonstrate that its preferred method of calculation was fair, reasonable, equitable, and nondiscriminatory. On its face, the computation by the actuary and the rate increase sought by petitioner does not appear to be fair and equitable. Persons seeking insurance in the regular market are quoted a base rate, but then given discounts to arrive at the ultimate premium that is charged. Petitioner's rates would be set on the weighted average of the base rate charged, without taking into consideration that the base rate was inflated to account for the discounts given. Therefore, the circuit court erred by reversing the commissioner's decision.

Furthermore, affording the agency's construction of the statute respectful consideration, there are no cogent reasons for overruling the agency interpretation. *Rovas*, 482 Mich at 103. Review of the administrative record[4] reveals that the commissioner received petition-

[4] Petitioner repeatedly contends that respondents do not have record evidence to support their position and that an administrative record does not exist. On the contrary, the correspondence between petitioner and

er's request for a rate increase of 18.9 percent. In the actuary's report, it was noted that there were problems arising from the methodology employed. Despite the fact that the statute at issue required an average of the 10 voluntary market insurer groups with the largest premium volume, none of those 10 writers of insurance were currently using the same territorial definitions in Michigan. Additionally, petitioner had recently revised its territory ratings from 25 to 67.[5] The report also noted that a number of the top 10 writers of insurance did not write form two (HO-2) homeowners insurance and, therefore, form three (HO-3) factors were applied from companies that did not write form two insurance. The actuary's report was calculated using base rates and did not account for discounts granted by the industry.

In response to the actuary's report, the commissioner's office requested information regarding the use of the base rate as opposed to the ultimate premium charged to the insured. When petitioner refused to provide additional information or recalculate the rates, the insurance commissioner issued an order disapproving of the proposed rate increase. In his order, the insurance commissioner noted that the industry had altered its methodology for calculating base rates and premiums. Specifically, the commissioner stated that insurance companies deliberately inflated the base rates and discounts were then

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the commissioner and his office and the actuary's report were transmitted as part of the administrative record to this Court.

[5] Although MCL 500.2930a provides that petitioner's rating territories would be the same as those used by the largest number of insurers by premium volume, the actuary noted that the insurance companies did not have consistent rating territories. The lack of consistency will affect the calculation of rates, an area that the commissioner is charged with regulating, and his authority to oversee the insurance industry.

subtracted from the base rate. Because of this methodology, the commissioner concluded that base rates no longer had any meaningful correlation to expected losses. Therefore, the commissioner opined that petitioner's use of base rates was improper, unfairly discriminatory, and inconsistent with a plan of operation that is fair, reasonable, equitable, and nondiscriminatory.

Giving respectful consideration to the agency's determination, we cannot find any cogent reasons to reverse the insurance commissioner's disapproval of the rate increase. *Rovas*, 482 Mich at 103. Insurance laws are to be liberally construed in favor of the public. *Mich Surety*, 364 Mich at 325; *Tevis*, 283 Mich App at 81. Administrative agencies were created so that entities with specialized knowledge and expertise would address regulatory matters, and this expertise is necessary to resolve regulatory issues. *Travelers Ins Co*, 465 Mich at 198. Here, the insurance commissioner was aware of the prior calculations and acceptance of rate approvals. Because of his experience and expertise, the insurance commissioner was aware of the fact that a disparity had been created between base rates and premiums charged to consumers because of the industry's adoption of inflated base rates. Additionally, data had to be extrapolated because of the inconsistencies in the number of rating territories and the number of insurers that did not provide form two (HO-2) insurance.[6]

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[6] Although the Legislature referred to certain lines of insurance in MCL 500.2930a, it did not define those terms. The insurance commissioner is aware of the lines of insurance despite the lack of statutory specifications. HO-2 (home) covers the dwelling and other structures, but only insures against named perils. HO-3 (home) is the most common policy and covers against a wide range of perils even if not

Petitioner contends that the insurance commissioner lacks the authority to disapprove of the use of base rates for calculating the weighted average because use of base rates has been acceptable for the last 28 years. However, the plain language of the statutes at issue reveals that the insurance commissioner has the continuing authority to examine the practices of insurance companies to determine the propriety of their rates. As noted, administrative agencies are legislative creations staffed by individuals of special competence and expertise to address issues of a regulatory nature. *Id*. An agency's expertise is necessary in areas of regulatory matters where judges and juries have little familiarity. *Id*. The insurance commissioner has the broad authority to supervise and regulate the actions by petitioner. MCL 500.2941 ("The operation of the pool shall at all times be subject to the supervision and regulation of the commissioner."). Petitioner's plan of operation must ensure "the fair, reasonable, equitable, and nondiscriminatory manner of administering the pool . . . ." MCL 500.2920(2). The insurance commissioner was placed in his position to ensure that applicants for insurance are charged fair and reasonable rates. The commissioner, in the course of his supervision, con-

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specifically designated in the policy. HO-4 is for renters and covers only the contents of the home. HO-6 is for condominium owners and is similar to renters' insurance in that the owner owns the building jointly with other owners in the co-operative. This insurance covers the specific unit and the contents therein. See The Truth About Insurance.com, *Types of Homeowners Insurance* <www.thetruthaboutinsurance.com/types-of-homeowners-insurance/> (accessed May 20, 2010). This lack of specificity in the statute indicates the Legislature's intention to allow the insurance commissioner to apply his expertise to regulate and supervise through the plan of adoption and through rules and regulations. See MCL 500.2920(4) and MCL 500.2941.

cluded that the industry had begun deliberately inflating its base rates to promote the use of discounts. This shift resulted in base rates having little connection to the premiums actually paid in the regular market. Therefore, when individuals sought insurance from petitioner, as a last resort, the use of base rates to calculate their premiums was no longer fair, reasonable, equitable, and nondiscriminatory. We note that when respondents' analyst requested additional information, petitioner did not provide a justification for the rates charged to demonstrate that they were fair, reasonable, and equitable. Rather, petitioner merely asserted that this was the methodology previously employed and then filed suit to obtain its rate increase. The position of insurance commissioner was created to ensure that the insurance industry does not skew the underlying methodology to increase its rates. Petitioner's reliance on prior rate approvals is misplaced and contrary to the stated need for the Insurance Code.[7]

In summary, the statutory provision at issue, MCL 500.2930a(1), is ambiguous because it fails to identify the subject matter to be calculated as a weighted

[7] We note that petitioner also contends that the insurance commissioner "abandoned" his rationale for rejecting the rate increase and in the circuit court, for the first time, alleged that the statute was ambiguous. The insurance commissioner submitted his disapproval of the rate increase in a written order. There is no indication that the commissioner withdrew this order or altered his position. Rather, petitioner did not provide further justification for its rate increase to the commissioner's analyst, as requested, but filed suit to obtain its rate increase. In the circuit court petition, it was asserted that the commissioner's actions were contrary to law, exceeded his statutory authority, and were not supported by the record and competent evidence. Respondents' argument regarding the ambiguity of the statute was in response to the legal issues raised in the petition and did not reflect "abandonment" of the commissioner's reasons for disapproving the rate increase.

average. The insurance commissioner is charged with oversight of the insurance industry to ensure fair and reasonable rates to the general public. Petitioner was created to allow qualified persons to obtain insurance unavailable in the regular market. Petitioner is subject to supervision and regulation by the insurance commissioner, and petitioner must follow a plan of operation that ensures fair, reasonable, equitable, and nondiscriminatory maintenance of the pool. In his expertise, the insurance commissioner concluded that petitioner's calculation of territorial rates was improper because it was premised on the base rates of the 10 insurers with the largest premium volume in this state. The insurance commissioner acknowledged that base rates may have been used in the past, but he also recognized that, in recent years, base rates were deliberately inflated to account for discounts that ultimately lead to the premium charged to the insured.

Petitioner's own actuary acknowledged that use of other acceptable actuarial methods would result in a decrease in rates, but the method employed in years past led to the requested 18.9 percent increase. Despite inquiry from the commissioner's analyst regarding the propriety of the calculation, petitioner did not defend the fairness, reasonableness, equitableness, and manner of administering the pool and the consistency with its plan of operation. Rather, petitioner filed suit to obtain its 18.9 percent increase. Although statutory construction is the domain of the judiciary, MCL 500.2930a(1) is ambiguous because it omits the subject matter from which the weighted average is computed. After reviewing the Insurance Code, the authority of the insurance commissioner, and the responsibilities of the pool, we conclude that respondents' construction of the statute is in accordance with the intent of the

Legislature. Furthermore, cogent reasons[8] do not exist for overruling respondents' interpretation.

Reversed.

DAVIS, J., concurred.

BANDSTRA, P.J. (*concurring).* I concur with the majority that this matter must be reversed for the reasons stated. In addition, I write separately to point out a complementary reason that reversal is warranted. As the majority notes, the statutory language at issue does not specify the subject matter to be calculated as a weighted average: "rates charged in each territory by the pool for home insurance shall be equal to the weighted average of" an unspecified variable pertaining to certain market insurer groups. MCL 500.2930a(1). While the statute is thus ambiguous, logically it seems quite defensible to conclude that the subject matter of the "weighted average" is the "rates charged" specified earlier in this clause. The rates charged by the subject insurer groups, again as a matter of logic, are the amounts that people actually pay for their insurance, i.e., the premiums, which result from base rates as they have been reduced by applicable discounts. This is

[8] At oral argument, counsel for petitioner asserted that the pool was operating at a loss. Although we have the administrative record, there is no documentary evidence contained in the file to demonstrate that petitioner was operating at a deficit. Curiously, in response to respondent's analyst, petitioner failed to provide documentary evidence to sustain its need for the requested increase. Finally, we recognize that the commissioner concluded that a six percent decrease was appropriate if rates were calculated properly. The underlying basis for the amount of the decrease is not contained in the lower court record. However, both petitioner's actuary and the commissioner concluded that a decrease was warranted. The amount is irrelevant to our disposition on appeal. Rather, our conclusion is premised on the statutory authority given to an agency charged with addressing regulatory issues of a monitored industry.

respondents' position, and this analysis belies petitioner's argument that the missing variable to be averaged is, simply, the base rates. Thus, the majority's analysis correctly leads us to conclude what a close reading of the statutory language itself suggests.

BC TILE & MARBLE CO, INC V MULTI BUILDING CO, INC

Docket No. 289258. Submitted April 6, 2010, at Detroit. Decided April 13, 2010. Approved for publication June 8, 2010, at 9:05 a.m.

BC Tile & Marble Co., Inc., brought an action in the Oakland Circuit Court against Multi Building Co., Inc., Maybury Park, L.L.C., and others, including Adriano Paciocco, who was both the president and resident agent of Multi Building and a member and the resident agent of Maybury Park. BC Tile alleged, in part, a violation of the Michigan builders' trust fund act (MBTFA), MCL 570.151 *et seq*., as a result of defendants' failure to pay BC Tile the amount of its recorded lien for labor and materials it provided for improvements to real property owned by Maybury Park that was sold by Maybury Park to defendants Irfan and Maisa Haddad after the lien was recorded. BC Tile claimed that Paciocco, Multi Building, and Maybury Park received funds from the sale of the property and failed to pay its lien in violation of the MBTFA. A default was entered against Multi Building. Maybury Park, the Haddads, and other defendants, but not Paciocco, were then dismissed from the action. BC Tile moved for partial summary disposition against Paciocco, alleging, in part, that as an officer of Multi Building, he was personally responsible for the amount owed. Paciocco responded that a lesser amount was due because the Haddads had been given a closing credit, allegedly to compensate them for BC Tile's defective work and the delay in the closing caused by attempts to correct the work. Paciocco also argued that to hold a principal of a corporate contractor liable under the MBTFA, there must be evidence that the principal knew about or approved the alleged violation and that there was no such evidence in this case. Paciocco requested that the court deny BC Tile's motion and grant summary disposition in his favor. The court, Shalina D. Kumar, J., denied BC Tile's motion and granted summary disposition in favor of Paciocco, relying in part on an uncontradicted affidavit provided by Paciocco in which he denied making any decisions about what to do with the money received from the sale and stated that he did not misappropriate any funds. The court thereafter denied BC Tile's motion for reconsideration, and BC Tile appealed.

The Court of Appeals *held*:

1. The MBTFA imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts. It is a violation of MCL 570.152 if a contractor or subcontractor, with intent to defraud, retains or uses the proceeds of payments for any other purpose than first paying laborers, subcontractors, and suppliers. BC Tile established a prima facie case under the MBTFA against Multi Building by showing that Multi Building was a contractor in the building construction industry, the Haddads paid Multi Building for labor and materials used to construct the real property they purchased, Multi Building made a profit on the project and used the funds received from the Haddads to pay other expenses but did not pay BC Tile, and Multi Building engaged BC Tile to supply and install materials in the property sold to the Haddads.

2. The evidence created a question of fact regarding the extent to which Paciocco was involved in causing Multi Building to act in violation of the MBTFA. Officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully, even when those officers are not involved in the day-to-day operations of the corporation. The MBTFA indicates that intent to defraud is shown simply by the contractor's appropriation of any moneys paid to the contractor for building operations before the contractor pays all moneys due or to become due to laborers, subcontractors, suppliers, or others entitled to payment. A reasonable inference of appropriation arises under the MBTFA from the payment of construction funds to a contractor and the contractor's subsequent failure to pay laborers, subcontractors, suppliers, or others entitled to payment. The denial of BC Tile's summary disposition motion must be affirmed.

3. Paciocco's mere denials without documentation were not enough to overcome the presumption of appropriation and did not entitle him to a judgment as a matter of law. The trial court erred by granting summary disposition in favor of Paciocco.

Affirmed in part, reversed in part, and remanded.

1. TRUSTS — BUILDERS' TRUST FUND ACT — VIOLATIONS — PRIMA FACIE CASE.

A plaintiff must show the following elements to establish a prima facie case of a violation of the builders' trust fund act: (1) that the defendant was a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the

defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and suppliers, and (5) that the laborers, subcontractors, and suppliers were engaged by the defendant to perform labor or furnish material for the specific construction project (MCL 570.151 *et seq*.).

2. CORPORATIONS — LIABILITY OF OFFICERS.

An officer of a corporation may be held individually liable when the officer personally causes the corporation to act unlawfully, regardless of whether the officer was acting on his or her own behalf or on behalf of the corporation.

3. TRUSTS — BUILDERS' TRUST FUND ACT — INTENT TO DEFRAUD — APPROPRIATION OF FUNDS.

An intent to defraud is shown for purposes of the builders' trust fund act simply by a contractor's appropriation of any moneys paid to the contractor for building operations before the contractor pays all moneys due or to become due to laborers, subcontractors, suppliers, or others entitled to payment; a reasonable inference of appropriation arises from the payment of construction funds to a contractor and the contractor's subsequent failure to pay laborers, subcontractors, suppliers, or others entitled to payment (MCL 570.153).

4. MOTIONS AND ORDERS — SUMMARY DISPOSITION.

A nonmoving party may not rely on mere allegations or denials in pleadings in response to a motion for summary disposition when the burden of proof at trial on a dispositive issue rests on the nonmoving party, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists with regard to the issue.

Abramson Law Offices, PLLC (by *Jay A. Abramson*), for BC Tile & Marble Co., Inc.

Jaffe, Raitt, Heuer & Weiss, PC (by *Peter M. Alter* and *James W. Rose*), for Adriano Paciocco.

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

PER CURIAM. In this action brought pursuant to the Michigan builders' trust fund act (MBTFA),[1] plaintiff, BC Tile & Marble Co., Inc., appeals as of right the trial court's denial of its motion for summary disposition and the trial court's order granting summary disposition to defendant Adriano Paciocco. We affirm in part and reverse in part.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff BC Tile supplies and installs tile and marble materials in construction projects. Defendant Paciocco is the president and resident agent of defendant Multi Building Co., Inc. Paciocco is also a member and resident agent of defendant Maybury Park, L.L.C.

In 2006, BC Tile provided labor and materials and made improvements to the property located at 20838 Maybury Park Drive (Unit 5) in Novi, Michigan, which at the time was owned by Maybury Park. In January 2006, BC Tile sent an invoice to Multi Building for its labor and materials in the amount of $33,813, but the invoice was not paid. Consequently, in November 2006, BC Tile recorded a lien in the amount of $33,813 on Unit 5, delivering a copy of the lien and a notice of furnishing to defendant Metropolitan Title Company on November 9, 2006. On November 13, 2006, Maybury sold Unit 5 to defendants Irfan and Maisa Haddad for $946,366.72. Paciocco, Multi Building, and Maybury received funds from the sale of Unit 5.

In September 2007, BC Tile filed a complaint against Multi Building, Maybury, Paciocco, the Haddads, Walmar, Inc., D. West Construction, Inc., and Washington Mutual Bank. BC Tile alleged claims for account stated, breach of contract, breach of implied contract, quantum

[1] MCL 570.151 *et seq*.

meruit and unjust enrichment, promissory estoppel, violation of the MBTFA, and conversion. The crux of BC Tile's claims was that defendants owed BC Tile money for the labor, materials, and improvements that it made to Unit 5. Subsequently, a default was entered against Multi Building, and Maybury, the Haddads, Walmar, D. West Construction, and Washington Mutual Bank were all dismissed from the action.

BC Tile moved for partial summary disposition against Paciocco, pursuant to MCR 2.116(C)(9) and (10), arguing that there was no genuine issue of material fact that Paciocco had violated the MBTFA when he failed to pay BC Tile the $33,813 owed even after Unit 5 was sold to the Haddads. BC Tile argued that, as an officer of Multi Building, Paciocco was personally liable for the amount owed. BC Tile contended that, under the MBTFA, a contractor was required to pay laborers and suppliers before making any other payments, but Multi Building violated this requirement by instead first paying for other costs and expenses.

Paciocco responded to BC Tile's partial motion for summary disposition, contending that BC Tile's work was defective and that attempts to have it corrected had delayed the closing on Unit 5. According to Paciocco, the Haddads received a closing credit of approximately $22,000, largely to account for BC Tile's defective workmanship. Paciocco asserted that Multi Building incurred damages totaling not less than $47,000 as a result of BC Tile's defective workmanship. Paciocco further contended that the true balance due was only $10,000, not $33,813. Therefore, Paciocco argued that BC Tile's argument under MCR 2.116(C)(9) (failure to state a valid defense) was without merit. Paciocco also argued that to hold a principal of a corporate contractor liable under the MBTFA, there must be evidence that

the principal knew about or approved the alleged violation; however, there was no such evidence in this case. Accordingly, Paciocco requested that the trial court deny BC Tile's motion and instead grant Paciocco summary disposition under MCR 2.116(I)(2).

After hearing oral arguments on the motion, the trial court ruled:

> As it pertains to your—to [BC Tile's] summary disposition Motion, there's certainly a question of fact established on whether [BC Tile] is entitled to the money based upon the allegations that there is delay and bad work, defective work. However, I'm also going to respond to Paciocco's Motion pursuant to the Court Rules. And when Paciocco provides me an affidavit saying he didn't make any decisions about what to do with the money received, didn't misappropriate the funds, that it was his partner who made all the decisions, and I'm not given any evidence to contradict that, I'm going—based on that, I'm going to grant Paciocco's summary disposition Motion.

Accordingly, the trial court entered an order denying BC Tile's motion for summary disposition and granting summary disposition in favor of Paciocco, pursuant to MCR 2.116(I)(2).

BC Tile then moved for reconsideration of the order granting summary disposition in favor of Paciocco. BC Tile argued that the trial court committed palpable error by ruling that BC Tile had failed to provide evidence rebutting Paciocco's affidavit, which was not required by law, and by accepting Paciocco's argument that he did not personally violate the MBTFA. The trial court responded in a written opinion and order, relying on this Court's decision in *James Lumber Co, Inc v J & S Constr, Inc*,[2] that a corporate principal "could not be

[2] *James Lumber Co, Inc v J & S Constr, Inc*, 107 Mich App 793, 795; 309 NW2d 925 (1981) (citation omitted).

held personally liable under MCL 570.151 *et seq*., without proof of knowledge or approval of the misuse of the money received by the construction company." Accordingly, the trial court denied BC Tile's motion for reconsideration. BC Tile now appeals.

II. BC TILE'S MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

BC Tile argues on appeal that the trial court erred by denying its motion for summary disposition because it presented sufficient evidence to establish a prima facie case of a violation of the MBTFA.

A summary disposition motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. Summary disposition is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly support a plaintiff's right to recovery.[3] " '[A] motion for summary disposition under MCR 2.116(C)(9) is tested solely by reference to the parties' pleadings.' "[4] In this case, however, the trial court considered Paciocco's affidavit and other documentary evidence presented by the parties. "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)."[5]

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the com-

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[3] *Allstate Ins Co v JJM*, 254 Mich App 418, 421 n 2; 657 NW2d 181 (2002).

[4] *Glass v Goeckel*, 473 Mich 667, 677; 703 NW2d 58 (2005) (citation omitted).

[5] *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

plaint.[6] This Court reviews "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party."[7] Moreover, the Court considers only "what was properly presented to the trial court before its decision on the motion."[8] Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law."[9] "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party."[10]

This Court reviews de novo a trial court's decision on a motion for summary disposition.[11]

B. ANALYSIS

BC Tile brought this suit under the MBTFA, which "imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts."[12] Because the MBTFA is a remedial statute, designed to protect people of the state from fraud in the construction industry, it should be construed liberally for the advancement of the remedy.[13]

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[6] *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

[7] *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

[8] *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

[9] *Latham*, 480 Mich at 111.

[10] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

[11] *Id.* at 424.

[12] *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 518; 742 NW2d 140 (2007).

[13] *People v Brown*, 239 Mich App 735, 740; 610 NW2d 234 (2000).

The MBTFA is a penal statute, but the Michigan Supreme Court has recognized that a civil cause of action may be brought for its violation.[14]

MCL 570.151 provides:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

MCL 570.152 provides:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor [sic], of any payment made to him, *for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement*, *shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid*, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.[15]

And MCL 570.153 provides:

> *The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the*

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[14] *Livonia Bldg*, 276 Mich App at 519; *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 48; 631 NW2d 59 (2001), citing *B F Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966).

[15] Emphasis added.

> *payment by him of all moneys due* or so to become due laborers, subcontractors, materialmen or others entitled to payment, *shall be evidence of intent to defraud*.[16]

Interpreting these statutory provisions, this Court has stated that a plaintiff must show the following elements to establish a prima facie case under the MBTFA:

> (1) that the defendant is a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and materialmen, and (5) that the laborers, subcontractors and materialmen were engaged by the defendant to perform labor or furnish material for the specific construction project.[17]

Here, regarding the elements necessary to establish a prima facie case for an MBTFA violation, the evidence shows the following: (1) Multi Building, of which Paciocco was the president, was a contractor in the building construction industry, (2) the Haddads paid Multi Building for labor and materials used to construct Unit 5, (3) Multi Building made a profit on the project and used the funds received from the Haddads (4) to pay other expenses, but did not pay BC Tile, and (5) Multi Building engaged BC Tile to supply and install ceramic tile in Unit 5. Thus, we conclude that BC Tile has made out a prima facie case against Multi Building. However, the salient question is whether those allegations extend to Paciocco.

BC Tile asserts that Paciocco was personally liable for all of the violations of the MBTFA. BC Tile points to

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[16] Emphasis added.

[17] *Livonia Bldg*, 276 Mich App at 519 (citations omitted).

evidence that Paciocco signed the closing documents that allowed the payment of liens to other contractors and that showed that Multi Building received funds from the sale. BC Tile contends that once it established that Multi Building received proceeds from the Haddads yet failed to pay BC Tile and that, at all relevant times, Paciocco was president of Multi Building and a participant in decision-making, a presumption arose under MCL 570.153 that both Multi Building and Paciocco misappropriated funds and violated the MBTFA.

"Officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully."[18] In fact:

> [A] corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation. If a defendant personally misappropriates funds after they are received by the corporation, he or she can be held personally responsible under the MBTFA.[19]

In *People v Brown*, the defendant corporate officer argued that because her company was the actual "contractor" for the project in question and "she did not actively participate in the day-to-day operations" of the company, she could not be held criminally responsible under the MBTFA.[20] This Court disagreed, explaining that there was evidence that the defendant withdrew the homeowner's funds from the company's account before subcontractors had been paid and, accordingly, "there was sufficient evidence presented that defendant personally caused the misappropriation of construction

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[18] *Id.*, citing *Brown*, 239 Mich App at 739-740.

[19] *Livonia Bldg*, 276 Mich App at 519 (citations and quotation marks omitted).

[20] *Brown*, 239 Mich App at 742.

funds under the MBTFA, and she therefore could be prosecuted under the statute even though she technically was not the 'contractor' for the . . . project."[21] The *Brown* defendant also argued that "she could not have violated the MBTFA because she did not personally receive [the purchaser's] payments . . . ."[22] This Court again disagreed, holding that

> there is no requirement that contract payments be made directly to the officer of a corporate contractor in order to hold the officer individually responsible under the MBTFA. Indeed, as long as defendant personally misappropriated the funds after they had been received by the corporation, she could be held responsible under the MBTFA.[23]

There is no evidence here that Paciocco personally used the funds owed to BC Tile as did the defendant in *Brown*. However, as demonstrated in *Livonia Bldg Materials Co v Harrison Constr Co*, such proof is not necessary to find an officer liable for an MBTFA violation. In *Livonia Bldg*, the defendant contractor received funds for a project but did not pay the plaintiff in full.[24] The corporate officers gave testimony regarding their decision to put the funds received in various accounts and, subsequently, their actions in writing checks to entities other than the plaintiff.[25] This Court concluded that the individual corporate officers "acted in direct contravention of the MBTFA . . . ."[26] According to this Court, there was sufficient evidence to create a presumption of misappropriation and to find the corporate

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[21] *Id*. at 743.

[22] *Id*.

[23] *Id*. at 743-744.

[24] *Livonia Bldg*, 276 Mich App at 521.

[25] *Id*. at 522.

[26] *Id.* at 516.

officers individually liable.[27] This Court explained that the plain language of the MBTFA indicates that "intent to defraud is evidenced simply by '[t]he appropriation by a contractor . . . of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment.' "[28] Moreover, " 'a reasonable inference of appropriation arises from the payment of construction funds to a contractor and the subsequent failure of the contractor to pay laborers, subcontractors, materialmen, or others entitled to payment.' "[29]

Multi Building received payment from the Haddads for the Unit 5 project, but BC Tile was not paid. Paciocco stated that the Haddads were not happy with the tile work done by BC Tile, among other things, and Multi Building therefore agreed to give them a closing credit of $23,300. He claimed that at least $15,000[30] of this credit was attributable to the defective tile work. Paciocco also stated that $32,000 in interest and carrying costs were attributable to a five-month delay on the

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[27] *Id*.

[28] *Id*. at 520, quoting MCL 570.153.

[29] *Livonia Bldg*, 276 Mich App at 520, quoting *People v Whipple*, 202 Mich App 428, 435; 509 NW2d 837 (1993).

[30] Although the seller's settlement statement showed a credit of $23,300, Paciocco offered no supporting documentation to substantiate his claim that BC Tile was responsible for $15,000 worth of this credit. BC Tile, on the other hand, attached to its brief on appeal an addendum to the purchase agreement that showed a $14,000 credit "as compensation for the purchaser[s'] accepting the ceramic tile as is, accepting the sliding door installed in the nook as is and for the builder not being required to install the burm . . . ." Thus, this $14,000 credit was not entirely attributable to BC Tile. However, this document was not submitted to the trial court below. This Court considers only "what was properly presented to the trial court before its decision on the motion." *Peña*, 255 Mich App at 310.

part of BC Tile. As a result, Paciocco stated, "I have believed and continue to believe that Multi [Building] does not owe [BC Tile] *any* money for the labor and/or materials that it provided, let alone $33,813 . . . ." It should be noted that BC Tile submitted an affidavit executed by the Haddads stating that they approved BC Tile's work and that the credit they received "was not related to [BC Tile's] labor and materials, and minor problems were remedied." This suggests a question of fact regarding the extent to which the tile work was defective and the amount of money to which BC Tile was entitled.

Although Paciocco denies that he had day-to-day involvement with or exercised decision-making for the Unit 5 project, he does admit that he dealt personally with the Haddads when they allegedly complained about the tile work. Paciocco concludes that he "did not personally receive, misapply, misappropriate, and/or engage in any misappropriation of any construction funds from or relating to the subject property or know about and/or approve of any violation of the [MBTFA]." Several of these latter statements are conclusions of law, and further, pursuant to *Brown*, not having "day-to-day" involvement in a project does not absolve a corporate officer of individual liability.[31] The fact remains that Paciocco's signature is on the seller's settlement statement, which provided for the payment of liens to contractors other than BC Tile and indicated that Multi Building received $33,419.17 from the sale. We conclude that this evidence creates at least a question of fact regarding the extent to which Paciocco was involved in causing Multi Building to act in violation of the MBTFA.

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[31] *Brown*, 239 Mich App at 743.

III. PACIOCCO'S MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

BC Tile argues that the trial court erred by granting summary disposition to Paciocco. Although BC Tile brought a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10), the trial court granted summary disposition in favor of Paciocco pursuant to MCR 2.116(I)(2). "This Court's review of a trial court's decision to deny or grant summary disposition is de novo."[32] "The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law."[33]

B. ANALYSIS

BC Tile argues that the trial court erred by granting summary disposition to Paciocco on the basis of its conclusion that BC Tile had the burden of proof and its erroneous reliance on Paciocco's affidavit as credible and conclusive when BC Tile presented contradictory evidence. We agree that summary disposition in Paciocco's favor was improper.

First, *James Lumber*[34] is not binding authority.[35] And, as discussed earlier, the plain language of MCL 570.153 "indicates that *intent to defraud is evidenced simply by '[t]he appropriation by a contractor . . . of any moneys paid to him for building operations before the*

[32] *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 657; 651 NW2d 458 (2002).

[33] *Id*. at 658.

[34] *James Lumber*, 107 Mich App 793.

[35] *Livonia Bldg*, 276 Mich App at 520, citing MCR 7.215(J)(1).

payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment.' "[36] Moreover, " 'a reasonable inference of appropriation arises from the payment of construction funds to a contractor and the subsequent failure of the contractor to pay laborers, subcontractors, materialmen, or others entitled to payment.' "[37]

Although Paciocco argues that the quoted passage from *Livonia Bldg* proves only that there would be a presumption of appropriation against Multi Building, it is clear that *Livonia Bldg* addressed the personal liability of corporate officers. This Court explained: "[T]he appropriation of any monies paid to a contractor for building operations before payment of the protected parties—here, the materialman—is evidence of intent to defraud. Accordingly, evidence was presented from which the jury could reasonably have concluded that [the corporate officers] violated the MBTFA . . . ."[38] Thus, as previously stated, the simple fact that a corporate officer wrote checks to make payments to entities other than the contractor to whom money was owed under the MBTFA was enough to establish a presumption of appropriation, and further to find the officer personally liable.

Paciocco's denials, relied on by the trial court, simply stated that he did not have "day-to-day involvement in matters or decision-making relating to the subject property." Paciocco did, however, admit that he dealt with the Haddads when they allegedly complained about the tile work, and BC Tile presented evidence that Paciocco

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[36] *Livonia Bldg*, 276 Mich App at 520, quoting MCL 570.153 (emphasis added).

[37] *Livonia Bldg*, 276 Mich App at 520, quoting *Whipple*, 202 Mich App at 435.

[38] *Livonia Bldg*, 276 Mich App at 522 (citation omitted).

signed the seller's settlement statement at the closing, which provided that liens to other contractors be paid and further, along with the profit-and-loss statement, indicated that Multi Building received funds from the sale. Nevertheless, Paciocco further stated that he "did not personally receive, misapply, misappropriate, and/or engage in any misappropriation of any construction funds from or relating to the subject property or know about and/or approve of any violation of the [MBTFA]."

Even if Paciocco's statements can be construed as a denial of responsibility for writing checks after the proceeds of the Unit 5 sale had been deposited, if "the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists."[39] Paciocco's mere denials without documentation were not enough to overcome the presumption of appropriation and, likewise, did not entitle him to judgment as a matter of law. Therefore, we conclude that the trial court erred by granting summary disposition to Paciocco.

We affirm the trial court's order denying BC Tile's motion for summary disposition, reverse the trial court's grant of summary disposition to Paciocco, and remand for further proceedings in accordance with this opinion. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

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[39] *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001) (citation, emphasis, and quotation marks omitted).

HENRY FORD HEALTH SYSTEM
v ESURANCE INSURANCE COMPANY

Docket No. 288633. Submitted May 11, 2010, at Detroit. Decided June 8, 2010, at 9:10 a.m.

Henry Ford Health System brought an action in the Wayne Circuit Court against Esurance Insurance Company and Citizens Insurance Company of America to recover the cost of Travion Hamilton's medical treatment as a no-fault benefit. Hamilton was severely injured when the stolen motor vehicle in which he was a passenger struck a utility pole. The case against Citizens was dismissed after the court, Prentis Edwards, J., determined that Esurance had no-fault priority over Citizens. Esurance denied liability, asserting that Hamilton, and thus plaintiff, was not entitled to personal protection insurance benefits under MCL 500.3113(a), which excludes from coverage an injured person who "was using a motor vehicle . . . which he or she had taken unlawfully," because he was using the vehicle knowing it had been stolen. Esurance also filed a counterclaim seeking a declaratory judgment that it was not required to pay no-fault benefits to plaintiff. The court denied the parties' cross-motions for summary disposition, and the case proceeded to trial. The jury found that Hamilton was using the vehicle at the time of the accident, that he had unlawfully taken the vehicle, and that he did not reasonably believe that he was entitled to take and use the vehicle. On the basis of these findings, the court granted Esurance its requested declaratory relief and also entered a judgment of no cause of action in favor of Esurance. Plaintiff appealed.

The Court of Appeals *held*:

The trial court erred by denying plaintiff's motion for summary disposition because there was no evidence that Hamilton was using a motor vehicle that he had taken unlawfully. MCL 500.3113(a) envisions the completed taking of a motor vehicle, followed by its use during which an accident occurs giving rise to injuries. Hamilton never engaged or participated in an act through which he took possession or gained control of the vehicle, given that he was a mere passenger in a vehicle that had been stolen before his involvement. Hamilton's mere use of the vehicle

as a passenger did not establish that he had taken the vehicle, which is a prerequisite for the exclusion from coverage under MCL 500.3113(a).

Reversed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — MOTOR VEHICLES — UNLAWFUL TAKING OF A MOTOR VEHICLE.

The no-fault act excludes from entitlement to personal protection insurance benefits for accidental bodily injury a person who at the time of the accident was using a motor vehicle or motorcycle that he or she had taken unlawfully; the exclusion does not apply to situations in which the injured person was merely a passenger in a vehicle that had been stolen before the injured person's involvement; use of the vehicle alone is insufficient; there must be evidence that the injured person engaged or participated in the unlawful taking for the statutory exclusion to apply (MCL 500.3113[a]).

Foster, Swift, Collins & Smith, P.C. (by *Paul J. Millenbach*), for Henry Ford Health System.

Siemion Huckabay, P.C. (by *Raymond W. Morganti*), for Esurance Insurance Company.

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

MURPHY, C.J. Plaintiff, Henry Ford Health System, provided medical services to Travion Hamilton, who was severely injured when a stolen Jeep Cherokee in which he was a passenger struck a utility pole. Plaintiff filed this action against defendant Esurance Insurance Company, the insurer of the stolen vehicle, to recover the cost of Hamilton's medical treatment as a no-fault benefit.[1] Relying on MCL 500.3113(a), Esurance denied

[1] Plaintiff also sued Citizens Insurance Company of America, which had been assigned the case by the Michigan Assigned Claims Facility. After the trial court determined that Esurance had no-fault priority over Citizens, the action against Citizens was dismissed. Citizens is not a party to this appeal.

liability, arguing that Hamilton, and thus plaintiff, was not entitled to no-fault benefits because at the time of the accident Hamilton was using the Jeep knowing it had been stolen.[2] The trial court denied the parties' cross-motions for summary disposition, and the case proceeded to trial. The jury found that Hamilton was using the Jeep at the time of the accident, that he had unlawfully taken the vehicle, and that Hamilton did not reasonably believe that he was entitled to take and use the Jeep. Accordingly, the trial court entered a judgment of no cause of action in favor of Esurance.[3] Plaintiff appeals as of right. We hold that the trial court erred by denying plaintiff's motion for summary disposition because there was an absolute dearth of evidence that Hamilton was using a motor vehicle that "he . . . had taken unlawfully. . . ." MCL 500.3113(a). We thus reverse and remand for entry of judgment in favor of plaintiff.

I. FACTS

The documentary evidence indicated that Hamilton's girlfriend, Chanda Profic, borrowed the Jeep from an acquaintance for a small fee knowing that it was a stolen vehicle. There is no dispute that the Jeep had been stolen from its owner, and there is no claim that Hamilton participated directly in taking the vehicle from the owner. Profic was not provided with keys to operate the vehicle. The Jeep's ignition cylinder had been removed by damaging the housing on the steering column. The door lock on the driver's side was also missing. The vehicle was given to Profic with the engine running, and she did not know

[2] Esurance also filed a counterclaim seeking a declaratory judgment that it was not required to pay no-fault benefits to plaintiff.

[3] The trial court also granted Esurance declaratory relief, stating that it was not required to pay no-fault benefits to plaintiff.

how to turn it off or restart it. Profic, who did not have a driver's license or own her own vehicle, later picked up Hamilton in the vehicle, and the two of them drove around and used the vehicle for three to five hours. During this period, Profic and Hamilton stopped several times to visit friends or to go inside a store. They would leave the Jeep unattended with the engine running during these stops. During one stop, a friend turned the engine off and had to restart the vehicle for Profic because she did not know how to start it without a key. Hamilton never operated or drove the Jeep, but simply rode along as a passenger. Profic and Hamilton were later involved in an accident when the vehicle struck a utility pole, causing severe and permanent injuries to Hamilton. Hamilton did not have any automobile insurance of his own.

The trial court entertained cross-motions for summary disposition in which the parties presented a variety of arguments, including plaintiff's argument that there was no evidence that Hamilton himself had taken the vehicle unlawfully and, thus, the no-fault coverage exclusion of MCL 500.3113(a) was not implicated. The trial court denied the motions, finding that there were genuine issues of material fact that precluded summary disposition in favor of either party. The case proceeded to trial, and a judgment of no cause of action predicated on the jury's verdict was entered. As noted, the jurors found that Hamilton was using the Jeep at the time of the accident, that he had unlawfully taken the vehicle, and that Hamilton did not reasonably believe that he was entitled to take and use the Jeep. Plaintiff appeals as of right.

II. ANALYSIS

Plaintiff argues, in part, that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(10) because it was entitled to its claim for

payment as a matter of law given that there was a complete absence of evidence that Hamilton himself had taken the stolen vehicle, let alone taken it unlawfully. We agree.

A. STANDARD OF REVIEW AND PRINCIPLES GOVERNING MCR 2.116(C)(10)

This Court reviews de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Also reviewed de novo are issues of statutory interpretation. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(4) and (5). "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*, 469 Mich at 183. A court may only consider "substantively admissible evidence actually proffered" relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not

permitted to assess credibility, to weigh the evidence, or to determine the facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

B. PRINCIPLES OF STATUTORY CONSTRUCTION

In *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009), this Court set forth the well-established principles of statutory construction:

> Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. [Citations and quotation marks omitted.]

C. DISCUSSION

Under the no-fault act, MCL 500.3101 *et seq*., and with respect to personal protection insurance (PIP) benefits, "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, op-

eration, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of [the act]." MCL 500.3105(1). With regard to PIP benefits, they are payable for, in part, "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). Esurance argues that Hamilton was barred from recovering no-fault PIP benefits under MCL 500.3113(a), which provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle *which he or she had taken unlawfully*, unless the person reasonably believed that he or she was entitled to take and use the vehicle. [Emphasis added.]

Plaintiff argues that Hamilton never engaged in the act of taking the Jeep from anyone; rather, it had already been taken by the time he hopped into the vehicle and rode along as a passenger.

Addressing the language of MCL 500.3113(a), this Court observed in *Amerisure Ins Co v Plumb*, 282 Mich App 417, 425; 766 NW2d 878 (2009):

> Thus, PIP benefits will be denied if the taking of the vehicle was unlawful and the person who took the vehicle lacked "a reasonable basis for believing that he [or she] could take and use the vehicle." *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 626; 499 NW2d 423 (1993). When applying § 3113(a), the first level of inquiry will always be whether the taking of the vehicle was unlawful. If the taking was lawful, the inquiry ends because § 3113(a) does not apply.

We would add that the inquiry into whether MCL 500.3113(a) is implicated must also necessarily entail

ascertaining whether the injured individual seeking coverage took the vehicle or engaged in the taking of the vehicle.

The terminology "taken" or "had taken," as used in MCL 500.3113(a), is not defined in the statutory scheme. With respect to statutory language, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language." MCL 8.3a. The word "taken" is the past participle of "take." In *Plumb*, the panel construed the word "take" as found in the "take and use" clause of MCL 500.3113(a).[4] *Plumb*, 282 Mich App at 428. The Court stated that "take" means to get something into one's hands or possession through a voluntary action. *Id.* This would necessarily involve either a transfer of possession or control of an object from one person to another or the gaining of possession or control of an unattended object that is not in anyone's control or possession. And the words "had taken" reflect a past or completed action. Accordingly, MCL 500.3113(a) envisions an accomplished or completed taking of a motor vehicle followed by its use during which an accident occurs giving rise to injuries.

Hamilton never engaged or participated in an act through which he took possession or gained control of the Jeep. There was no act transferring possession or control of the Jeep from Profic or others to Hamilton, nor did Hamilton take possession or control of a vehicle that was unattended and not within anyone's control or possession. He never took the Jeep from anyone or anyplace. On the evidence presented, we cannot find that he "had taken" the vehicle, let alone that he took it

[4] In MCL 500.3113(a), the exclusion bars a person from recovering PIP benefits "unless the person reasonably believed that he or she was entitled to *take and use* the vehicle." (Emphasis added.)

unlawfully. Rather, the thief who directly took the Jeep away from the owner, or possibly Profic, would most accurately be described as having taken the vehicle, and Hamilton then merely joined in relative to the "use" of the Jeep—a Jeep that had already been taken. The taking had been completed by the time Hamilton came into the picture, and he never thereafter took control or possession of the vehicle away from Profic.

One might argue that Hamilton aided and abetted Profic or the initial thief in an ongoing taking such that it could be said that he "had taken" the Jeep. However, this argument would circumvent the statutory language and is inconsistent with the words "had taken," which reflect a completed act. Once Profic or the initial thief took or gained control and possession of the Jeep, the taking was completed. The ongoing-taking argument would also be inconsistent with the separate treatment in MCL 500.3113(a) of the words "using" and "taken." Again, MCL 500.3113(a) precludes the recovery of PIP benefits when the person seeking those benefits "*was using* a motor vehicle or motorcycle which he or she *had taken* unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." (Emphasis added.) Certainly, there can be no reasonable dispute that Hamilton was using or making use of the Jeep as a passenger for purposes of transportation when the accident occurred, but, for the reasons stated earlier, he was not involved in the taking of the vehicle. Had the Legislature intended to preclude the receipt of benefits by an injured person under the circumstances presented here, it could simply have provided that PIP benefits are not recoverable by a person who was using a motor vehicle "which he or she had taken *or was using* unlawfully." Stating that a person "had taken" a vehicle is not synonymous with saying that a person "had used" the vehicle; the terms

have different meanings. Indeed, this is reflected in the language of the statute itself: MCL 500.3113(a) provides that the exclusion of coverage does not apply in situations in which the person "reasonably believed that he or she was entitled to *take and use* the vehicle." (Emphasis added.) This language shows that a person must both take and use a vehicle. This understanding is consistent with the preceding language in MCL 500.3113(a) that refers to "using" a vehicle that a person "had taken." Hamilton used the Jeep, but he did not take the Jeep.

Our construction is in accord with the *Plumb* panel's discussion of the "take and use" clause:

> *Random House Webster's College Dictionary* (1997) defines the word "take" as "to get into one's hands or possession by voluntary action" and the word "use" as "to employ for some purpose; put into service[.]" Clearly, the terms "take" and "use" are not interchangeable or even synonymous; obtaining possession of an object is very different from employing that object or putting it into service. The term "and" is defined as a conjunction, and it means "with; as well as; in addition to[.]" When given its plain and ordinary meaning, the word "and" between two phrases requires that both conditions be met. . . . Construing the word "and" as a conjunction does not give the text of § 3113(a) a dubious meaning. On the contrary, it is clear that it requires a driver who obtains a vehicle unlawfully to have (1) a reasonable belief that he or she was entitled to *take* the vehicle and (2) a reasonable belief that he or she was entitled to *use* the vehicle. The statute does not contain any clear legislative intent that the term "and" was meant to be applied as providing a choice or alternative between taking the vehicle and using the vehicle. . . . Therefore, in circumstances in which the vehicle was unlawfully taken, the injured party may obtain PIP benefits only if it can be shown (1) that the injured party reasonably believed that he or she was entitled to take the vehicle *and* (2) that the injured party reasonably believed that he or she was

> entitled to use the vehicle. [*Plumb*, 282 Mich App at 428-429 (citations omitted; alterations in original).]

Accordingly, Hamilton's mere use of the vehicle as a passenger did not establish that he "had taken" the vehicle, which is a prerequisite for imposition of the coverage exclusion in MCL 500.3113(a). The vehicle must be one that the injured person was "using" *and* one that the injured person "had taken." The evidence presented in this case established use, not a taking.

The caselaw does not conflict with our resolution of this case. In *Mester v State Farm Mut Ins Co*, 235 Mich App 84; 596 NW2d 205 (1999), three young girls skipped school and went looking for a vehicle with keys in it so that they could take the vehicle and drive away from the area. The Court described what happened next:

> Amanda . . . found a truck parked with keys inside and got into the driver's seat. Jessica[5] got into the passenger seat, Edelfina got into the back seat, and Amanda drove the vehicle away.
>
> The girls used the truck to go to the upper peninsula, stopping occasionally to purchase gas and to take turns driving the truck in a field. After running out of money, the girls used the truck to return to the lower peninsula on I-75 and headed back toward Cass City. At approximately 1:00 A.M. on the morning of March 25, the girls were spotted in the truck by a police officer in the village of Reese. A chase ensued, and Amanda refused to pull over despite the pleas of Edelfina and Jessica for her to stop. The truck went out of control during the chase, resulting in a roll-over collision that killed Edelfina and injured Jessica and Amanda. [*Id.* at 85-86.]

The plaintiff filed suit against State Farm Mutual Insurance Company, seeking to recover no-fault PIP

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[5] The lawsuit was pursued by Jessica's mother as her next friend. *Mester*, 235 Mich App at 85-86.

benefits, and the trial court granted State Farm's motion for summary disposition, finding "that there was no question of fact that Jessica was actively involved in unlawfully taking the truck and driving it away." *Id.* at 86. This Court affirmed, holding:

> An unlawful taking does not require an intent to permanently deprive the owner of the vehicle to constitute an offense. Indeed, the offense of unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.645, a felony commonly referred to as "joyriding," requires an intent to take or drive the vehicle away but not to steal the vehicle. The offense requires the specific intent to take possession of the vehicle unlawfully, and punishes conduct that does not rise to the level of larceny where an intent to permanently deprive the owner of the property is lacking. Had the Legislature intended to exempt from subsection 3113(a) all joyriding incidents, it would have chosen a different term than "unlawful taking," such as "steal" or "permanently deprive." Instead, the Legislature chose a term that encompasses the offense of joyriding. As explained above, the justices of the Supreme Court who recognized a joyriding exception in the *Priesman*[6] case did so not because joyriding does not involve an unlawful taking, but only because of special considerations attendant to the joyriding use of a family vehicle by a family member. Those considerations do not warrant expansion of the exception beyond the family context.
>
> Here, on the basis of Jessica's deposition testimony, there is no question of fact that Jessica participated in the unlawful taking of the truck, without permission and without any reason to believe that she was entitled to take or use the truck. On these undisputed facts, the clear intent of the Legislature was to deny the payment of no-fault PIP benefits. Hence, summary disposition was properly granted under MCR 2.116(C)(10). [*Id.* at 88-89 (citations omitted).]

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[6] *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992).

As is readily apparent, *Mester* is distinguishable from the facts here because Jessica actually participated in the act of taking the parked truck, along with the two other girls, and once they had taken the vehicle, she was injured while using the truck. Jessica engaged or participated in an act through which she and the others took possession or gained control of the unattended truck. That was simply not the case in the instant action.

With respect to the joyriding discussion in *Mester*, it does not have any implication here because the discussion was focused on the question whether the taking was unlawful, not on whether there was a taking in the first place. While Hamilton may well indeed have been guilty of joyriding under MCL 750.414 for the unauthorized use of the Jeep, MCL 500.3113(a) requires a taking by the person seeking PIP benefits, not mere use.

In *Plumb*, 282 Mich App 417, this Court held that summary disposition in favor of the no-fault insurer was proper because the injured motorist seeking PIP benefits, Plumb, unlawfully took the vehicle involved in the underlying accident and did not have a reasonable belief that she was entitled to use the vehicle within the meaning of MCL 500.3113(a). The Court described the facts of the case as follows:

> Plumb arrived at a bar near Caro, Michigan, about 11:30 p.m. one evening, socializing and consuming alcohol with several men. A couple of hours later, David Shelton drove a Jeep Cherokee to the same bar and parked it in the parking lot. Shelton did not maintain insurance on the Jeep, and although he had entered into an agreement to purchase the Jeep several months earlier, he was not the titled owner. Shelton left his keys in the Jeep, and he did not usually lock his car doors. Plumb and Shelton did not know one another, and during the time they were both in the bar,

> they never spoke to one another. Shelton did not give Plumb the keys or permission to drive the Jeep, and she did not receive the keys or permission from the titled owner. Plumb left the bar with two men, one of whom she described as Caucasian and wearing a baseball cap and a goatee. Plumb claimed that the unidentified man with the baseball cap and goatee handed her the keys to the Jeep and asked her to drive because he was on probation. Plumb, who did not maintain automobile insurance and did not reside with a relative who carried automobile insurance, was intoxicated, and her driver's license had been suspended. Shelton left the bar shortly after Plumb and discovered that the Jeep was missing.
>
> Later that morning, Plumb was found lying in a field near the bar, having sustained severe burn injuries. In a deep drainage ditch about 250 yards away from Plumb, the police found Shelton's Jeep, which had been totally consumed by fire. Plumb suffers from a closed-head injury and posttraumatic stress disorder and does not recall all the events leading up to the accident or the accident itself. The police determined that the Jeep had been driven away from the bar across a mowed field and an unmowed hayfield, struck an electric transformer, and ultimately crashed into the drainage ditch. In the mowed field near the parking lot, there were several other sets of tire tracks. The police concluded that Plumb had been driving the Jeep and was its sole occupant. [*Id.* at 420-421.]

Plumb is distinguishable from the facts here because it was uncontested that Plumb engaged or participated in an unlawful taking when she took possession or gained control of the vehicle and drove it away. Here, again, Hamilton never took the Jeep.

In *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 246; 570 NW2d 304 (1997), the injured person for whom PIP benefits were sought "telephoned his mother at work, asked her permission to use her car, and she refused. Nevertheless, [he] took the car keys from his parents' mobile home, drove the car, and was

involved in an accident in which he sustained injuries . . . ." In *Bronson Methodist Hosp*, 198 Mich App at 620-621, the injured person seeking PIP benefits had taken possession and control of a vehicle that had earlier been driven by a friend, who had taken over the driving from yet another friend, who in turn had been stopped and arrested on a probation violation. In *Landon v Titan Ins Co*, 251 Mich App 633, 635-636; 651 NW2d 93 (2002), the injured person seeking PIP benefits drove off in a vehicle owned by a friend who, by agreement, had parked the car on the injured person's property for the purpose of selling it. In *Butterworth Hosp* and *Bronson Methodist Hosp*, this Court ultimately held that the insured motorists were entitled to PIP benefits, and in *Landon*, this Court held that the trial court erred as a matter of law by finding that the injured person unlawfully took her friend's vehicle. *Landon*, 251 Mich App at 642-643; *Butterworth Hosp*, 225 Mich App at 249; *Bronson Methodist Hosp*, 198 Mich App at 631. But even had the panels ruled against the injured motorists, the cases clearly involved injured persons who "had taken" a motor vehicle, which was not the case here.

It is certainly arguable, on a practical level, that it makes little sense to distinguish between a thief or joyrider who directly participates in the taking of a motor vehicle and a person who, while not involved in the taking of the vehicle, later uses the vehicle for his or her benefit knowing it had been stolen. It is clear that the Legislature in drafting the statute was focused on the person or persons engaged in taking a motor vehicle for purposes of the PIP-benefits exclusion, apparently without contemplating scenarios in which other persons may also have been involved in criminal activity associated with the use of the vehicle. We cannot, however, go beyond the words of MCL 500.3113(a). If

the Legislature desires to preclude an award of PIP benefits to persons engaged in criminal activity who did not take a motor vehicle, it is for the Legislature to amend the statute. It is certainly not within our authority to do so.

III. CONCLUSION

The trial court erred by denying plaintiff's motion for summary disposition under MCR 2.116(C)(10) because there was no evidence that Hamilton was using a motor vehicle that "he . . . had taken unlawfully. . . ." MCL 500.3113(a). In light of our ruling, it is unnecessary to reach plaintiff's alternative arguments.

Reversed and remanded for entry of judgment in favor of plaintiff. We do not retain jurisdiction. Having prevailed in full, plaintiff is awarded taxable costs pursuant to MCR 7.219.

PEOPLE v SWAIN

Docket No. 293350. Submitted April 14, 2010, at Lansing. Decided June 8, 2010 at 9:15 am.

Lorinda I. Swain was convicted by a jury in the Calhoun Circuit Court of four counts of first-degree criminal sexual conduct involving a victim, her adopted son, under the age of 13. Defendant moved for a new trial, claiming that the victim had recanted his trial testimony and that the recantation constituted newly discovered evidence. Defendant also alleged that her trial counsel had rendered ineffective assistance. The court, Conrad J. Sindt, J., denied the motion based on newly discovered evidence and, following a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), denied the motion based on ineffective assistance of counsel. The Court of Appeals, SAWYER, P.J., and SAAD and BANDSTRA, JJ., affirmed the convictions in an unpublished opinion per curiam, issued February 24, 2004 (Docket No. 244804). Defendant then moved in the trial court for relief from the judgment on the basis of alleged newly discovered evidence and ineffective assistance of trial counsel. The trial court denied the motion, holding that even if the foundational elements for granting a new trial on the basis of newly discovered evidence were met, the newly discovered evidence, if admitted at a new trial, would not cause a different result. Defendant did not appeal that order. Defendant again moved for a new trial, and the trial court denied the motion. The Court of Appeals denied defendant's delayed application for leave to appeal the trial court's order in an unpublished order, entered May 20, 2005 (Docket No. 261667). Defendant, represented by new appellate counsel, again moved for relief from her judgment on the basis of alleged newly discovered evidence, the testimony of two witnesses, that defendant asserted would make a different result at a new trial probable. Defendant also asserted that if the trial court concluded that the evidence could have been discovered at the time of her trial, her prior appellate counsel was ineffective for failing to investigate and present the witnesses' testimony. The prosecution responded and, following an evidentiary hearing, the trial court granted defendant's motion and set aside defendant's convictions. The trial court concluded that the witnesses' testimony was not newly discovered and that defen-

dant's trial counsel could have produced the witnesses at trial or her prior appellate counsel could have raised that claim of ineffective assistance on appeal or in a postconviction motion. The trial court noted that MCR 6.502(G)(1) generally prohibits successive motions for relief from judgment, but MCR 6.502(G)(2) provides limited exceptions for newly discovered evidence and retroactive changes in the law. The court stated that, although the exception for newly discovered evidence did not apply, MCR 6.508(D)(3) provides a limited additional exception when a defendant establishes both good cause for not raising an issue previously and actual prejudice. The court concluded that the failure of defendant's trial counsel to investigate the witnesses and the failure of her prior appellate counsel to pursue the issue of ineffective assistance of counsel could not be characterized as competent strategy. The court held that defendant had established actual prejudice and, but for the error, defendant would have had a reasonably likely chance of acquittal. The court stated that although the prior appellate counsel's failure did not establish good cause, the good-cause requirement should be waived, pursuant to MCR 6.508(D)(3), because, given the witnesses' testimony, there was a significant possibility that defendant was innocent. The Court of Appeals denied the prosecution's application for leave to appeal in an unpublished amended order, entered September 10, 2009 (Docket No. 293350). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted, directing the Court of Appeals to consider whether the successive motion for relief from judgment was barred by MCR 6.502(G) and, if it was, whether defendant's constitutional rights are implicated given that the trial court found a significant possibility that defendant was innocent on the basis of evidence defendant's attorney failed to present at trial. 485 Mich 997 (2009).

The Court of Appeals *held*:

1. MCR 6.502(G)(2) provides that a defendant may only file a successive motion for relief from judgment when there is a retroactive change in the law that occurred after the first motion or there is new evidence that was not discovered before the first motion. Reading the good-cause and actual-prejudice requirements of MCR 6.508(D)(3) as providing a third exception to the general rule of MCR 6.502(G)(1) that a defendant may only file one motion for relief from judgment, as the trial court did, contradicts the clear language of MCR 6.502(G)(2). The good-cause and actual-prejudice requirements of MCR 6.508(D)(3) are not relevant until, and are only relevant if, the court determines that the

successive motion falls within one of the two exceptions of MCR 6.502(G)(2). Therefore, the trial court was required to deny defendant's successive motion once it determined that the witnesses' testimony was not new evidence discovered after defendant's first motion for relief from judgment.

2. The United States Supreme Court has provided that a defendant may have an otherwise barred constitutional claim arising from his or her trial heard on the merits in a federal habeas corpus action if the defendant can make a gateway showing of actual innocence. To satisfy the actual-innocence standard, a defendant must show that it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt. The actual-innocence standard requires a stronger showing than that needed to establish prejudice in an ineffective-assistance-of-counsel claim. Considering all the evidence, old and new, and the fact that the case rested on credibility determinations, defendant did not establish that it is more likely than not that no reasonable juror would have convicted her. Defendant failed to make the gateway showing of actual innocence.

3. Even if defendant had made the necessary gateway showing, it cannot be concluded that defendant's trial counsel was ineffective for failing to investigate the witnesses and present them at trial, and the trial court erred by holding he was. Defendant was not denied the effective assistance of counsel. The order granting defendant's successive motion for relief from judgment must be reversed.

Reversed.

1. MOTIONS AND ORDERS — RELIEF FROM JUDGMENT — CRIMINAL LAW — SUBSEQUENT MOTIONS.

MCR 6.502(G)(2) provides that a criminal defendant may not file a second or subsequent motion for relief from judgment unless the motion is based on either a retroactive change in law that occurred after the first motion or new evidence that was not discovered before the first motion; the good-cause and actual-prejudice requirements of MCR 6.508(D)(3) do not provide a third exception and are not relevant until, and are only relevant if, the court determines that the successive motion falls within one of the two exceptions provided in MCR 6.502(G)(2).

2. CONSTITUTIONAL LAW — HABEAS CORPUS ACTIONS — GATEWAY SHOWINGS — ACTUAL INNOCENCE.

A defendant may have an otherwise barred constitutional claim arising from his or her trial heard on the merits in a federal habeas corpus action if the defendant makes a gateway showing of actual

> innocence by showing that it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Susan K. Mladenoff*, Prosecuting Attorney, and *Jennifer Kay Clark*, Assistant Prosecuting Attorney, for the people.

Michigan Innocence Clinic (by *Bridget McCormack* and *David A. Moran*) for defendant.

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

HOEKSTRA, J. This matter is before us on remand from the Michigan Supreme Court for consideration as on leave granted. *People v Swain*, 485 Mich 997 (2009). On appeal, the prosecution challenges the July 21, 2009, order granting defendant's successive motion for relief from judgment of her four convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). In its remand order, the Supreme Court specified that we "should address among the issues presented: (1) whether [defendant's] successive motion for relief from judgment in this case was barred by MCR 6.502(G), and (2) if it was, whether defendant's constitutional rights are implicated given that the trial court found a significant possibility that defendant is innocent based on evidence defendant's attorney failed to present at trial." *Swain*, 485 Mich 997. Because we conclude that defendant's successive motion was barred by MCR 6.502(G) and that, despite the motion's being barred, defendant's constitutional rights are not implicated, we reverse.

I. FACTS AND PROCEDURAL HISTORY

Following a jury trial in August 2002 defendant was convicted of four counts of CSC I for engaging in fellatio

with the victim, her adopted son. This Court affirmed defendant's convictions, and the trial court denied two motions for a new trial and a motion for relief from judgment. In 2009, represented by new appellate counsel, defendant filed a second motion for relief from judgment, which was based, in part, on two "newly discovered" witnesses. The trial court, after hearing the testimony of the new witnesses, concluded that there was a "significant possibility" that defendant was innocent of the CSC I crimes, and it granted the motion.

A. PERTINENT TRIAL TESTIMONY

The victim testified that when he was "[f]ive or six" years old, while in the "young five[]s" class, he lived in a trailer on Nine Mile Road with defendant and his younger brother. Every day before school while defendant helped the victim get dressed, defendant would place her mouth on his penis. According to the victim, his brother was not in the trailer when the sexual abuse occurred, because defendant had sent the brother outside to wait for the school bus. The brother would knock on the trailer door when he saw the school bus coming, and defendant would quickly finish dressing the victim. The brother testified that he and the victim usually watched for the school bus together. He remembered "[l]ike, three or four times" when he waited for the bus by himself. Those times, the brother yelled for the victim when he saw the school bus coming.

Sometime in 1995 or 1996, defendant, the victim, and the brother moved into defendant's parents' house on Oak Grove Road. The three of them slept in one bedroom. The brother slept in one bed, while defendant and the victim shared a second, larger bed.

According to the victim, when he was asleep and defendant, who slept naked, was in bed with him, he would feel "[s]omething wet," like spit, on his penis. This happened "[p]retty much all week."

Both the victim and the brother testified that defendant treated the two boys differently. Defendant treated the victim like a "boyfriend" and the brother like a "slave." She gave the victim more money than the brother, and she made the brother do most of the household chores. She kissed the victim on the lips, but kissed the brother on the cheek or forehead. The brother testified that he never saw defendant do anything bad to the victim.

The victim first disclosed the sexual abuse in June 2001 when his stepmother questioned him about inappropriate contact with a young cousin. The contact involved the victim's tongue, and when the victim's stepmother asked him where he got the idea, the victim responded that defendant had done it to him. The victim admitted that he was afraid of getting in trouble when he was questioned by his stepmother about his contact with the cousin. He explained that he did not tell anyone about the abuse until June 2001 because he did not want defendant to get in trouble. The victim also admitted that he subsequently told relatives on two occasions that defendant had not abused him.

Defendant testified that she did not sexually abuse the victim. She denied that she ever sent the brother outside to wait for the school bus by himself. According to defendant, the victim and the brother waited for the bus inside, and the two boys went outside together when they saw the bus at "Little Willy's" house, two trailers down. Defendant testified that the "neighbor and the bus stop — driver could verify it."

B. PRIOR POSTCONVICTION MOTIONS

In March 2003, defendant, represented by her prior appellate counsel, Patrick O'Connell, moved for a new trial. The victim had recanted his trial testimony, and defendant asserted that the recantation constituted newly discovered evidence. Defendant also claimed that she was denied effective assistance of trial counsel. She argued that her trial counsel was ineffective for failing to list and call Dr. Stephen Miller as an expert regarding the sexual abuse of children to rebut the testimony of the prosecution's expert and for failing to object to numerous instances when inadmissible and prejudicial evidence was presented. The trial court denied the motion for a new trial based on newly discovered evidence and, after holding a *Ginther*[1] hearing, denied the motion for a new trial based on ineffective assistance of counsel.

This Court affirmed defendant's convictions. *People v Swain*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 244804). The Court rejected defendant's arguments that trial counsel was ineffective for failing to respond to the prosecution's demand for a witness list until seven days before trial; failing to call Dr. Miller as an expert regarding the sexual abuse of children; failing to object to, and even opening the door for, irrelevant and prejudicial testimony; questioning the prosecution's expert on the sexual abuse of children about his opinion regarding whether the victim was abused; failing to object to the expert's testimony that the victim's behavior was consistent with that of sexually abused children; and failing to introduce a videotape of the victim denying the abuse allegations. The Court also rejected

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

defendant's arguments that the testimony of the prosecution's expert exceeded the parameters set forth by the Supreme Court and that the trial court abused its discretion by denying the motion for a new trial based on newly discovered evidence.[2]

In September 2004, defendant, still represented by O'Connell, moved for relief from judgment. The motion was based on several pieces of newly discovered evidence: (1) Deborah Charles, a prison inmate who testified at the trial that defendant confessed to her, had a history of rummaging through other inmates' files to gain knowledge of their cases and had been investigated by the Department of Corrections, (2) the victim and the brother had viewed pornographic photographs and videos, and this was how the victim learned about oral sex, (3) Julia Johnson, the victim's special education teacher from the second and third grades, could have testified that defendant treated the victim differently because of defendant's inadequate methods of disciplining him, and (4) two letters by the victim and the brother that were introduced into evidence at trial were actually written by the boys' stepmother. Defendant also argued that this newly discovered evidence established that her trial counsel was ineffective because counsel had failed to properly investigate and interview potential witnesses. The trial court denied the motion, holding that even if the "foundational elements" of granting a new trial on the basis of newly discovered evidence were met, the newly discovered evidence, if admitted at a new trial, would not cause a different result. Defendant did not appeal the trial court's order.

[2] The Court held that the victim's recantation of his trial testimony was cumulative of evidence presented at trial. It noted that defendant's trial counsel elicited testimony from the victim that he had told several family members that the sexual abuse had not occurred.

Defendant moved again for a new trial in February 2005. O'Connell continued to represent defendant. Defendant asserted that the motion presented the "profound question" of whether she would be condemned to prison for the rest of her life when the victim had recanted and admitted that he perjured himself at trial, she and the victim had taken polygraph examinations and each were deemed truthful when they denied the sexual abuse, no physical evidence or testimony corroborated the victim's trial testimony, and she had always maintained her innocence. The trial court denied the motion. It concluded that the motion presented no new evidence that would be admissible at trial and likely to cause a different result. It noted that the victim's credibility had been "fully before the jury," explaining that the jury heard evidence that the victim was hesitant to testify and that he had, on at least one occasion, stated that the allegations against defendant were not true. This Court denied for lack of jurisdiction defendant's delayed application for leave to appeal the trial court's order. *People v Swain*, unpublished order of the Court of Appeals, entered May 20, 2005 (Docket No. 261667).

C. THE PRESENT POSTCONVICTION MOTION

In March 2009, now represented by her present counsel from the Michigan Innocence Clinic, defendant moved again for relief from her judgment of conviction and sentence. The motion was based on newly discovered evidence—the testimony of two witnesses, Tanya Winterburn, who was the school bus driver, and William Risk, a neighbor who rode the school bus with the victim and the brother—that rebutted the prosecution's theory that defendant sent the brother outside to wait for the school bus while she sexually abused the victim.

Affidavits from Winterburn and Risk were attached to the motion. According to Winterburn, the victim and the brother either waited outside for the bus together or ran out the door together to catch the bus. Risk "never saw one of the boys without the other . . . they were always together." He averred that the victim and the brother always ran out of the house together to catch the bus. Defendant also noted that the brother had recanted his trial testimony on that issue.

Defendant argued that this "successive motion for relief from judgment" met the requirements of MCR 6.502(G)(2) because the motion alleged newly discovered evidence. She also argued that the four requirements for granting a new trial on the basis of newly discovered evidence were met. She pointed out that the evidence was newly discovered and had not been discovered at trial because the brother had refused to be truthful and because her trial counsel and her prior appellate counsel had failed to investigate Winterburn and Risk, who had just recently been contacted by her present counsel. Defendant also asserted that the new evidence made a different result at a new trial probable because the evidence established that the sexual abuse could not have occurred as claimed by the prosecution. In the alternative, defendant argued that, if the trial court concluded that the newly discovered evidence could have been discovered at the time of trial, her trial counsel was ineffective for failing to investigate Winterburn and Risk and her prior appellate counsel was ineffective for failing to investigate and raise an issue regarding the trial counsel's failure to investigate and present the testimony of Winterburn and Risk.

The trial court ordered the prosecution to respond to defendant's motion. The prosecution responded by requesting the trial court, pursuant to MCR 6.502(G)(1),

to return the motion to defendant because it was a successive motion for relief from judgment not allowed by the court rules.

After defendant filed an amended motion for relief from judgment, the trial court ordered the prosecution to respond to the merits of the motion, which the prosecution did. It argued that the testimony of Winterburn and Risk did not meet the four criteria for granting a new trial on the basis of newly discovered evidence. In addition, the prosecution claimed that its case did not hinge on the school bus schedule, noting that neither Winterburn nor Risk was present at defendant's parents' house when defendant and the victim shared a bed and the victim would feel something wet on his penis. It also asserted that recanted testimony is to be regarded with great caution and, because the jury was able to see the victim and the brother as they testified and were cross-examined, the trial court should not discount the trial testimony of the victim and the brother when analyzing defendant's motion. The prosecution further argued that the failure of defendant's trial counsel to procure the testimony of Winterburn and Risk at trial did not constitute ineffective assistance of counsel because the testimony would not have made a difference in the trial's outcome. It explained that Winterburn and Risk could not account for every opportunity that defendant had to sexually abuse the victim and that the jury heard evidence that the victim had recantated, was angry with defendant, and disclosed the abuse after he was confronted with his inappropriate contact with a cousin.

The trial court ordered an evidentiary hearing. It stated that an evidentiary hearing was necessary to determine whether reasonable diligence by trial counsel could have led to the discovery of Winterburn and Risk

before trial. The evidentiary hearing would also cover whether defendant's trial counsel and her prior appellate counsel were ineffective. Winterburn and Risk testified at the evidentiary hearing, as did Edwin Hettinger, defendant's trial counsel, and O'Connell, defendant's prior appellate counsel. The victim and the brother also testified, limited to whether they waited for the school bus together.

1. EVIDENTIARY HEARING TESTIMONY

Winterburn confirmed that she drove the school bus that picked up the victim and the brother when the boys lived on Nine Mile Road. Risk lived two houses down the road, approximately 250 to 400 feet, from defendant's trailer. The school bus first stopped at Risk's house, and then proceeded to pick up the victim and the brother. Nine Mile Road in front of defendant's trailer and the Risk house was a straight road. Winterburn testified that, even before she stopped the bus at the Risk house, she was able to see the victim and the brother, who were generally waiting for the bus together at the end of defendant's driveway. Winterburn did not remember ever seeing one of the boys without the other. She never saw the brother wait by himself and then run to get the victim when the bus arrived.

Risk testified that he often waited outside for the bus at the end of his driveway. From his driveway, he could see the victim and the brother, if they were waiting for the bus outside. Risk acknowledged that the victim and the brother sometimes waited inside the trailer. Risk did not recall ever seeing the brother wait for the bus and then run to get the victim. He would have noticed if that had been a regular pattern.

Hettinger testified that he had hoped the victim, upon being cross-examined at trial, would admit that the alle-

gations against defendant were false. Otherwise, his trial strategy was to show that the victim was lying. He was surprised by the victim's testimony that, while living on Nine Mile Road, defendant abused him every morning and that the abuse occurred after defendant sent the brother outside to wait for the bus. These specific allegations were not in the police reports or in the victim's preliminary examination testimony. He admitted that the testimony of Winterburn and Risk would have been consistent with his strategy of proving that the victim was lying, but he never had the opportunity to speak with Winterburn and Risk. Hettinger did not learn of Winterburn and Risk until defendant testified that the school bus driver and the neighbor could verify that the brother never waited outside for the bus by himself. He explained that he did not attempt to contact Winterburn and Risk during trial because "it only came up at trial, and with all the testimony and occurrence[s] at trial, it was just one of many." He did not recall "it standing out as so significant . . . to do so."

O'Connell testified that he interviewed defendant on a number of occasions and that, during the interviews, defendant brought up Winterburn and Risk. And he looked into whether Winterburn and Risk could confirm defendant's testimony that she never sent the brother outside to wait for the bus by himself. However, he never spoke with Winterburn. An appointment was made with Winterburn,[3] but O'Connell missed the appointment when he was delayed in court. The meeting was never rescheduled. O'Connell did speak with Risk, and Risk told him that the brother never appeared at the bus stop by himself; the victim and the brother always

[3] Winterburn testified that the appointment was made when she contacted O'Connell in October 2003 after learning that her name had been mentioned at defendant's trial.

arrived at the bus stop together. O'Connell did not view Risk's testimony as newly discovered evidence, because the testimony was available to Hettinger before and during trial. He did view Risk's testimony as evidence that Hettinger failed to conduct a proper investigation, and he regretted not lumping Hettinger's failure in with the ineffective-assistance claims that he did raise.

The victim and the brother testified that they waited inside the trailer for the school bus. They both denied that defendant ever sent the brother to wait outside for the bus by himself and that the brother would run back to the house when the bus came.

2. THE TRIAL COURT'S RULING

The trial court granted defendant's motion for relief from judgment and set aside her four convictions of CSC I. The court concluded that the testimony of Winterburn and Risk was not newly discovered evidence because, using reasonable diligence, Hettinger could have identified and produced Winterburn and Risk at trial or O'Connell could have raised Hettinger's failure in the form of a claim of ineffective assistance of counsel either on appeal or in a postconviction motion. It explained:

> [Defendant], as proven by her trial testimony, obviously knew of these witnesses. Furthermore, the trial lasted a number of days. There was certainly the opportunity for defense counsel to investigate, assuming he was unaware of them previously, although no investigation occurred. Nor was any request made to the Court during the trial for time to investigate these witnesses. Trial counsel testified at the evidentiary hearing that he made no effort to identify or to investigate and produce these witnesses during the trial.

* * *

> This Court has reviewed the police reports [provided by stipulation] and the Preliminary Examination transcript. Trial defense counsel is accurate that the police reports do not contain information similar to the complainant's trial testimony about the alleged manner of commission of the offenses occurring on 9 Mile Road. However, the complainant's testimony at the Preliminary Examination [page 12] clearly refers to acts occurring while waiting for the bus, inviting inquiry about the brother's whereabouts at the time and inviting investigation about corroboration or lack thereof.
>
> And [defendant's] first appellate counsel testified that he identified both witnesses at the time of the previous post-trial motions, that he had contact with both of them at that time, and that [he] knew of their proposed testimony which would contradict [the victim's].

The trial court noted that MCR 6.502(G)(1) generally prohibits successive motions for relief from judgment, but that MCR 6.502(G)(2) provides limited exceptions for newly discovered evidence and retroactive changes in the law. Although the exception for newly discovered evidence did not apply, the trial court stated that "MCR 6.508 provides a limited additional exception when the defendant establishes both 'good cause' for not raising an issue previously and 'actual prejudice'."

The trial court concluded that the matter before it was a claim of ineffective assistance of counsel. It concluded that Hettinger's failure to investigate Winterburn and Risk, as well as O'Connell's failure to pursue any issue concerning Winterburn and Risk, could not be characterized as competent strategy. It opined:

> Trial defense counsel testified that his strategy in defending [defendant] was to demonstrate that the complainant was lying, certainly a sound strategy since the only evidence against [defendant] was the complainant's testimony. He admitted that calling these two witnesses would

> have been appropriate in carrying out his trial strategy since their testimony would have tended to put in question the accuracy and truthfulness of the complainant's. He offered no viable excuse for not pursuing the matter.
>
> [Defendant's] first appellate counsel testified that his strategy in representing [defendant] was to explore all possible trial errors, including any of defense counsel which he could discover. This is certainly appropriate appellate strategy; this Court can think of no other appellate strategy that meets the requirements of competent representation. [Defendant's] first appellate counsel offered no viable reason for his failure to raise issues concerning these witnesses during his representation.

The trial court further concluded that defendant established "actual prejudice," meaning that but for the error, she would have had a reasonably likely chance of acquittal. It explained:

> [T]he People's case against [defendant] consisted entirely of the testimony of [the victim]. There was no other witness to the alleged crime; there was no physical evidence; there was no circumstantial evidence. . . .
>
> . . . These offenses either were committed as [the victim] testified or they were not committed at all, as [defendant] testified. The jury obviously had questions about [the victim's] credibility which explains the extraordinary length of deliberations . . . . The jury deadlocked on one occasion before finally reaching a unanimous decision.
>
> The testimony of Ms. Winterburn and Mr. Risk would clearly have been important to the jury's consideration of [the victim's] credibility. These witnesses' [testimony] would have been the only testimony by independent witnesses which the jury could have utilized to test [the victim's] testimony about events at the very moment he said that these crimes were being committed. And their testimony would have completely contradicted his testimony about the alleged sexual assaults occurring on 9 Mile Road. Their testimony would have been pivotal in the

> jury's consideration of whether his testimony, even that portion concerning alleged offenses occurring at his grandparents' home, was credible.
>
> * * *
>
> This Court is mindful that Winterburn's and Risk's testimony does not pertain in any way to the alleged crimes which occurred at the grandparents' home, the second location where [the victim] testified he was sexually assaulted by his mother on numerous occasions. They have no knowledge of what went on there. But this Court is nonetheless convinced that their testimony is so potentially damaging to [the victim's] credibility about the events at 9 Mile Road that the jury would question his credibility as to all the allegations in the entire case.

The trial court noted that the only reason that any issue concerning Winterburn and Risk was not raised in any previous posttrial proceeding was that O'Connell had failed to pursue the matter. While O'Connell's failure did not establish "good cause," the trial court concluded that the "good cause" requirement should be waived, pursuant to MCR 6.508(D)(3), because, given the testimony of Winterburn and Risk, there is a "significant possibility" that defendant is innocent of the CSC I crimes.

The prosecution filed in this Court an application for leave to appeal the trial court's order, which was denied "for lack of merit in the grounds presented." *People v Swain*, unpublished amended order of the Court of Appeals, entered September 10, 2009 (Docket No. 293350). The prosecution then sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted. *Swain*, 485 Mich 997. The Supreme Court directed the Court to consider two specific issues:

> The Court of Appeals should address among the issues presented: (1) whether the successive motion for relief from judgment in this case was barred by MCR 6.502(G), and (2) if it was, whether defendant's constitutional rights are implicated given that the trial court found a significant possibility that defendant is innocent based on evidence defendant's attorney failed to present at trial. [*Id.*]

II. SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT

The Supreme Court has directed us to consider "whether [defendant's] successive motion for relief from judgment . . . was barred by MCR 6.502(G)[.]" *Swain*, 485 Mich 997. This directive requires us to address whether the trial court erroneously concluded that MCR 6.508(D)(3) provides a "limited additional exception" for when a defendant may file a successive motion for relief from judgment.

Following the evidentiary hearing, the trial court in its written order held that the exception in MCR 6.502(G)(2) for new evidence did not apply because, with reasonable diligence, Hettinger could have discovered Winterburn and Risk and produced them at trial and O'Connell could have raised an ineffective-assistance claim regarding Hettinger's failure. The trial court's analysis was premised on the rule applicable to motions for a new trial based on newly discovered evidence that a defendant is not entitled to a new trial if the defendant, using reasonable diligence, could have discovered and produced the evidence at trial. See *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Despite its conclusion that defendant's successive motion was barred under MCR 6.502(G)(2), the trial court held that it could address and decide the merits of defendant's motion. It reasoned that MCR 6.508(D)(3) provides "a limited additional exception" to MCR 6.502(G)'s bar on successive motions for relief from judgment.

On appeal, the prosecution agrees with the trial court's holding that defendant's successive motion was barred by MCR 6.502(G)(2) because it was not based on new evidence. But it argues that the trial court erred by concluding that MCR 6.508(D)(3) provides an additional limited exception for when a defendant may file a successive motion for relief from judgment. It asserts that a trial court may not engage in the analysis contained in MCR 6.508(D)(3) unless the court first determines that the defendant meets one of the two exceptions in MCR 6.502(G)(2) for filing a successive motion. According to the prosecution, once the trial court determined that the testimony of Winterburn and Risk was not new evidence, the trial court was required to deny defendant's successive motion for relief from judgment.

Defendant agrees with the result reached by the trial court. However, unlike the trial court, she claims that MCR 6.502(G)(2) did not bar her successive motion. According to defendant, MCR 6.502(G)(2) refers to "new evidence that was not discovered," as opposed to evidence that *could* have been discovered. Thus, defendant claims that the discoverability of the new evidence is irrelevant to determining whether a defendant's successive motion falls within the new-evidence exception of MCR 6.502(G)(2). Defendant maintains that the testimony of Winterburn and Risk was "new evidence that was not discovered" because her present counsel was the first to interview the two witnesses and learn the details of their prospective testimony.

Defendant further asserts that the trial court did not err by granting her relief from her CSC I convictions because the testimony of Winterburn and Risk created a significant possibility that she is innocent. According to defendant, if the "new evidence that was not discov-

ered" could have been discovered before the first motion for relief from judgment, a defendant is generally not entitled to relief under MCR 6.508(D)(3) because the defendant cannot meet the "good cause" requirement. However, defendant notes that the "good cause" requirement can be waived if there is a significant possibility that the defendant is innocent. She therefore claims that, if a successive motion for relief from judgment is based on new evidence that was not, but could have been, discovered before the first motion for relief from judgment, a defendant is entitled to relief under MCR 6.508(D)(3) only if the evidence creates a significant possibility that the defendant is innocent.[4]

A. STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272

[4] Defendant also argues that the prosecution has waived the argument that, once the trial court determined that the testimony of Winterburn and Risk was not new evidence, the trial court could no longer consider her successive motion for relief from judgment. Defendant asserts that the prosecution agreed in the trial court that defendant could obtain relief if she met the requirements of MCR 6.508(D)(3). We find no merit to defendant's waiver claim because the prosecution, before it was ordered to respond to the merits of defendant's successive motion, asserted that the motion was improperly before the trial court. This objection to the successive motion was sufficient to preserve the issue for appeal. In addition, the Supreme Court has specifically directed us to consider "whether the successive motion for relief from judgment in this case was barred by MCR 6.502(G)." *Swain*, 485 Mich 997. We are bound to follow the dictates of the Supreme Court. *Werkhoven v Grandville (On Remand)*, 65 Mich App 741, 744; 238 NW2d 392 (1975).

(2008), or makes an error of law, *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006). The interpretation of a court rule is a question of law that is reviewed de novo. *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003).

The interpretation of a court rule is governed by the principles of statutory construction. *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009). The goal of court-rule interpretation is to give effect to the intent of the Supreme Court, the author of the rules. *Id.*; *People v Orr*, 275 Mich App 587, 595; 739 NW2d 385 (2007). We begin with the language of the court rule. *Buie*, 285 Mich App at 416. If the language is clear and unambiguous, further interpretation is neither required nor permitted; the rule must be enforced as written. *Id.*; *Orr*, 275 Mich App at 595. We may not read into an unambiguous court rule a provision not included by the Supreme Court. *Orr*, 275 Mich App at 595.

B. MCR SUBCHAPTER 6.500

A defendant in a criminal case may move for relief from a judgment of conviction and sentence. MCR 6.502(A). Such motions are governed by MCR 6.500 *et seq*. These rules outline the procedure for how a trial court is to consider a motion for relief from judgment, identify the requirements that a defendant must establish to be entitled to relief, and limit the number of motions that a defendant may file.

A motion for relief from judgment is to be presented to the judge to whom the case was assigned at the time of the defendant's conviction. MCR 6.504(A). The court is required to "promptly examine" the motion and all files, records, transcripts, and correspondence relating to the judgment under attack. MCR 6.504(B)(1). If it is plainly apparent that the defendant is not entitled to relief, the court must deny the motion. MCR 6.504(B)(2). If the court

does not dismiss the entire motion, it must order the prosecution "to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508." MCR 6.504(B)(4).[5]

The court, after reviewing the motion, response, record, and any record expansion, must then decide whether an evidentiary hearing is required. MCR 6.508(B). If it determines that a hearing is not required, the court may rule on the motion for relief from judgment or afford the parties an opportunity for oral argument. *Id.* If the court decides that an evidentiary hearing is required, it shall schedule and conduct a hearing. MCR 6.508(C).

A defendant has the burden to establish entitlement to relief. MCR 6.508(D). Pursuant to MCR 6.508(D)(3), a court is precluded from granting relief if the motion

> alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal[.]
>
> * * *
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

[5] MCR 6.505 concerns the appointment of counsel for indigent defendants. MCR 6.506 governs the prosecution's response. MCR 6.507 allows for expansion of the record at the trial court's direction.

The requirement of "good cause" can be established by proving ineffective assistance of counsel. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004).

A defendant is only entitled to file one motion for relief from judgment. MCR 6.502(G)(1). However, this rule is not absolute. MCR 6.502(G)(2) permits the filing of a successive motion under two circumstances:

> A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

Any successive motion that does not assert one of these two exceptions is to be returned to the defendant without filing by the court. MCR 6.502(G)(1). No appeal of the denial or rejection of a successive motion is permitted. *Id.*

The court rules are silent on the procedure to be used by a trial court for determining whether a successive motion for relief from judgment falls within either of the two exceptions of MCR 6.502(G)(2). However, MCR 6.508(A) provides that "[i]f the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate."

C. ANALYSIS

We begin by addressing the trial court's conclusion that the "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) provide "a limited additional exception" to the rule prohibiting successive motions

for relief from judgment. We hold that MCR 6.502(G)(2) provides the only two exceptions to the prohibition of successive motions.

MCR 6.508(D)(3), by its own language, applies to successive motions. It provides that if a motion for relief from judgment "alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter," a defendant is not entitled to relief unless the defendant demonstrates "good cause" and "actual prejudice." However, MCR 6.502(G)(2) unambiguously provides that a defendant may only file a successive motion for relief from judgment in two circumstances: (1) there is a retroactive change in the law that occurred after the first motion or (2) there is new evidence that was not discovered before the first motion. Reading the "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) as a third exception to the general rule that a defendant may only file one motion for relief from judgment, MCR 6.502(G)(1), as the trial court did, contradicts the clear and unambiguous language of MCR 6.502(G)(2). In addition, no part of a court rule should be rendered nugatory. *Johnson v White*, 261 Mich App 332, 348; 682 NW2d 505 (2004). If a defendant could obtain relief on a successive motion by only establishing entitlement to relief under MCR 6.508(D)(3), then the prohibition against successive motions, MCR 6.502(G)(1), and the two exceptions to the prohibition, MCR 6.502(G)(2), would be rendered nugatory.

Because a successive motion for relief from judgment may only be filed if, after the first motion, there is a retroactive change in the law or new evidence is discovered, the "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) are not relevant until, and

are only relevant if, the trial court determines that the successive motion falls within one of the two exceptions of MCR 6.502(G)(2). Thus, we agree with the prosecution that once the trial court determined that the testimony of Winterburn and Risk was not new evidence discovered after defendant's first motion for relief from judgment, the trial court was required to deny defendant's successive motion.

Our holding, contrary to defendant's assertion, is not inconsistent with *People v Clark*, 274 Mich App 248, 255; 732 NW2d 605 (2007), wherein the Court stated that, in determining whether the defendant was entitled to relief on his successive motion for relief from judgment, "the trial court was required to apply MCR 6.508(D)(3)." The Court made this statement in explaining that, because the trial court did not find that there was a significant possibility that the defendant was innocent, the trial court erred by granting the defendant's motion for relief without requiring the defendant to show good cause for failing to raise the grounds for relief in his direct appeal and previous motions for relief from judgment. *Id.* The issue in *Clark* was whether MCR 6.508(D)(3) requires a defendant who files a successive motion to show good cause for not raising the grounds for relief in his or her direct appeal and in the defendant's previous motions. *Id.* at 251. The issue did not concern MCR 6.502(G). Thus, the Court's statement in *Clark* that "the trial court was required to apply MCR 6.508(D)(3)" is not determinative of the current issue.[6]

As set forth previously, defendant offers an alternative interpretation of the new-evidence exception found

[6] Similarly, the Supreme Court's reversal of *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued December 9, 2003 (Docket No. 244652), rev'd 471 Mich 928 (2004), is of no value. MCR 6.502(G) was not at issue in *Williams*.

in MCR 6.502(G)(2) and, relying on it, argues that the trial court reached the right result. In essence, defendant argues that the discoverability element of the new-evidence test that the trial court relied on is contrary to the plain language of the rule. Rather defendant submits that the proper test is whether a defendant's successive motion is based on "new evidence that was not discovered." Defendant claims that she has satisfied this test because Winterburn and Risk were not interviewed until her present counsel spoke with them. Because an unambiguous court rule is to be enforced as written, *Orr*, 275 Mich App at 595, there is merit to defendant's claim regarding the proper test to be applied. But even if defendant's interpretation of the phrase "new evidence that was not discovered" is correct, we conclude that under that test, defendant's successive motion is barred by MCR 6.502(G)(2) because Winterburn and Risk in fact were discovered before defendant's first motion for relief from judgment.

At trial, defendant testified that the victim and the brother waited inside for the school bus and when the bus stopped at the Risk house, the two boys went outside together to wait for the bus. According to defendant, "the neighbor and the bus stop — driver could verify it." Defendant knew of Winterburn and Risk at trial, and she identified them as two persons who could corroborate her testimony that the brother never waited outside for the bus by himself. Accordingly, Winterburn and Risk, and their potential testimony, were discovered before defendant filed her first motion for relief from judgment.

Inherent in defendant's argument is that evidence is not discovered for purposes of MCR 6.502(G)(2) until the evidence is known by counsel. However, the plain

language of MCR 6.502(G)(2) does not support such a narrow reading of the court rule. But even if defendant is correct, we would not conclude that the testimony of Winterburn and Risk was new evidence. O'Connell testified at the evidentiary hearing that he investigated defendant's claim that Winterburn and Risk could corroborate her testimony. Despite having a scheduled appointment with Winterburn, O'Connell never spoke with her because he was delayed at court and missed the appointment. However, O'Connell did meet with Risk and learned that Risk always saw the victim and the brother wait for the school bus together; Risk told O'Connell that he never saw the brother arrive at the bus stop by himself. Under these circumstances, we conclude that O'Connell knew of the alleged new evidence. Moreover, the evidence was known to O'Connell before defendant filed her first motion for relief from judgment. O'Connell testified that he regretted not including Hettinger's failure to investigate Winterburn and Risk in the ineffective-assistance-of-counsel claim. It was in the September 2004 motion for relief from judgment that defendant argued that Hettinger was ineffective for failing to adequately investigate and interview potential witnesses.

In conclusion, the "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) do not provide a "limited additional exception" to the general rule prohibiting successive motions for relief from judgment. There are only two exceptions to the general prohibition: the successive motion (1) is "based on a retroactive change in the law that occurred after the first motion for relief from judgment" or (2) is based on "a claim of new evidence that was not discovered before the first such motion." MCR 6.502(G)(2). Only after the trial court has determined that the successive motion falls within one of the two exceptions do MCR 6.508 and the

"good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) become relevant. Because the evidence on which defendant's successive motion for relief from judgment was based was not discovered after defendant filed her first motion for relief, the trial court was prohibited from granting defendant's motion. Accordingly, the trial court abused its discretion when it granted defendant relief from her CSC I convictions. However, pursuant to the Supreme Court's remand order, our inquiry is not complete.

III. CONSTITUTIONAL RIGHTS

The Supreme Court has also directed us to consider, if defendant's successive motion was barred by MCR 6.502(G)(2), "whether defendant's constitutional rights are implicated given that the trial court found a significant possibility that defendant is innocent based on evidence defendant's attorney failed to present at trial." *Swain*, 485 Mich 997. Despite this directive, neither party specifically identifies a constitutional right of defendant that is or could potentially be implicated as a result of defendant's being prohibited from bringing her successive motion for relief from judgment despite, as the trial court found, there being a significant possibility that she is innocent of the CSC I crimes.

However, relying on caselaw from the United States Supreme Court regarding federal habeas review of procedurally defaulted claims, defendant does maintain that the procedural bar of MCR 6.502(G) prohibiting successive motions for relief from judgment must yield in cases in which the defendant can show that his or her constitutional rights were violated and that the defendant is actually innocent. According to the United States Supreme Court, a defendant may have an otherwise barred constitutional claim arising from his or her

trial heard on the merits in a federal habeas action[7] if the defendant can make a "gateway" showing of actual innocence. *Schlup v Delo*, 513 US 298, 314-315; 115 S Ct 851; 130 L Ed 2d 808 (1995); *Herrera v Collins*, 506 US 390, 404; 113 S Ct 853; 122 L Ed 2d 203 (1993); see also *House v Bell*, 547 US 518, 536-537; 126 S Ct 2064; 165 L Ed 2d 1 (2006). This "actual innocence" exception is required by the "ends of justice" or, stated differently, to prevent a "miscarriage of justice." *Schlup*, 513 US at 319-320; *Sawyer v Whitley*, 505 US 333, 339; 112 S Ct 2514; 120 L Ed 2d 269 (1992). However, it is not readily apparent that the "actual innocence" exception is rooted in constitutional concerns. See *Sawyer*, 505 US at 339 (stating that the "miscarriage of justice" exception developed from language of a federal habeas statute); *Engle v Isaac*, 456 US 107, 135; 102 S Ct 1558; 71 L Ed 2d 783 (1982) (stating that "[i]n appropriate cases those principles [cause and prejudice] must yield to the imperative of correcting a fundamentally unjust incarceration," but not providing any support or reasoning for the statement). Consequently, it is not clear that the exception for federal habeas review is rooted in constitutional principles. Nonetheless, even assuming that the federal limitation ought to apply in cases in which successive motions are barred by MCR 6.502(G)(2), we conclude that defendant is unable to establish the requisite gateway showing of actual innocence. We also disagree with the trial court's finding that counsel's representation at trial was constitutionally ineffective.

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[7] Unless a habeas petitioner establishes cause and prejudice, a federal court may not reach the merits of (1) successive claims that raise grounds identical to ones decided in a previous petition, (2) new claims not previously raised, but which constitute an abuse of the habeas writ, and (3) procedurally defaulted claims in which the petitioner failed to follow state procedural rules in raising the claims. *Sawyer v Whitley*, 505 US 333, 338; 112 S Ct 2514; 120 L Ed 2d 269 (1992).

A. ACTUAL INNOCENCE

To satisfy the "actual innocence" standard, a defendant "must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *Schlup*, 513 US at 327. This standard does not require absolute certainty about the defendant's guilt or innocence. *House*, 547 US at 538. It is, however, a demanding standard and permits review only in "extraordinary" cases. *Id.*; *Schlup*, 513 US at 327.

For obvious reasons, the trial court did not address the actual innocence standard in its order granting defendant's successive motion for relief from judgment. However, it did find that defendant had met the "actual prejudice" requirement of MCR 6.508(D)(3)(b)(i). It reasoned that, because the testimony of the "relatively independent" witnesses Winterburn and Risk was "so potentially damaging" to the victim's credibility, had the testimony been presented at trial, defendant "would have had a reasonably likely chance of acquittal." Defendant maintains that the "actual prejudice" standard is the equivalent of the "actual innocence" standard. The "actual prejudice" requirement is similar to the prejudice standard in an ineffective-assistance-of-counsel claim. See *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). The United States Supreme Court has instructed that the "actual innocence" standard requires "a stronger showing than that needed to establish prejudice" in an ineffective-assistance-of-counsel claim. *Schlup*, 513 US 327 & n 45.

Accordingly, the trial court's conclusion that defendant showed "actual prejudice" does not equate with a finding by the trial court that defendant met the "actual innocence" standard.

The trial court also concluded that, pursuant to MCR 6.508(D)(3), there was a "significant possibility" that defendant was innocent of the CSC I crimes. The trial court made this finding in determining that it was proper to waive the good-cause requirement of MCR 6.508(D)(3). Generally, to relieve a defendant from a judgment of conviction, a defendant must prove "good cause" and "actual prejudice," MCR 6.508(D)(3), but if the trial court concludes that there is a "significant possibility" that the defendant is innocent, the court may waive the "good cause" requirement. The court rule does not define the phrase "significant possibility," nor has this Court or our Supreme Court defined the phrase. However, it is clear from a reading of MCR 6.508(D)(3) that the "significant possibility" standard is a higher standard than the "actual prejudice" standard of MCR 6.508(D)(3)(b)(i). Even without a definition of what constitutes a "significant possibility,"[8] we discern no meaningful distinction between it and the "actual innocence" standard. Thus, for purposes of resolving this issue, we assume that the trial court, when stating that there was a "significant possibility that the defendant is innocent of the crime," essentially found that it was more likely than not that no reasonable juror, hearing the testimony of Winterburn and Risk, would have found defendant guilty beyond a reasonable doubt.

No Michigan case has discussed an appellate court's review of a trial court's conclusion that, under MCR 6.508(D)(3), there is a significant possibility that the

[8] Defendant does not advocate any particular definition for the phrase "significant possibility."

defendant is innocent. We find persuasive the United States Supreme Court's statement in *House* that deference is to be given to the trial court's assessment of the evidence, but that the inquiry "requires a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House*, 547 US at 539 (quotation marks and citations omitted).

Giving deference to the trial court's assessment of the new evidence, the trial court did not err by determining that the testimony of Winterburn and Risk "would clearly have been important to the jury's consideration of [the victim's] testimony." The testimony certainly would have impeached the victim's testimony that defendant sexually abused him every morning after the brother was sent outside to wait for the school bus. But all the evidence, old and new, incriminating and exculpatory, must be considered, *House*, 547 US at 538, and this the trial court failed to do. Of the old evidence, it only considered the testimony of the victim and defendant. When all the evidence is considered, we cannot agree with the trial court that it is more likely than not that no reasonable juror, upon hearing the testimony of Winterburn and Risk, would have found defendant guilty beyond a reasonable doubt.

The testimony of Winterburn and Risk was inconsistent, not only with the victim's testimony, but also with the testimony of defendant and the brother. Defendant testified that the victim and the brother waited inside the trailer for the school bus until they saw the bus at "Little Willy's" house. But Winterburn testified that, even before she arrived at Risk's house, she saw the victim and the brother waiting by the road for the bus. Similarly, while Risk acknowledged that the victim and the brother sometimes waited inside the trailer for the

school bus, he testified that, when he was outside at the end of his driveway waiting for the bus, he would see the victim and the brother waiting for the bus. In addition, the testimony of Winterburn and Risk that they never saw the brother wait for the school bus by himself was inconsistent with the brother's admission that on a limited number of occasions he waited for the school bus by himself. The inconsistencies between Winterburn's and Risk's testimony and the testimony of defendant and the brother could have led a reasonable juror to doubt the credibility of Winterburn and Risk.

Even with the testimony of Winterburn and Risk, the case would remain a credibility determination. And there was evidence that could have led a reasonable juror to believe the victim, at least to the extent that two acts of CSC I occurred at the trailer on Nine Mile Road and at the house on Oak Grove Road. Detective Guy Picketts testified that when he interviewed defendant, he only told defendant that she was being investigated for a CSC complaint involving oral sex and the victim and that defendant then yelled, "I never sucked my kid's dick." A reasonable juror, as the prosecutor argued, may have found defendant's statement to be incriminating, given that Picketts had not informed defendant of the specific allegations. Similarly, a reasonable juror, again as argued by the prosecutor, may have found that defendant's inconsistent statements during the interview with Picketts were evidence of a lack of truthfulness. Moreover, Dr. Randall Haugen, an expert regarding the sexual abuse of children and a counselor of the victim, testified that the victim manifested behavior, such as sexually reactive behavior toward other children, compulsive masturbation, and a hoarding of women's underwear, that was consistent with a child who had been sexually abused. Haugen also

testified that the discovery of a child's sexually inappropriate behavior can lead to a disclosure by the child of prior sexual abuse, and Haugen noted that the victim disclosed the abuse when he was confronted by his stepmother concerning his actions toward a young cousin. Haugen further testified that a sexual abuser of children often grooms or forms a special relationship with the child that might include granting the child special privileges. The victim testified, and his testimony was corroborated by the brother, that defendant treated him better than the brother; defendant treated the victim like a boyfriend, but the brother like a slave. In addition, Haugen testified that children who make false accusations are often not anxious, fearful, or embarrassed when talking of the abuse and that the victim was anxious, fearful, and embarrassed when the victim spoke to him of the abuse.

Considering all the evidence, new and old,[9] and the fact that the case rested on credibility determinations, defendant has not established that, even though the new testimony of Winterburn and Risk contradicted the victim's testimony, it is more likely than not that no reasonable juror would have convicted her. *Schlup*, 513 US at 327. Accordingly, defendant has not made the "gateway" showing of actual innocence.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

However, even if defendant had made the necessary "gateway" showing, we would not conclude that Hettinger was ineffective for failing to investigate Winterburn and Risk and present them as witnesses at trial. We disagree with the trial court's conclusion that Het-

[9] The old evidence also included the testimony of Charles, an inmate with defendant at the Scott Correctional Facility, that defendant confessed to performing oral sex on the victim.

tinger rendered ineffective assistance of counsel. "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted).

The right to counsel guaranteed by the United States and Michigan constitutions, US Const, Am VI; Const 1963, art 1, § 20, includes the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

At the evidentiary hearing, Hettinger testified that he was surprised by the victim's trial testimony that, while the family lived at the trailer on Nine Mile Road, defendant sexually abused him every morning after the brother was sent outside to wait for the school bus. He explained that these two specific accusations were not in the police reports and that the victim had not testified similarly at the preliminary examination. The trial court reviewed the police reports and the victim's preliminary examination testimony. While it found that Hettinger was correct about the police reports, the trial

court concluded that the victim's testimony at the preliminary examination, which referred to defendant's abusing him while waiting for the bus, invited inquiry into the brother's whereabouts during the abuse and investigation into corroboration.

At the preliminary examination, the victim testified, in pertinent part:

> *Q*. Okay. Did there come a time when something happened between you and your mom when you were living at the trailer?
>
> * * *
>
> *A*. Um, yeah, she would always sleep naked with me but not with—but not with [my brother].
>
> *Q*. Okay. Did something ever happen when you were in the bed with your mom?
>
> * * *
>
> *A*. Yeah. She would put her mouth over my private part.
>
> * * *
>
> *Q*. Did it ever happen in the morning?
>
> *A*. Yeah.
>
> *Q*. Tell me about in the morning.
>
> *A*. In the morning she would get me undressed and she would put her mouth over my wiggly.
>
> * * *
>
> *Q*. Okay. Were you getting dressed for school?
>
> *A*. Yeah.
>
> *Q*. Okay. And what would happen?

A. I'd be gettin' undressed, she'd put her mouth over my wiggly and then after that she'd put my clothes on [indiscernible] when it almost time to get to the bus.

* * *

Q. How many times did that happen?

A. More than 20.

Knowing the victim's subsequent testimony at trial, one could easily conclude that it would have been prudent for Hettinger to investigate the brother's whereabouts when the abuse occurred. However, counsel's competence is not to be assessed with the benefit of hindsight. *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003). Considering solely the victim's testimony at the preliminary examination, Hettinger's failure to conduct a pretrial investigation into the brother's whereabouts cannot be said to fall below objective standards of reasonableness. *Frazier*, 478 Mich at 243. The victim's preliminary examination testimony gave no indication that the brother was not in the trailer when the abuse occurred or that corroboration, or a lack thereof, of the brother's whereabouts by a third person would be anything more than marginally relevant to the case.[10]

Hettinger also testified at the evidentiary hearing that he did not learn of Winterburn and Risk until trial. The trial court faulted Hettinger for failing to investigate Winterburn and Risk once he learned of the two potential witnesses. However, Hettinger's failure to investigate Winterburn and Risk during the middle of trial cannot be said to fall below objective standards of reasonableness. *Id*. The testimony of Winterburn and

[10] There is no claim that any other aspect of Hettinger's pretrial investigation was inadequate.

Risk was not direct evidence that defendant was innocent of the CSC I charges. Rather, the testimony would have been impeachment evidence; the testimony would have undermined the credibility of the victim's testimony that defendant abused him after sending the brother outside to wait for the bus by himself. Hettinger's trial strategy was to show that the victim was lying. And although presenting the testimony of Winterburn and Risk may have been consistent with that strategy, defendant has not shown that Hettinger's decision to focus on the impeachment evidence that he planned to present and elicit at trial, rather than attempt to identify and locate two new witnesses during the course of trial, was not sound trial strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Hettinger presented and argued meaningful impeachment evidence from which the jury could have found that the victim was lying. The evidence included the victim's failure to disclose the sexual abuse until he was questioned about his inappropriate actions toward a cousin, his admission that he was mad at defendant, his statements to family members that defendant had not sexually abused him, his differing stories to the forensic interviewer, and the inconsistencies in the testimony of the victim and the brother regarding how often the brother waited for the school bus by himself.

For the above reasons, we conclude that the trial court erred by holding that Hettinger was ineffective for failing to investigate Winterburn and Risk and to present them as witnesses at trial.[11] Defendant was not denied the effective assistance of counsel.

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[11] Because Hettinger was not ineffective, O'Connell's failure to raise an ineffective-assistance-of-counsel claim regarding Hettinger's failure to investigate Winterburn and Risk did not prejudice defendant's appeal. See *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Defendant was not denied effective assistance of counsel on appeal.

IV. CONCLUSION

The Supreme Court, in its remand order, directed us to consider two issues, and we have done so. We concluded that a defendant may not obtain relief on a successive motion for relief from judgment unless the motion falls within either of the two exceptions of MCR 6.502(G)(2). The "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) do not provide a third exception. Because defendant's successive motion was based on evidence discovered before defendant's first motion for relief from judgment, MCR 6.502(G) barred defendant's successive motion.

Then, pursuant to defendant's argument, we addressed whether defendant can make a showing of actual innocence as articulated by the United States Supreme Court in *Schlup* and *House*, a showing that is predicated on evidence that was not presented at trial because of an alleged constitutional violation, and if so, whether defendant was denied the effective assistance of counsel. We concluded that when all the evidence is considered, defendant cannot establish her actual innocence and that the omission of Winterburn's and Risk's testimony at trial was not the result of ineffective assistance of counsel. Accordingly, we reverse the trial court's order granting defendant's successive motion for relief from judgment.

Reversed.

PEOPLE v LIKINE

Docket No. 290218. Submitted February 9, 2010, at Lansing. Decided April 20, 2010. Approved for publication June 8, 2010, at 9:20 a.m.

An Oakland Circuit Court jury convicted Selesa A. Likine of failing to pay child support in violation of MCL 750.165. Before trial, the court, John J. McDonald, J., granted the prosecution's motion to preclude defendant from offering any evidence pertaining to her alleged inability to pay the ordered child support. The court reasoned that inability to pay was not a defense to the strict-liability crime. After she was convicted, defendant moved for reconsideration of the court's order granting the prosecution's motion in limine. She also moved for relief, contending that the statute was unconstitutional because it did not require her to have a morally culpable mental state. Finally, defendant moved for a new trial, arguing that her rights under Michigan's Due Process Clause were violated because she was not allowed to present as a defense her inability to pay. The court denied the motions, and defendant appealed.

The Court of Appeals *held*:

1. The Michigan Constitution does not require that a defendant be permitted to present an inability-to-pay defense to a charge of felony nonsupport. Defendant had ample opportunity to contest her ability to pay during the civil proceedings at which the support was mandated.

2. Permitting defendant to present evidence of her inability to pay would have permitted her to challenge the amount of support ordered in the civil proceeding by the civil court that had sole, exclusive, and continuing jurisdiction over the support order under MCL 600.1021. The trial court properly denied defendant's attempt to make such an impermissible collateral attack on the underlying support order.

3. The crime of felony nonsupport is complete at the time that the individual fails to pay the ordered amount at the ordered time. Thus, the *actus reus* is the failure to pay support as ordered.

4. The elements of the crime of felony nonsupport are (1) the defendant was required to support a child or current or former

spouse, (2) the defendant appeared in or received notice by personal service of the action in which the support order was issued, and (3) the defendant failed to pay the support at the required time. Evidence of inability to pay was not relevant to any fact in issue, and the trial court did not abuse its discretion by declining to admit the evidence.

5. The prosecutor did not commit prosecutorial misconduct by stating in rebuttal closing arguments that defense counsel's strategy was to distract the jury from the evidence. The comment was an appropriate response to defense counsel's emphasizing facts during closing argument that had no bearing on the elements of the crime. It was not a personal attack on defense counsel, and a timely objection could have cured any perceived prejudice.

Affirmed.

1. CRIMINAL LAW — CHILD SUPPORT — NONSUPPORT — STRICT-LIABILITY OFFENSES — INABILITY TO PAY CHILD SUPPORT.

A child support order imposed after the parent has been judicially determined to be able to pay support subjects the parent to strict liability for failure to pay the required support at the required time; the parent may not defend against the criminal charge with evidence of an inability to pay given that the parent had the opportunity to contest the support order at the child support proceedings (MCL 750.165).

2. CRIMINAL LAW — CHILD SUPPORT — NONSUPPORT — ELEMENTS OF FELONY NONSUPPORT.

The elements of felony nonsupport are (1) the defendant was required to support a child or current or former spouse; (2) the defendant appeared in or received notice by personal service of the action in which the support was ordered, and (3) the defendant failed to pay the support at the time ordered or in the amount ordered; the crime of felony nonsupport is not a continuing crime, but is complete at the time that the individual fails to pay the ordered amount at the ordered time; the *actus reus* is the failure to pay the support as ordered (MCL 750.165).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *William E. Molner*, *Patrick J. O'Brien*, and *George Stevenson*, Assistant Attorneys General, for the people.

Michigan Innocence Clinic (by *David Moran* and *Bridget McCormack*) and American Civil Liberties Union Fund of Michigan, Inc. (by *Michael J. Steinberg*), for defendant.

Before: FITZGERALD, P.J., and CAVANAGH and DAVIS, JJ.

PER CURIAM. Defendant appeals as of right her jury conviction of failing to pay child support in violation of MCL 750.165, for which she was sentenced to probation for one year. We affirm.

Following a divorce in June 2003, defendant was ordered to pay child support to her ex-husband, Elive Likine, who was awarded physical custody of their three minor children. The child support initially was $54 a month, but was eventually raised to $181 a month. Apparently, in March or May 2005, Elive sought an increase in child support payments from defendant. Elive was prompted to seek the increase in child support after he learned that defendant had purchased a house worth about $500,000 by securing two mortgages in her name, one for $2,000 a month and one for $1,000 a month. She had also purchased a new vehicle.

After hearings were held on the matter, the Friend of the Court recommended that income consistent with her standard of living, $5,000 a month, be imputed to defendant and that her child support obligation be increased to $1,131 a month, retroactively effective as of June 1, 2005. The family division of the circuit court adopted that recommendation after holding its own hearing. Defendant's motion for reconsideration was denied. Thus, by order entered August 23, 2006, defendant was obligated to pay $1,131 a month in child support as of June 1, 2005. Defendant applied for delayed leave to appeal in this Court, which ultimately

denied leave "for failure to persuade the Court of the need for immediate appellate review." *Likine v Likine*, unpublished order of the Court of Appeals, entered March 14, 2008 (Docket No. 280148).

Defendant's payment history was very sporadic. In 2006, she paid nothing. In 2007, she paid a total of $488.85 for the year—$381.21 in February, $20 in June, and $87.64 in December. Through March 2008, defendant paid a total of $100. The amount of arrearage as of February 29, 2008, was $40,182.71. In March 2008, felony charges were filed against defendant for failure to pay child support as ordered between February 2005 and March 2008, in violation of MCL 750.165. She stood mute at her arraignment on May 19, 2008, and a plea of not guilty was entered on her behalf.

On September 29, 2008, the prosecution filed a motion in limine seeking to prevent defendant from offering any evidence pertaining to her alleged inability to pay the ordered child support. The prosecution argued that, as this Court held in *People v Adams*, 262 Mich App 89; 683 NW2d 729 (2004), the failure to pay child support in violation of MCL 750.165 is a strict-liability offense; thus, evidence of an alleged inability to pay is immaterial and irrelevant. The trial court agreed and granted the motion in limine, holding that "inability to pay is not a defense. Something should have been raised earlier for a modification, but it wasn't." A jury trial began on November 14, 2008, and defendant was convicted as charged.

On November 25, 2008, defendant moved for relief from an unconstitutional statute and for reconsideration of the order granting the prosecution's motion in limine precluding her from asserting as a defense the inability to pay. Defendant primarily argued that MCL 750.165 is unconstitutional because, as a strict-liability

offense, it does not require defendant to have a morally culpable mental state regarding nonpayment of child support. The motion was denied. On December 22, 2008, defendant was sentenced to probation for one year. On February 2, 2009, defendant filed this appeal. On March 16, 2009, defendant filed with the trial court a motion for a new trial, primarily arguing that her rights under Michigan's Due Process Clause, as interpreted by *Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889), were violated because she was not allowed to present as a defense her inability to pay child support. Relying on *Adams*, 262 Mich App at 99-100, which made it clear that inability to pay is not a defense to this strict-liability offense, the trial court denied the motion.

On appeal, defendant first argues that she is entitled to a new trial because her rights under Michigan's Due Process Cause were denied by the trial court's order prohibiting her from presenting as a defense her inability to pay the ordered child support. We disagree.

This Court reviews de novo questions of constitutional law. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion as is a trial court's decision on a motion for a new trial. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008); *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Blackston*, 481 Mich at 460.

In her brief on appeal, defendant argues that, in accordance with our Supreme Court's decision in *Jenkinson*, 77 Mich at 419-420, "the Michigan Constitution forbids the interpretation of MCL 750.165 as a statute which prevents the presentation of an inability to pay

defense, thus criminalizing an involuntary omission." In *Jenkinson*, the impoverished defendant was prosecuted for failing to comply with a local ordinance that imposed a duty on property owners and occupants to " 'keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate' " and provided that " 'any such person failing or refusing to build or repair any such sidewalk . . . for ten days after notice to him . . . shall be deemed a violator of this ordinance.' " *Id.* at 416 (citation omitted). The *Jenkinson* Court found that the ordinance was unconstitutional, and therefore void, on the ground that "[n]o legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his non-performance of such duty a crime, for which he may be punished by both fine and imprisonment." *Id*. at 419-420. Defendant's reliance on *Jenkinson* is misplaced.

Defendant claims that MCL 750.165 is unconstitutional because, just as in *Jenkinson*, the government imposed an impossible duty on her, specifically, the duty of paying child support in the amount of $1,131 a month despite her poverty. Defendant further contends that she was unconstitutionally prevented from presenting her defense of poverty to this strict-liability offense. But unlike the defendant in *Jenkinson*, defendant was prosecuted for failing to comply with a court order that was entered after a judicial determination was made that defendant had the financial means to comply with the court order, i.e., the duty imposed on defendant *was* adjudged possible for her to perform.

Defendant was a party to several civil proceedings in which the family division modified her child support obligation. Those proceedings afforded her ample op-

portunity to present evidence of her ability or inability to pay an increased amount of child support. During those proceedings, evidence was adduced that while defendant was paying $181 a month in support for her three minor children, she purchased a house worth about $500,000 by securing two mortgages in her name that obligated her to pay $3,000 a month. She also purchased a brand new vehicle. Thereafter, defendant was adjudged, in accordance with the evidence of her standard of living, to be capable of paying child support in the amount of $1,131 a month for her three minor children. Thus, unlike the situation in *Jenkinson*, the government did not blindly impose on defendant a duty that was impossible for her to perform. Rather, after a full and fair hearing, the court determined what defendant could pay and imposed on her an accordant duty to do so.

Defendant's claim of ineffective assistance of counsel is premised on her attorney's failure to "bring *Jenkinson* to the trial court's attention and to raise a claim under the Michigan Constitution . . . ." Because defendant's constitutional argument is without merit, her ineffective assistance of counsel claim, which is premised on that argument, also fails. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant's argument is actually an impermissible collateral attack on the underlying support order. Pursuant to MCL 600.1021, the family division of circuit court has sole and exclusive jurisdiction over cases of divorce and ancillary matters, including those matters set forth in the Support and Parenting Time Enforcement Act, MCL 552.601 to 552.650. Under MCL 552.16(1), the court that enters a divorce judgment "may enter the orders it considers just and proper concerning the care, custody, and, as prescribed in

section 5 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605, support of a minor child of the parties." Under MCL 552.605, the court that orders the payment of child support must generally order child support in an amount determined by application of the child support formula, unless the court specifically finds that its application would be unjust or inappropriate. "[A] support order that is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date the support amount is due . . . with the full force, effect, and attributes of a judgment of this state . . . ." MCL 552.603(2). Pursuant to MCL 552.1224(1), the "tribunal of this state that issues a support order consistent with this state's law has continuing, exclusive jurisdiction over a child support order" if the parties and children at issue remain residents of this state. Accordingly, with regard to domestic relations actions, MCR 3.205(C) provides:

> (1) Each provision of a prior order remains in effect until the provision is superseded, changed, or terminated by a subsequent order.
>
> (2) A subsequent court must give due consideration to prior continuing orders of other courts, and may not enter orders contrary to or inconsistent with such orders, except as provided by law.

Here, defendant was prosecuted for the criminal offense of violating MCL 750.165, which states, in pertinent part:

> (1) If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both.

> (2) This section does not apply unless the individual ordered to pay support appeared in, or received notice by personal service of, the action in which the support order was issued.

Defendant argues that she should have been permitted to present the defense of inability to pay during her criminal trial. However, such a defense merely attempts to challenge the amount of the support ordered in the civil proceeding by a court that has sole, exclusive, and continuing jurisdiction over the support order—an order that is a judgment having the "full force, effect, and attributes of a judgment of this state . . . ." MCL 552.603(2). "[A] collateral attack occurs wherever a challenge is made to a judgment in any manner other than through a direct appeal." *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995). Thus, defendant's attempt to challenge the child support order in her criminal trial by claiming an inability to pay the amount ordered was properly denied and did not constitute an abuse of discretion. As simply stated in *Adams*, 262 Mich App at 96, " '[t]he Michigan nonsupport statutes generally reflect the rule that the offense presupposes the ability to pay.' " (Citation omitted.)

Defendant also argues that her rights to due process under the federal and state constitutions are offended by characterization of the statute as a strict-liability offense for which inability to pay is not a defense. See *id.* at 99-100. She claims that her failure to pay the child support as ordered could not have been a voluntary act if "it was completely impossible for her to pay," i.e., the *actus reus* component of the crime would have been lacking. This argument, too, fails. As our Supreme Court held in *People v Monaco*, 474 Mich 48, 56-58; 710 NW2d 46 (2006), felony failure to pay child support is not a continuing crime, but is complete at the time that the individual fails to pay the ordered amount at the

ordered time. That is, the *actus reus* is the failure to pay the support as ordered. As discussed earlier, defendant was afforded numerous opportunities in the civil proceedings to establish her inability to pay the ordered amount of child support. Those civil proceedings provided the proper forum and time to adjudicate such a claim. Accordingly, defendant was not denied due process on the ground that, because the offense imposes strict liability, she was prevented from proving that her failure to pay child support in compliance with the court order was involuntary.

Further, the order that increased defendant's child support obligation was entered on August 23, 2006, and was given retroactive effect to June 1, 2005. Defendant's motion for reconsideration was denied. Nevertheless, in 2006, defendant paid no child support. In 2007, she paid a total of $488.85 in child support. In 2008, through March, she paid $100. The charges of felony nonsupport were not filed until March 2008. During the extended period between the entry of the child support order at issue and the filing of the criminal charge, it does not appear from the record evidence that defendant sought again to have the support order modified. And it does not appear, for example, that she filed a motion in the circuit court under MCL 552.605e for a payment plan to pay arrearages and to discharge or abate arrearages, particularly after her receipt of social security disability benefits. Had she properly raised a challenge to her ability to pay the ordered child support, as well as any of her bona fide efforts to pay such support, they would have been considered and adjudicated by the court that issued the support order. However, defendant did not seek those, or any other, remedies before she was prosecuted under MCL 750.165.

Defendant also seems to argue that she was denied her due process right to present a defense because she was prohibited from arguing that "it was impossible for her to comply with her child support order . . . ." We disagree. Whether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question subject to review de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The right to present a defense is a fundamental element of due process, but it is not an absolute right. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). The right extends only to relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The elements of the crime of felony nonsupport are

> (1) the defendant was required by a decree of separate maintenance or divorce order to support a child or current or former spouse, (2) the defendant appeared in or received notice by personal service of the action in which the order was issued, and (3) the defendant failed to pay the required support at the time ordered or in the amount ordered. [*People v Monaco*, 262 Mich App 596, 606; 686 NW2d 790 (2004), aff'd in part and rev'd in part on other grounds 474 Mich 48 (2006).]

Clearly, evidence of the inability to pay was not relevant to any fact at issue. Therefore, the trial court did not abuse its discretion by declining to admit the evidence, and defendant's constitutional right to present a defense was not implicated. See *Katt*, 468 Mich at 278; *Kurr*, 253 Mich App at 327.

Finally, defendant argues that a new trial is required because the prosecutor improperly attacked defense counsel during closing rebuttal argument. Because defendant did not object to the prosecutor's remarks at trial, this issue is unpreserved and our review is for plain error affecting her substantial rights. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Error requiring reversal will not be found if a curative instruction could have alleviated any prejudicial effect, given that jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor "may not personally attack defense counsel." *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). The prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, but reversal is not required if the prosecutor's remarks are responsive to defense counsel's arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

In his closing argument, defense counsel emphasized facts that had no bearing on the elements of the crime. In response, the prosecutor argued that defense counsel's strategy was to distract the jury from the evidence. The prosecutor's remarks were an appropriate response

to defense counsel's argument and not a personal attack on defense counsel. Thus, there was no plain error. Moreover, a timely objection could have cured any perceived prejudice. Therefore, reversal is not required.

Affirmed.

PEOPLE v REID

Docket No. 286784. Submitted December 9, 2009, at Detroit. Decided June 10, 2010, at 9:00 a.m.

Michael D. Reid was charged in Wayne Circuit Court with felony drug possession and the misdemeanor of operating a motor vehicle while intoxicated. On the day of trial, the prosecutor moved to dismiss the felony drug possession charge, leaving only the misdemeanor charge. The jury convicted defendant of the misdemeanor, and defendant appealed.

The Court of Appeals *held*:

Because the felony charge was dismissed before trial commenced, the circuit court lacked jurisdiction over the misdemeanor charge and should have remanded the case to the district court, which had jurisdiction over the misdemeanor charge under MCL 600.8311(a), for trial on that charge.

Reversed.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kim L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Janice M. Joyce Bartee*, Assistant Prosecuting Attorney, for the people.

Rubin & Shulman, PLC (by *Allan S. Rubin* and *Neil B. Pioch*), for defendant.

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

SAWYER, J. This case presents the question whether the circuit court possesses the jurisdiction to try a defendant on a misdemeanor charge when the accompanying felony charge was dismissed before the beginning of trial. We hold that it does not and that the

circuit court erred by trying defendant on the misdemeanor charge rather than remanding the matter to the district court for trial.

This case arises from a traffic stop by the Michigan State Police in Wayne County. The traffic stop resulted in defendant being arrested for operating a motor vehicle while intoxicated (OWI).[1] A search of defendant's vehicle yielded pill bottles and pills, with one of the bottles missing a label. Defendant was originally charged with felony drug possession and misdemeanor OWI. On the day of trial, however, the prosecutor moved to dismiss the felony drug charge, apparently because it had been determined that defendant did, in fact, have a valid prescription for the pills. Thus, only the misdemeanor charge remained. Defendant was convicted on the misdemeanor OWI charge and sentenced to 93 days in jail.

MCL 767.1 generally grants the circuit court jurisdiction over all criminal cases, felony and misdemeanor. But MCL 600.8311(a) specifically grants the district court jurisdiction over misdemeanors punishable by not more than one year in jail. In *People v Veling*,[2] the Supreme Court reviewed the circumstances under which the circuit court may exercise jurisdiction over criminal cases that otherwise belong in other courts. *Veling* itself dealt with juveniles charged as adults under the automatic-waiver statute but convicted of lesser offenses not included within that statute. In resolving that issue, the Court considered the historical circumstances under which the circuit court maintains jurisdiction over misdemeanors. The Court identified three such circumstances.[3]

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[1] MCL 257.625(1)

[2] *People v Veling*, 443 Mich 23, 32-35; 504 NW2d 456 (1993).

[3] *Id.*

First, relying on *People v Schoeneth*,[4] the *Veling* Court noted that the circuit court maintains jurisdiction to sentence a defendant charged with a felony but convicted of a lesser included misdemeanor. Second, relying on *People v Loukas*,[5] the *Veling* Court observed that when a defendant is charged with multiple counts involving both felony and misdemeanor charges arising out of the same transaction, the circuit court possesses jurisdiction over the misdemeanor as well as the felony charges.[6] And, third, relying on *People v Shackelford*,[7] the *Veling* Court stated that when a posttrial action eliminates a felony charge, the circuit court retains jurisdiction to sentence on the remaining misdemeanor.[8]

None of these circumstances was present here. Had trial commenced on both charges and the felony charge been dismissed by motion or directed verdict, perhaps the *Schoeneth* exception could be said to have applied. But that is not what happened. The felony charge was dismissed before trial. Once that occurred and only a misdemeanor charge that came within the district court's jurisdiction under MCL 600.8311 remained, we believe that under *Veling* the appropriate course of action for the circuit court was to remand the matter to the district court rather than for the circuit court to proceed to trial solely on the misdemeanor charge.

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[4] *People v Schoeneth*, 44 Mich 489; 7 NW 70 (1880).

[5] *People v Loukas*, 104 Mich App 204; 304 NW2d 532 (1981).

[6] It is on this basis that both of the charges here were to be tried together in circuit court. The misdemeanor followed the felony charge to circuit court.

[7] *People v Schakelford*, 146 Mich App 330; 379 NW2d 487 (1985).

[8] In *Shackelford*, the defendant was tried on a misdemeanor marijuana possession charge that was enhanced to a felony as a second offense. Defendant was convicted of the felony possession charge, but thereafter the prosecutor moved to dismiss the felony enhancement, leaving only the misdemeanor possession charge. *Id.* at 332-333.

Finally, we note that the prosecution's reliance on *People v Goecke*[9] is misplaced. *Goecke* dealt more with the issue of personal jurisdiction than the issue of subject-matter jurisdiction and, more specifically, the question whether the prosecution must proceed by an appeal in the circuit court or by a motion to amend the information in the circuit court when challenging a district court's decision to bind a defendant over on one felony charge but dismiss a different felony charge. This is a significantly different issue from that presented in this case.

In light of our resolution of this issue, we need not address the remaining issues raised by defendant.

Reversed.

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[9] *People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998).

TICE ESTATE v TICE

Docket No. 290716. Submitted June 3, 2010, at Detroit. Decided June 10, 2010, at 9:05 a.m.

Robert Porter brought an action in his own name against Scott M. Tice and Barbara E. Tice in the Muskegon Circuit Court. Porter sought title to a parcel of property that his deceased mother, Gloria Tice, had transferred to Barbara in a quitclaim deed before her death. Barbara had subsequently transferred the property to her son Scott. Porter alleged that the transfer to Barbara was fraudulent and that the deed was insufficient. Defendants moved for summary disposition, asserting that Porter was not the real party in interest. The court, James M. Graves, Jr., J., agreed, but granted Porter's motion for leave to file an amended complaint. After reopening the estate, Porter filed an amended complaint as personal representative, with the estate designated as the plaintiff. Defendants then filed a second motion for summary disposition, contending that the case was barred by the statute of limitations. Plaintiff countered that the action was timely because the amended complaint related back to the original filing under MCR 2.118(D). The court ruled that the relation-back doctrine did not apply because the estate was a new party and granted defendants' motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

1. The relation-back doctrine does not extend to the addition of new parties, but when a plaintiff has brought an action in the wrong capacity, a new plaintiff is allowed to take advantage of the original action if the original plaintiff had an interest in the subject matter of the controversy. In this case, the estate should have been permitted to take advantage of the original filing because Porter, as Gloria's sole heir, had an interest in the subject matter of the controversy.

2. MCL 700.3701 also supports application of the relation-back doctrine in this case. The statute requires that a personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as acts occurring after appointment. Under the statute, Porter's act of commencing the suit should

have been given the same effect as if, at the time, he had been the personal representative of the decedent.

Reversed and remanded.

1. PLEADING — AMENDMENT OF PLEADINGS — NEW PARTIES — SUBSTITUTION OF PARTIES — RELATION-BACK DOCTRINE.

The relation-back doctrine, which provides that an amended complaint relates back in time to the filing of the original complaint, does not extend to the addition of new parties, but when a plaintiff has brought an action in the wrong capacity, a new plaintiff may take advantage of the original action—for example, to avoid a statute of limitations—if the original plaintiff had an interest in the subject matter of the controversy (MCR 2.118[D]).

2. EXECUTORS AND ADMINISTRATORS — PERSONAL REPRESENTATIVES — POWERS OF PERSONAL REPRESENTATIVES — RELATION-BACK DOCTRINE.

A personal representative's powers relate back in time to give his or her acts before appointment that were beneficial to the estate the same effect as those occurring after appointment (MCL 700.3701).

Mary E. Farrell, PLLC (by *Mary E. Farrell*), for plaintiff.

Ladas & Hoopes Law Offices, PLC (by *Kenneth S. Hoopes*), for defendants.

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

PER CURIAM. In this dispute over a parcel of real property, plaintiff, the estate of Gloria Tice, appeals as of right the trial court's order granting summary disposition to defendants on the basis of statute of limitations. Because we conclude that the relation-back doctrine of MCR 2.118(D) applies to the amended complaint, we reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

Gloria Tice was the owner of a five-acre parcel of real

property in Holton, Michigan. Defendant Barbara Tice, who was related to Gloria's deceased husband, served as Gloria's caregiver in 1999. On August 30, 1999, Gloria executed a quitclaim deed transferring the property to Barbara for $1. Barbara subsequently transferred the property to her son, defendant Scott Tice.

Gloria died on January 24, 2004, leaving her son, Robert Porter, as the personal representative of her estate. Porter testified that he believed Gloria had transferred either an acre or an acre and a half of the parcel to Barbara, but he was unaware that she had transferred the entire five-acre parcel to Barbara. According to Porter, he discovered that defendants were claiming title to the entire property in June 2006.

Porter brought suit in his own name against defendants on April 16, 2008. He sought title to the property, alleging that the transfer to Barbara was fraudulent and that the quitclaim deed to her was insufficient. Defendants moved for summary disposition under MCR 2.116(C)(5), arguing that Porter was not the real party in interest and that Porter should have brought the suit as the personal representative of the decedent. The trial court agreed with defendants that the case was improperly brought by Porter, but granted Porter's motion for leave to file an amended complaint. After reopening the estate, which had been administratively closed, Porter filed an amended complaint on November 3, 2008, as the personal representative, with the estate designated as the plaintiff. Defendants filed a second motion for summary disposition under MCR 2.116(C)(7), contending that the case was barred by the statute of limitations. The trial court agreed and granted summary disposition to defendants.

II. ANALYSIS

The estate argues that because the amended complaint only changed the name of the plaintiff, rather than adding a new plaintiff, the trial court erred by holding that the amended complaint was barred by the statute of limitations. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). Summary disposition is appropriate under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . [the] statute of limitations . . . ." "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002) (quotation marks and citation omitted).

Porter relied on MCL 600.5855 in asserting the timeliness of the original complaint. MCL 600.5855 provides:

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

The trial court found that there was an issue of fact regarding whether Porter was aware of the alleged fraudulent conveyance in 1999 or whether he discov-

ered it in June 2006. However, because the complaint was not amended to reflect that the estate was the plaintiff until after the two-year period arguably provided by MCL 600.5855 had expired, the trial court determined that the action was not timely filed. In so holding, the court ruled that the relation-back doctrine of MCR 2.118(D) did not apply because the estate was a new party.

MCR 2.118(D) provides:

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

This Court has previously held that "the relation-back doctrine does not extend to the addition of new parties." *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991); see also *Hurt v Michael's Food Ctr, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996). We conclude, however, that the present case is distinguishable from *Employers Mut* and *Hurt* on the basis of *Stamp v Mill Street Inn*, 152 Mich App 290; 393 NW2d 614 (1986). In *Stamp*, which concerned the substitution of a party rather than the addition of a new party, the Court held that

> amendment of pleadings may be allowed to change the identity of a party plaintiff where the plaintiff originally brought an action in the wrong capacity and the new plaintiff may be allowed to take advantage of the former action if the original plaintiff had, in any capacity, either before or after the commencement of the action, an interest in the subject matter of the controversy. [*Id*. at 298.]

In this case, Porter, as Gloria's sole heir, had an interest in the subject matter of the controversy. Presuming for the sake of analysis that the estate's action

will be successful, Porter will be the ultimate beneficiary. Thus, under the *Stamp* rule, the estate should have been allowed to take advantage of Porter's filing of the original complaint.

Peculiar to this case, there is also statutory support for such a holding. MCL 700.3701 provides:

> A personal representative's duties and powers commence upon appointment. A personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment. Subject to [MCL 700.3206 to 700.3208], before or after appointment, a person named as personal representative in a will may carry out the decedent's written instructions relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative.

Under this statute, it appears that Porter's act of commencing the suit should have been given the same effect as if, in April 2008, he had been the personal representative of the decedent. If Porter had been the personal representative at the time that he filed suit, then the only issue would have been that the case was not properly captioned. This Court has held that the form of the caption is generally not of particular importance. *Howard v Bouwman*, 251 Mich App 136, 145-146; 650 NW2d 114 (2002), citing *Stamp*, 152 Mich App at 296.

From the foregoing, we conclude that the amended complaint related back in time to the filing of the original complaint. The relation-back doctrine does not extend to the addition of new parties, *Employers Mut*, 190 Mich App at 63, but when a plaintiff has brought an action in the wrong capacity, a new plaintiff is allowed

to take advantage of the original action if the original plaintiff had an interest in the subject matter of the controversy, *Stamp*, 152 Mich App at 298. Under the *Stamp* rule, the estate should have been allowed to advantage of the original filing because Porter, as Gloria's heir, had an interest in the subject matter of the controversy. Permitting relation back is also supported by MCL 700.3701, under which Porter's act of commencing the suit should have been given the same effect as if, at the time, he was the decedent's personal representative. Notably, defendants had notice within the statutory period that they would have to defend against claims of a fraudulent transfer and an insufficient deed. Thus, ruling in the estate's favor will not undermine the purpose of the statute of limitations. See *Stamp*, 152 Mich App at 299, citing 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 416.

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

WHITMAN v GALIEN TOWNSHIP

Docket No. 287991. Submitted June 2, 2010, at Grand Rapids. Decided June 10, 2010, at 9:10 a.m.

The Galien Township Zoning Board of Appeals granted a special-use permit allowing the owners of a parcel of property in the township's agricultural zoning district to operate a snowmobile, dirt bike, and ATV racetrack on that property. Daniel H. Whitman, Larry and Mary Piccoli, and others appealed the zoning board's decision in the Berrien Circuit Court. The court, John E. Dewane, J., affirmed the grant of the special-use permit. Plaintiffs sought leave to appeal to the Court of Appeals, which denied leave. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 485 Mich 859 (2009).

The Court of Appeals *held*:

Plaintiffs contended that the zoning board's decision did not comport with the law because the Galien Township Zoning Ordinance did not comply with the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*. A local unit of government may only regulate land use through zoning to the limited extent authorized by the Legislature. Under MCL 125.3502(1)(a), the MZEA allows for special-use permits if the local ordinance specifically identifies the special land uses and activities eligible for approval. The township zoning ordinance failed to comply with this requirement because it identified only general categories of uses or activities eligible for special-use status. Because the zoning ordinance did not comply with the MZEA, the zoning board's decision to grant a special-use permit did not comport with the law, and the circuit court erred by affirming the board's decision.

Reversed; special-use permit vacated.

ZONING — MICHIGAN ZONING ENABLING ACT — SPECIAL-USE PERMITS.

The Michigan Zoning Enabling Act requires that a local zoning ordinance specifically identify the land uses and activities that are eligible for special-use status (MCL 125.3502[1][a]).

Olson, Bzdok & Howard, P.C. (by *Jeffrey L. Jocks* and *James M. Olson*), for Daniel H. Whitman, Larry Piccoli, and Mary Piccoli.

Desenberg, Colip & Bell, P.C. (by *Sara A. Bell* and *Louis Desenberg*), for Galien Township and the Galien Township Zoning Board of Appeals.

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

O'CONNELL, J. On September 30, 2008, plaintiffs filed an application for leave to appeal the circuit court's September 9, 2008, order affirming defendant Galien Township Zoning Board of Appeals' grant of a special-use permit to Timothy Richter and Corrine Hoetger (the applicants). The permit was granted pursuant to the Galien Township Zoning Ordinance. Specifically, the circuit court affirmed the zoning board's grant of a special-use permit to allow the operation of a snowmobile, dirt bike, and ATV racetrack during the summer months in the township's agricultural zoning district. This Court denied plaintiffs' application for leave to appeal. *Whitman v Galien Twp*, unpublished order of the Court of Appeals, entered February 20, 2009 (Docket No. 287991). The Supreme Court subsequently remanded the case to this Court for consideration as on leave granted. *Whitman v Galien Twp*, 485 Mich 859 (2009).[1] For the reasons stated in this opinion, we reverse the circuit court's order affirming the zoning board and vacate the special-use permit.

The applicants own a 70-acre parcel of property in Galien Township located at the corner of Mt. Zion Road

[1] By stipulation of the parties, George Klingspon, Etta Klingspon, Edward Howard, and Lois Howard were dismissed from the application for leave to appeal in the Michigan Supreme Court. *Whitman v Galien Twp*, 764 NW2d 788 (Mich, 2009). As used in this opinion, the term "plaintiffs" refers to Daniel H. Whitman, Larry Piccoli, and Mary Piccoli.

and US-12, a major highway in the township's agricultural zoning district. Several residential homes are located near the property. The township's agricultural zoning district is governed by a zoning ordinance that provides in pertinent part:

> The following uses and regulations shall apply in the Agricultural District.
>
> **SECTION 2.4 A – PERMITTED USES**
>
> 1. Any use allowed in an "A" Residential District.
>
> 2. Farming, including the raising of livestock, raising trees, and harvesting wood, excluding animal confinement or production feeding operations.
>
> 3. Sale of products produced mainly on the premises.
>
> 4. Mobile homes subject to the provisions of Section 3.1.
>
> **SECTION 2.4 B – USES BY SPECIAL PERMIT AS PROVIDED FOR BY SECTION 3.13**
>
> 1. Rooming Houses or Boarding Houses, subject to the provisions of Section 3.13[2] (Special Use Permits & Building Standards).

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[2] Section 3.13 provides, in relevant part:

> Uses requiring special permits are those uses of land which are not essentially incompatible with the uses permitted in a zoning district, but possess characteristics or locational qualities which require individual review and restriction in order to avoid incompatibility with the character of the surrounding area, public services and facilities, and adjacent uses of land. Proposed uses will be evaluated according to their compatibility with the nature, extent and density of the surrounding area.
>
> Special permit uses may be permitted only in those zoning districts where they are designated by this Ordinance, and only when specifically approved by the Galien Township Zoning Board in accordance with the provisions of this Ordinance.
>
> Prior to the approval of a Special Use Permit, the Zoning Board shall insure that the standards specified in this Section, as well as standards established elsewhere in this Ordinance shall be satisfied. All uses by special permit shall comply with each of the following standards and requirements:

2. Establishments for the conducting of commercial or industrial activities, subject to approval of the Zoning Board.

3. Animal confinement or production feeding operations.

4. Outdoor display and advertising media as provided by Section 3.17.

(a) The nature, location, and size of the special use shall not change the essential character of the surrounding area, nor disrupt the orderly and proper development of the district as a whole. The use shall not be in conflict with, or discourage the adjacent or neighboring lands or buildings.

(b) The special use shall not diminish the value of the land, buildings or structures in the neighborhood.

(c) The special use shall not increase traffic hazards or cause congestion on the public highways or streets of the area. Adequate access to the parcel shall be furnished.

(d) The water supply and sewage disposal system shall be adequate for the proposed special use by conforming to State and County Health Department requirements, and the special use shall not over-burden any existing services or facilities.

(e) Any agricultural use shall be conducted in conformity with generally accepted agricultural practices and shall not be located within 1000 feet of existing residential structures.

(f) Uses by special permit shall not be significantly more objectionable to nearby properties by reason of traffic, noise, vibrations, dust, fumes, odor, smoke glare, lights, or disposal of waste than the operation of any principal permitted use, nor shall the special use increase hazards from fire or other damages to either the property or adjacent property.

(g) The Zoning Board may require that the premises be permanently screened from adjoining or contiguous properties by a wall, fence, plant screen and/or other approved enclosure when deemed necessary to buffer the surrounding uses from objectionable noise, light, etc., created by the special use.

(h) The special use shall be consistent with the intent and purpose of this Ordinance. The special use shall be compatible with the natural environment and shall not [be] inimical to the public health, safety and general welfare. [Galien Township Zoning Ordinance, art III, § 3.13.]

> 5. Automobile or travel trailers subject to the provisions of Section 3.11. [Galien Township Zoning Ordinance, art II, § 2.4.]

On or about September 11, 2006, the applicants applied for a special-use permit to construct and operate a snowmobile, dirt bike, and ATV racetrack on their property during the summer months. Specifically, the applicants requested a special-use permit to allow the operation of ATV and dirt bike drag races on dirt tracks and snowmobile races on a pond that the applicants planned to construct on the property.[3] The zoning board granted the permit without making any findings of fact or conclusions of law on the record. Plaintiffs, and several neighboring landowners, appealed the board's decision in the circuit court. Thereafter, because the board had failed to create a proper record for review, the parties stipulated that the board would hold a rehearing.

The zoning board concluded that the proposed racetrack was a permissible commercial use for purposes of a special-use exception in the agricultural district, but found that the applicants failed to submit a proper site plan. After receiving the requested information and holding another hearing, the board found that the applicants' plan satisfied all requirements listed in § 3.13 of the zoning ordinance for granting a special-use permit.

After making findings on the record, the zoning board approved the special-use permit with restrictions.[4] On appeal, the circuit court ruled that the board

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[3] The applicants referred to snowmobile racing in the summer over a body of water as "watercross."

[4] In particular, the zoning board restricted operation of the racetrack to four Saturdays a year in July, August, September, and October. The board

had properly concluded that it had authority to grant a special-use permit for the racetrack in the agricultural district. The circuit court held that the zoning board had authority under the ordinance to issue a special-use permit because a racetrack qualified as a "commercial use" under § 2.4B(2) of the ordinance. In so holding, the circuit court determined that a zoning board may authorize a special-use permit even if the proposed use is not specifically enumerated in the applicable zoning ordinance. The circuit court held that the board's findings with respect to seven of the eight factors listed in § 3.13 of the zoning ordinance were supported by competent, material, and substantial evidence on the record, but remanded the case back to the zoning board for further findings regarding whether the proposed racetrack would diminish the value of the land, buildings, or structures in the surrounding neighborhood.

After another hearing and an opportunity for public comment, the zoning board found that the racetrack would not diminish the value of neighboring properties. On appeal, the circuit court ruled that the board's findings were supported by competent, material, and substantial evidence and affirmed the board's decision to grant the applicants a special-use permit.

On appeal, plaintiffs contend that the zoning ordinance unlawfully delegates legislative power to the zoning board by allowing the board to issue special-use permits within the agricultural zoning district to any establishment for "commercial or industrial activities." Galien Township Zoning Ordinance, art II, § 2.4B(2). However, the question whether the zoning ordinance

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restricted the timing of the races to 8:00 a.m. to 10:00 p.m. in July and August and 8:00 a.m. to 8:00 p.m. in September and October. The board allowed the applicants to hold races on Sunday if scheduled Saturday races were rained out. In addition, the board required two weeks' notice of the races and prohibited commercial camping on the property.

unlawfully delegates legislative power to the zoning board was not raised in the circuit court. Thus, plaintiffs failed to preserve this issue for our review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). "[T]his 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." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citation omitted). Because this Court is not obligated to address issues raised for the first time on appeal, and considering that manifest injustice would not result from our failure to consider this issue, we decline to address it. See *Polkton Charter Twp*, 265 Mich App at 95-96.

Next, plaintiffs claim that the zoning board's decision did not comport with the law because the zoning ordinance does not comply with the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*. We agree. Although this issue is also unpreserved, it involves a question of law, and the facts necessary for its resolution have been presented. In addition, failure to consider this issue would result in manifest injustice because the grant of the special-use permit did not comport with the law. See *Smith*, 269 Mich App at 427. Therefore, we will consider the issue on the merits.

We review de novo a circuit court's decision in an appeal from a zoning board. *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 458; 773 NW2d 730 (2009). When reviewing a zoning board's decision whether to issue an exception to a zoning ordinance, " 'this Court must review the record and . . . [the board's decision] . . . to determine whether

it (1) comports with the law, (2) was the product of proper procedure, (3) was supported by competent, material, and substantial evidence on the record, and (4) was a proper exercise of reasonable discretion.' " *Id*. (citations omitted). A decision by a zoning board that violates a statute or the constitution is not authorized by the law. *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 488; 586 NW2d 563 (1998). We review de novo issues involving the construction of statutes and ordinances. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

Municipalities have no inherent power to regulate land use through the enactment of zoning legislation; instead, a local unit of government must be specifically authorized by the Legislature to exercise any zoning authority. *Krajenke Buick Sales v Hamtramck City Engineer*, 322 Mich 250, 254; 33 NW2d 781 (1948). The Legislature has granted municipalities the power to zone through the enactment of enabling legislation. *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000). A local unit of government may regulate land use through zoning only to the limited extent authorized by that legislation. *Krajenke*, 322 Mich at 254-255.

In 2006, the Legislature consolidated the three separate zoning enabling acts for cities and villages, townships, and counties into the MZEA. The MZEA governs the creation and administration of local zoning ordinances and provides in relevant part:

> The legislative body of a local unit of government may provide by ordinance for the manner in which the regulations and boundaries of districts or zones shall be determined and enforced or amended or supplemented. Amendments or supplements to the zoning ordinance shall be adopted in the same manner as provided under this act for the adoption of the original ordinance. [MCL 125.3202(1).]

The MZEA also provides that a local zoning ordinance may include provisions for special-use permits within a zoning district as follows:

> The legislative body may provide in a zoning ordinance for special land uses in a zoning district. A special land use shall be subject to the review and approval of the zoning commission, the planning commission, an official charged with administering the zoning ordinance, or the legislative body as required by the zoning ordinance. The zoning ordinance shall specify all of the following:
>
> (a) The special land uses and activities eligible for approval and the body or official responsible for reviewing and granting approval.
>
> (b) The requirements and standards for approving a request for a special land use.
>
> (c) The procedures and supporting materials required for the application, review, and approval of a special land use. [MCL 125.3502(1).]

MCL 125.3504(1) further states that "[i]f the zoning ordinance authorizes the consideration and approval of special land uses . . . or otherwise provides for discretionary decisions, the regulations and standards upon which those decisions are made shall be specified in the zoning ordinance."

In this case, Galien Township apparently enacted its zoning ordinance in 2001 pursuant to the MZEA's predecessor, the Township Zoning Act (TZA), MCL 125.271 *et seq*., repealed by 2006 PA 110. *Hughes v Almena Twp*, 284 Mich App 50, 59; 771 NW2d 453 (2009); MCL 125.3702(1)(c). The provisions governing the issuance of special-use permits under the TZA were substantively identical to the language used in the MZEA. Compare MCL 125.286b(1) and MCL 125.286d(1) with MCL 125.3502(1) and MCL 125.3504(1). In any event, because this action arose after the effective date of the enactment

of the MZEA, the MZEA governs the resolution of this proceeding. *Hughes*, 284 Mich App at 59, citing MCL 125.3702(2).

The central issue in this case is whether § 2.4B(2) of the zoning ordinance complies with MCL 125.3502(1), which provides that if a zoning ordinance allows for special-use permits, the ordinance "shall specify . . . [t]he special land uses and activities eligible for approval . . . ." Section 2.4B(2) of the zoning ordinance provides that "[e]stablishments for the conducting of commercial or industrial activities" are eligible for special-use permits within the agricultural zoning district, subject to the zoning board's approval and compliance with the requirements set forth in § 3.13 of the ordinance. Plaintiffs contend that the zoning ordinance fails to "specify" the land uses and activities that are eligible for special-use permits because the ordinance generalizes that any establishment for commercial or industrial activities is eligible for special-use status. Thus, we must determine whether the provision of the ordinance conflicts with the MZEA. Resolution of this question necessarily involves the interpretation of statutes and ordinances.

For purposes of interpretation, ordinances and statutes are reviewed in the same manner. *Hughes*, 284 Mich App at 61. "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature . . . ." *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996). When a statute's language is clear, "we assume that the Legislature intended the plainly expressed meaning, and we enforce it as written." *Hughes*, 284 Mich App at 62. However, when a statute's language is ambiguous, "we apply a reasonable construction that best accomplishes the intent of the Legislature." *Id*. Unless other-

wise defined by statute, every word or phrase should be accorded its plain and ordinary meaning. *Risko*, 284 Mich App at 460. Statutes granting power to Michigan townships are construed liberally in the township's favor. *Hughes*, 284 Mich App at 62.

As stated earlier, the language from the MZEA at issue provides that a zoning ordinance "shall specify . . . [t]he special land uses and activities eligible for approval . . . ." MCL 125.3502(1). When used in a statute, the term "shall" is considered to mandate conduct. *Hughes*, 284 Mich App at 62. Because the terms at issue are not defined in the statute, see MCL 125.3102, consultation of dictionary definitions is appropriate. *Risko*, 284 Mich App at 460. *Random House Webster's College Dictionary* (1997) defines "specify" as "to mention or name specifically or definitely; state in detail" and as "to give a specific character to." It defines "specific" as "having a special application, bearing, or reference; explicit or definite" and as "specified, precise, or particular." *Id.* It defines "use" as "an instance or way of using something," as "a way of being used; a purpose for which something is used," as "continued, habitual, or customary employment or practice; custom," and as "the enjoyment of property, as by occupation or employment of it." *Id.* It defines "activity" as "a specific deed, action, function, or sphere of action[.]" *Id.* When these definitions are considered together, the statute can be read to mandate that a zoning ordinance must set forth in explicit, precise, definite, and detailed language both the customary uses and the specific actions and functions that are eligible for special-use permits. The legal definition of "special-use permit" supports this reading of the statute. Black's Law Dictionary (9th ed) defines a "special-use permit" as "[a] zoning board's authorization to use property in a way that is identified as a special exception in a zoning

ordinance." Accordingly, the MZEA's specificity requirement ensures that property uses and activities eligible for special-use status are identified in the language of the zoning ordinance.

The MZEA's requirement that a zoning ordinance specifically identify the land uses and activities that are eligible for special-use status encourages uniformity within a zoning district by placing limits on discretionary zoning decisions. See MCL 125.3201(2) ("Except as otherwise provided under this act, the regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district."). The MZEA's specificity requirement encourages consistency within a zoning district and guards against undesirable "spot zoning," which has been defined as "[a] zoning ordinance or amendment . . . creating a small zone of inconsistent use within a larger zone."[5] *Penning v Owens*, 340 Mich 355, 367; 65 NW2d 831 (1954). By requiring a zoning ordinance to specifically enumerate all land uses and

[5] Michigan courts closely scrutinize instances of "spot zoning." See *Raabe v City of Walker*, 383 Mich 165, 168-170, 174-179; 174 NW2d 789 (1970) (invalidating rezoning of a 180-acre parcel within a residential district from agricultural to industrial use when the industrial use was inconsistent with the surrounding area and there was no showing of a valid need for the rezoning for the sake of the public health, safety, and welfare); *Trenton Dev Co v Village of Trenton*, 345 Mich 353, 357-358; 75 NW2d 814 (1956) (invalidating the rezoning of three city blocks to single-family residential when the surrounding area was zoned for multiple dwellings and commercial use and noting that the inconsistency was invalid because there were no purported health, safety, or welfare considerations); cf. *Bruni v Farmington Hills*, 96 Mich App 664; 293 NW2d 609 (1980) (affirming special-use permit for cluster housing within low-density housing district because of unique character of the land); *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 277-278; 673 NW2d 815 (2003) (concluding that rezoning of an area from industrial to developmental despite the area's being surrounded by industrial use was not "spot zoning" when rezoning was in accordance with the master land-use plan).

activities that are eligible for a special-use permit, the MZEA guards against an administrative body's ability to haphazardly create small zones of inconsistent use within a larger district.

The MZEA's specificity requirement also operates to prevent an administrative body from engaging in rezoning by approving wholesale changes to the character of a zoning district. Rezoning is exclusively a legislative function. *Sun Communities*, 241 Mich App at 669. The specificity requirement, when coupled with the MZEA's requirement that the zoning ordinance include standards governing a zoning board's discretionary authority, serves to ensure that the ordinance complies with the Michigan Constitution and does not amount to an improper delegation of legislative authority.

Finally, one of the purposes of the MZEA is to provide for and facilitate the orderly development of land-use districts, whether residential, agricultural, industrial, or commercial. "The foundation of traditional zoning has been the division of the municipality into one or more land use districts. The intent is that these districts will be separated, organized, and regulated to achieve legitimate zoning objectives as set forth in the [MZEA] . . . ." Fisher et al., Michigan Zoning, Planning & Land Use (2010), § 1.3, p 5. In order to effectuate this intent, the MZEA provides:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, trans-

> portation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare. [MCL 125.3201(1).]

By requiring that a zoning ordinance specifically enumerate the land uses and activities that are eligible for special-use status, the MZEA helps to ensure that land-use districts are separated and created in an orderly manner.

Applying the interpretation of the language in the MZEA to the zoning ordinance at issue in this case, we conclude that the zoning ordinance does not comply with the enabling legislation. The zoning ordinance provides that "[e]stablishments for the conducting of commercial or industrial activities" are eligible for special-use status within the agricultural zoning district. Galien Township Zoning Ordinance, art II, § 2.4B(2). The ordinance does not define "commercial" or "industrial." *Random House Webster's College Dictionary* (1997) defines "commercial" as "of, pertaining to, or characteristic of commerce" and as "engaged in, used for, or suitable to commerce or business, [especially] of a public or nonprivate nature[.]" It defines "industrial" as "of or pertaining to a type of the nature of, or resulting from industry" and as "used or appropriate for use in industry[.]" *Id.* It defines "industry" as "any general business activity" and as "trade or manufacture in general[.]" *Id.* Considering these definitions, the language in the zoning ordinance sweeps broadly and makes all actions or functions (i.e., activities) pertaining to commerce, business, trade, manufacture, or industry in general eligible for special-use status within the agricultural zoning district. Section 2.4B(2) does not comply with MCL 125.3502(1) because it does

not specify the special land uses and activities eligible for approval, but identifies only general categories of uses or activities.

Section 3.13 of the ordinance does not change our conclusion. Section 3.13 does not identify which land uses or activities are eligible for special-use permits; instead, it sets forth standards to govern the zoning board's decision whether to grant a special-use permit to an eligible land use or activity. In addition to requiring that an ordinance specifically enumerate the land uses and activities that are eligible for special-use status, the MZEA also requires that a zoning ordinance specifically provide standards and criteria to govern a zoning board's discretionary decision whether to grant a permit for an eligible special use. The MZEA provides in relevant part that a zoning ordinance "shall specify" both "[t]he special land uses and activities eligible for approval and the body or official responsible for reviewing and granting approval" and "[t]he requirements and standards for approving a request for a special land use." MCL 125.3502(1). The fact that § 3.13 is specific and detailed regarding the "requirements and standards for approving a request for a special land use" does not save § 2.4B(2) from noncompliance with the statute for failure to specify the special land uses and activities eligible for approval.

Defendants' reliance on *Reilly v Marion Twp*, 113 Mich App 584; 317 NW2d 693 (1982), is unpersuasive. In *Reilly*, the plaintiffs appealed the zoning board's issuance of a special-use permit authorizing a commercial trucking operation within the township's agricultural-residential zoning district, arguing that the zoning board had acted outside the scope of its authority under the township's zoning ordinance. *Id*. at 585-587. This Court explained that the zoning ordi-

nance did not limit the zoning board's authority to grant special exceptions in cases involving only a use specified in the ordinance. *Id.* at 588. It noted, "The board is empowered under the ordinance to add to the list of special use exceptions those exceptions deemed necessary to protect adjacent properties, the general neighborhood, and its residents and workers . . . ." *Id.* The central issue in *Reilly* involved the interpretation of a zoning ordinance, while the central issue in this case concerns whether the zoning ordinance complies with the MZEA.

Because the zoning ordinance does not comply with the MZEA, the zoning board's decision to grant a special-use permit did not comport with the law, and the circuit court erred by affirming the board's decision.[6]

The circuit court's order affirming the zoning board is reversed. We vacate the special-use permit.

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[6] Plaintiffs also argue that the circuit court erred by affirming the zoning board's decision to grant the special-use permit because the board's conclusion that the racetrack qualified as a "commercial use" and its application of the factors set forth in § 3.13 of the ordinance were not supported by the evidence. Because we have determined that the zoning ordinance in question does not comply with the MZEA, we need not address this issue.

JOHNSON v DETROIT EDISON COMPANY

Docket No. 289763. Submitted May 11, 2010, at Detroit. Decided June 15, 2010, at 9:00 a.m.

Sandra Johnson and Hiram Jones brought an action in the Wayne Circuit Court against their employer, Detroit Edison Company, alleging that it committed an intentional tort under MCL 418.131(1) of the Worker's Disability Compensation Act (WDCA). Plaintiffs were burned when hot ash exploded from a boiler they were emptying. Plaintiffs contended that defendant knew the boiler was in a dangerous condition but did nothing to correct the problem. Defendant moved for summary disposition, asserting that plaintiffs had failed to present sufficient evidence of an intentional tort. The court, Wendy M. Baxter, J., denied defendant's motion. The Court of Appeals granted defendant's interlocutory application for leave to appeal.

The Court of Appeals *held*:

1. Generally, an employee's exclusive remedy against an employer for work-related personal injuries or occupational disease is the benefits provided by the WDCA. The sole exception to the rule allows recovery if the employee can prove that the employer committed an intentional tort. To establish an intentional tort pursuant to the WDCA, the evidence must show that the employer deliberately acted or failed to act with the purpose of inflicting an injury on the employee. In the absence of direct evidence to that effect, the plaintiff must proffer evidence that the employer had actual knowledge that an injury would follow from its actions or omissions, that an injury was certain to occur, and that the employer willfully disregarded its actual knowledge that an injury was certain to occur.

2. A jury may conclude that a plaintiff's employer knew the injury was certain to occur under MCL 418.131(1) if the plaintiff can show (1) that the employer subjected the plaintiff to a continuously operative dangerous condition that it knew would cause an injury, (2) that the employer knew that its employees were taking insufficient precautions to protect themselves against that danger, and (3) that the employer did nothing to remedy the situation.

3. Plaintiffs made the requisite evidentiary showing in support of their intentional tort claim for purposes of avoiding summary disposition. Plaintiffs proffered evidence that numerous supervisory employees and members of management were aware that the boiler was in disrepair and, as a result, that hot ash was building up and exploding. If believed, this evidence would demonstrate defendant's actual knowledge of the dangerous condition. Plaintiffs also proffered evidence that management was aware of previous ash spews, some of which had caused injuries; that defendant's employees had run from previous ash spews in order to avoid injury; and that management had discussed the need for boiler repairs and more appropriate apparel for defendant's employees. Viewed in the light most favorable to plaintiffs, this circumstantial evidence would be sufficient to establish that defendant had actual knowledge that an injury was certain to occur. Plaintiffs also proffered sufficient evidence of willful disregard by showing that defendant failed to remedy the dangerous condition that caused plaintiffs' injuries despite actual knowledge of the condition and an opportunity to correct it. The trial court properly denied defendant's motion for summary disposition.

Affirmed.

WORKERS' COMPENSATION — INTENTIONAL TORT EXCEPTION — DANGEROUS CONDITIONS — INJURIES — CERTAINTY OF INJURIES OCCURRING.

A jury may conclude that the plaintiff's employer knew that an injury was certain to occur under MCL 418.131(1) of the Worker's Disability Compensation Act for purposes of establishing that the employer committed an intentional tort if the plaintiff establishes (1) that the employer subjected the plaintiff to a continuously operative dangerous condition that it knew would cause an injury, (2) that the employer knew that its employees were taking insufficient precautions to protect themselves from that danger, and (3) that the employer did nothing to remedy the situation.

Edwards & Jennings, P.C. (by *Carl R. Edwards*), for plaintiffs.

Miller, Canfield, Paddock & Stone, P.L.C. (by *W. Mack Faison*, *Douglas W. Crim*, and *Kimberly A. Berger*), for defendant.

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM. This action requires us to determine whether plaintiffs, Sandra Johnson and Hiram Jones, proffered sufficient circumstantial evidence that defendant, Detroit Edison Company, committed an intentional tort under the exception to the exclusive remedy of the Worker's Disability Compensation Act (WDCA) found in MCL 418.131(1). For the purpose of summary disposition, we conclude that plaintiffs met their burden. Specifically, we hold that a jury may conclude that an employer knew an injury was "certain to occur" under MCL 418.131(1) if a plaintiff can show that (1) the employer subjected the plaintiff to a continuously operative dangerous condition that it knew would cause an injury, (2) that the employer knew that its employees were taking insufficient precautions to protect themselves against that danger, and (3) that the employer did nothing to remedy the situation. The trial court properly denied defendant's motion for summary disposition under MCR 2.116(C)(10).

I. BASIC FACTS

At the time relevant to this lawsuit, plaintiffs were employed as power plant operators by Detroit Edison Company. In this capacity, plaintiffs were required to dump bottom ash from four industrial furnaces, or boilers, including Boiler No. 19 (Boiler 19). The boilers' by-products, including hot ash and unburned coals, were typically emptied once a day. An operator would open the boiler's ash gate, and the ash would fall through a sluice trough and be carried away by running water. If, after opening the boiler's ash gate, large coals, or "clinkers," remained, the operator would be required to break them loose with a long poker in order to sufficiently clear the boiler. Employees engaged in bottom-ash dumping were required to wear safety glasses, hardhats, earplugs, cotton gloves, jeans, a shirt, and work shoes.

On April 28, 2007, plaintiffs were in the process of emptying bottom ash from Boiler 19 when hot ash exploded from it and covered plaintiffs. Johnson suffered serious burns, and Jones suffered minor ones. Plaintiffs then brought this action, alleging that defendant was liable under the intentional tort exception to the WDCA's exclusive-remedy provision.

At her deposition, Johnson testified that at the time of the incident, two of Boiler 19's five ash gates, Nos. 2 and 3, had been broken for several months to a year and that some of the doors' seams were corroded and could not be closed all the way.[1] According to Johnson and other employees, this caused ash to build up behind the improperly operating gates, which would then tumble over to the gates that operated properly and build up there as well; this buildup would cause a blowout, or explosion, of ash through any opening, including the defective boiler doors, which would be forced open. Johnson testified that employees regularly suffered minor "prickly" burns because of the mist of hot-ash spew that would cover them as they operated the boilers and that operators regularly ran from the boilers to avoid getting burned. Johnson indicated that she suffered a burn injury from operating a broken boiler in 1999 or 2000 that was reported to management. According to Johnson, in 2004 or 2005, one of her coworkers also had to be hospitalized for a burn injury he received as a result of a hot-ash spew from Boiler 19.

Johnson further testified that, before the incident, she and other employees had expressed concerns regarding the broken ash gates to management on numerous occasions at preshift meetings, that she had had

[1] Other employees deposed for purposes of this litigation attested to these same deficiencies and also indicated that Boiler 19 had broken or missing latches on four of its doors.

individual discussions with Daniel Braker and Mary Webb, plant manager and production manager, respectively, regarding the safety issues caused by the broken boiler doors, and that she had also specifically told her shift supervisor, Melvin Werner, that Boiler 19's ash gates were broken. In addition, Johnson had informed Webb of an injury she suffered in 2006 when the corroded seams of a boiler caused ash to blow into her eye and she had to go to the hospital. Thereafter, Johnson and other employees, at Webb's request, showed Webb and other members of management the safety problems in the ash-dumping process. According to Johnson, management acknowledged the dangers associated with the broken boilers, but later explained that there was no money to fix the problem.

John Bost, defendant's union field-safety specialist, testified that he received many complaints from plant operators regarding the safety issues associated with bottom-ash dumping, that he had seen operators run from hot-ash spews on multiple occasions, and that it was common knowledge to anyone in the plant that the boilers were broken and in need of repair. He informed management of these complaints at least a year before plaintiffs' injuries. Bost indicated that these problems were addressed in a Plant Safety Committee[2] meeting before the April 2007 incident, at which it was discussed how to repair the system and also how to complete the job in a safer manner. According to Bost, management agreed that something had to be done, but indicated that the repairs were not in the budget. Bost also noted that repairs for boilers were to be made only in the event of an outage, i.e., when the system was "offline." Bost

[2] This committee is referred to alternatively throughout the record as the "Plant Safety Committee" or the "Bottom Ash Subcommittee." We refer to it throughout our opinion as the "Plant Safety Committee."

testified that such an outage occurred a month before the incident, but Boiler 19's broken doors were not repaired at that time.

Edward Wacasey, another of defendant's plant operators, participated in the Plant Safety Committee meeting. Wacasey performed a demonstration for management, showing them the broken condition of the boilers, how ash would puff, and how employees attempted to break up clinkers with long rods. According to Wacasey, defendant's fuel supply manager, Tara Daly, told him, after viewing the demonstration, that she would not do bottom-ash dumping because it was too dangerous. Wacasey made numerous recommendations for safer operation, including fixing the boilers, squirting water into the boilers from a safer distance, and wearing safer apparel, including face shields and high-cutoff gloves, but management did not adopt any of these measures. Notes from the meeting corroborated Wacasey's deposition testimony that management knew that Boiler 19 was in disrepair and that the hazards of the job included hot material flying out of the boiler.

Defendant's plant manager, Braker, averred that he was not familiar with bottom-ash dumping and was unaware of any complaints related to it. He indicated that he was also not aware of any prior serious injuries related to bottom-ash dumping. Webb attested that she was aware of Johnson's prior eye injury related to bottom-ash dumping. Webb, however, indicated that she believed bottom-ash dumping to be safe, on the basis of her conversations with shift supervisors. Plaintiffs' immediate supervisor on the day of the incident, Douglas Struble, also attested that he did not believe the condition of Boiler 19 to be unsafe.

Defendant moved for summary disposition under MCR 2.116(C)(10). The trial court denied defendant's motion under the following reasoning:

As I understand TRAVIS [*v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996)], the only way for the plaintiff[s] to maintain the tort action is if the facts that plaintiff[s] plead make out actual knowledge on the part of the employer that an injury was certain to occur that the employer willfully disregarded. The facts Plaintiffs allege is that boiler, Furnace Number 19, was in disrepair and that there had been ash spew from Number 19 over a term of years.

The exhibits show that management was aware, and there had been meetings to deal with hot material flying out and blowing out of Boiler Number 19, and the gate not working according to Plaintiff[s] . . . . That included managerial employees, supervisory employees. That would satisfy the actual knowledge component that the plaintiff[s were] required to allege and show.

* * *

The issue according to the analysis is, next, whether or not an injury was certain to occur. And taking the evidence in the light most favorable to the plaintiff[s], since the hot coal and ash had already injured workers prior to April 28, 2006, I believe that plaintiff[s have] presented evidence that, if believed by the jury, will establish that the injury was certain to occur as required under the statute.

The last element is the specific intent or willful disregard that would allow by circumstantial evidence that plaintiff[s] to [sic] show the specific intent required under the exception.

Plaintiff[s'] theory is that management took a tour of the plant and confirmed that the gates on Furnace Number 19 were broken. I believe that on the evidentiary record, they have established that there was a continuously dangerous condition of which they were actually aware that injury was certain to occur, specifically, a burn injury.

* * *

> I think that looking at the evidence in the light most favorable to the plaintiff[s], the plaintiff[s have] met the burden of creating a genuine issue of material fact such that if the jury should believe the facts as alleged by plaintiff[s], [they have] made out a claim as an exception under the statute.

This Court granted leave to appeal.[3]

II. STANDARDS OF REVIEW

We review de novo a trial court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West*, 469 Mich at 183. We also review de novo the interpretation and application of statutes. *Gilliam v Hi-Temp Prod, Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003).

III. APPLICABLE LAW

Typically, an employee's exclusive remedy against an employer for work-related personal injury, or occupa-

[3] *Johnson v Detroit Edison Co*, unpublished order of the Court of Appeals, entered April 23, 2009 (Docket No. 289763).

tional disease, is those benefits provided by the WDCA. However, the sole exception to this rule provides recovery if an employee can prove that the employer committed an intentional tort. The plaintiff's burden, in such cases, is not synonymous with the showing required for a classic intentional tort. Rather, MCL 418.131(1) sets forth the burden of proof a plaintiff must meet. That section provides, in relevant part:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. [MCL 418.131(1).]

When a claim is brought under this provision, it is for the court to determine as a matter of law whether the plaintiff has alleged sufficient facts to sustain the intentional tort claim. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 154; 551 NW2d 132 (1996) (opinion by BOYLE, J.). If sufficient facts are alleged, then whether the facts are true, and other questions of credibility and the weight of the evidence, become questions for the jury to decide. *Id*.

In *Travis*, 453 Mich at 161-180, our Supreme Court construed the meaning of MCL 418.131(1). In a lead opinion by Justice BOYLE and an opinion concurring in part and dissenting in part by Justice RILEY, the *Travis* Court interpreted the sentence of MCL 418.131(1) setting forth when an intentional tort exists as requiring direct evidence that "the employer . . . deliberately act[ed] or fail[ed] to act with the purpose of inflicting an injury upon the employee." *Id*. at 172. The Court recognized that the Legislature did not confine an employer's liability to traditional intentional torts and

construed the next sentence of MCL 418.131(1) as permitting liability when direct evidence of an intentional tort is unavailable, but could be inferred from the surrounding circumstances. *Id*. at 173 Thus, the specific intent element may be satisfied in the absence of direct evidence if the plaintiff can show that the employer had "actual knowledge that an injury is certain to occur, yet disregards that knowledge." *Id*. at 180.

Because plaintiffs did not proffer direct evidence in this case, it is necessary for us to determine their burden under the sentence of the statute permitting the inference. Breaking that sentence down into its components, it requires a plaintiff to make several showings. First, a plaintiff must show that his or her employer possessed the requisite knowledge. Under the statute, "actual knowledge" cannot be constructive, implied, or imputed; rather, a plaintiff must show that the employer had actual knowledge that an injury would follow from the employer's act or omission. *Id*. at 173-174. In the case of a corporate employer, a plaintiff need only show that "a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 714; 777 NW2d 205 (2009) (citation and quotation marks omitted).

Second, a plaintiff must show that an injury is "certain to occur." "An injury is certain to occur if there is no doubt that it will occur . . . ." *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004). Questions of probability play no role in this inquiry. *Travis*, 453 Mich at 174; *Palazzola v Karmazin Prod Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997). It is not enough to satisfy this showing by demonstrating "an employer's awareness that a dangerous condition ex-

ist[ed]," *Palazzola*, 233 Mich App at 150, or that an employer knew an accident was likely, *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 756; 593 NW2d 219 (1999). A plaintiff may satisfy this prong with circumstantial evidence. The *Travis* Court explicitly approved of one type of circumstantial evidence that would satisfy this element:

> When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury [was] certain to occur. [*Travis*, 453 Mich at 178 (opinion by BOYLE, J.).]

Conversely, the Court indicated that an employer's attempts to repair a device and the employer's repeated warnings to its employees regarding the risk may remove the injury from the realm of certainty. *Id*. at 177.

Third, and last, a plaintiff must also show that the employer disregarded the employer's actual knowledge that an injury was certain to occur. This disregard must have been "willful," which denotes a state of mind that amounts to more than mere negligence. *Id*. at 178-179.

IV. ANALYSIS

Defendant argues that plaintiffs have failed to meet their burden of showing that it had actual knowledge that an injury was certain to occur and willfully disregarded it. Specifically, defendant contends that it had no actual knowledge that these particular plaintiffs would be injured on the date of the incident and that the injuries were merely foreseeable, not certain. We disagree.

At the outset, we reject defendant's implicit argument, made throughout their brief on appeal, that plaintiffs are required to show that defendants had actual knowledge that plaintiffs in particular would be injured in a specific way on a certain date. There is no requirement under the plain language of the statute that requires a plaintiff to make such a showing. Rather, the statute expressly uses the phrases "*an* injury" and "*an* employee," and it makes absolutely no mention of the date of an injury. MCL 418.131(1) (emphasis added). Had the Legislature wished injured employees to prove their claims with additional particularity, it could have so required by using the term "the" rather than the indefinite article "an." See *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009) (" '[T]he' is defined as a definite article . . . used . . . before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an . . . .") (citations and quotation marks omitted). We will not read additional terms into a plain and unambiguous statute. Thus, adhering to the plain language of the statute and its meaning as construed by *Travis*, we now consider whether plaintiffs, for the purpose of avoiding summary disposition, have met their burden of showing that defendant had actual knowledge that an injury was certain to occur and willfully disregarded it.

A. ACTUAL KNOWLEDGE

First, evidence on the record demonstrates that numerous supervisory employees and members of management were aware that Boiler 19 was in disrepair. Johnson told her immediate supervisor that two doors to Boiler 19 were broken, causing a buildup of ash that would explode. Numerous other operators informed

management of the same problem. The issue was also discussed at length during the Plant Safety Committee meeting, at which members of management observed the broken ash gates of Boiler 19. Accordingly, we conclude, that viewed in the light most favorable to plaintiffs, the record establishes the actual-knowledge prong.

B. INJURY CERTAIN TO OCCUR

Next, plaintiffs must establish that defendant had actual knowledge that the injury was "certain to occur." Taking the facts most favorable to plaintiffs, as we must do, it is our view that plaintiffs have also proffered sufficient circumstantial evidence that injury was certain to occur. Boiler 19 was in disrepair and causing dangerous ash spews for at least a year before the incident. Management was aware of this through numerous preshift briefings, reports from Bost, and its own observations at the Plant Safety Committee demonstration. Although many operators had been able to avoid injury from ash blowouts in the past by running from the boiler, management knew that Johnson had suffered an eye injury from an ash blowout in 2006 and that another employee had suffered a burn that required hospitalization in 2004 or 2005. Further evidence that injury was certain to occur is the fact that one member of management indicated that she would not do the job because it was too dangerous. Moreover, management dismissed Johnson's, and several other employees', complaints about the dangerous condition of Boiler 19 because a "fix" was not in defendant's budget. Management again offered this same budgetary constraint as a reason not to fix the boiler after the Plant Safety Committee meeting, although management unequivocally agreed that something had to be

done. Numerous solutions had also been discussed at this meeting, including safer ways to perform bottom-ash dumping and more appropriate apparel, but defendant's then current recommended clothing for bottom-ash dumping—none of which was fire-resistant—was not replaced with safer garments, and the safer proposed methods for performing bottom-ash dumping were not implemented. Instead, management allegedly did nothing. Additionally, about a month before the incident, an outage occurred and the boiler was not fixed, even though boilers had been slated for repair in the event of an outage. These facts constitute circumstantial evidence, if believed by a jury, that defendant knew injury was certain to occur: defendant knew of the inherent dangers involved that would cause injury, knew its employees were taking their own insufficient precautions, as demonstrated by the knowledge of previous injuries and employee complaints, and yet did nothing to remedy the problem. In other words, defendant subjected its employees to a continuously operating dangerous condition. From this evidence, a fact-finder could conclude that defendant had actual knowledge that an injury was certain to occur.

Defendant, however, argues that because no employee operating Boiler 19 had been previously seriously burned, the injury was not a certainty, but merely a foreseeable risk. At best defendant's argument merely creates a question of fact, insufficient to avoid the trial court's denial of summary disposition. The absence of a previous serious injury, or even the absence of previous minor ones, does not necessarily eliminate certainty that an injury will occur. *Travis*, 453 Mich at 186; *Fries*, 285 Mich App at 716 (explaining *Travis*). Similarly, the fact that employees knew of the danger and had been able to run safely from the exploding boiler in the past does not support defendant's position. Rather, it tends

to show that defendant's employees knew the danger was imminent and inherent in the absence of some remedial measures, including running from the boiler, and, further, because it can be inferred that defendant knew its employees were running from the boiler, given employees' numerous complaints, and defendant's admission that something needed to be done, that it too was aware of the threat posed by Boiler 19. Thus, taking all the evidence in the light most favorable to plaintiffs, we conclude that plaintiffs have demonstrated, by way of circumstantial evidence, a sufficient question of fact that defendant had actual knowledge that an injury was certain to occur.

Defendant also asserts that there needs to be a failure to warn of a danger by the employer and a concomitant lack of knowledge of the danger by an employee before a court can find a continuously operative dangerous condition. However, the Supreme Court's ruling in *Golec v Metal Exch Corp*, the companion case to *Travis*, undermines defendant's contention. *Golec* involved an employee, the plaintiff, who was loading a furnace with scrap metal in a smelting factory when there was an explosion that resulted in the plaintiff's being showered with molten aluminum. The plaintiff claimed that closed aerosol cans or water, or both, contained in the scrap caused the explosion. Before the explosion that caused the injuries for which the plaintiff filed suit, there had been a minor explosion involving the plaintiff, also while he was loading scrap, and the plaintiff indicated his belief at the time that this minor explosion was caused by closed aerosol cans or water, or both, contained in the scrap. But he was told to continue working. *Travis*, 453 Mich at 157-159. Therefore, *Golec* presented a situation in which the employee had knowledge of a potential hazard, proceeded to work, and was later injured because of that

same hazard. The Court held that a genuine issue of material fact existed concerning whether the employer committed an intentional tort, and the lead opinion noted that "[i]f the facts as alleged by plaintiff are established at trial, then plaintiff has proved the existence of a continually operative dangerous condition." *Id.* at 186. Accordingly, the "continually operative dangerous condition" doctrine was invoked despite the evidence that the employee had some knowledge of the hazard before the injury, as was the case here.

We hold that an employee's knowledge of a danger, whether gained through information provided by the employer or otherwise, does not preclude invocation of the intentional tort exception based on the existence of a continually operative dangerous condition. There are situations in which, even when an employee has been warned of a hazard or otherwise has knowledge of the hazard, there remains a certainty of injury because there is no reasonable and effective means by which the employee can avoid the harm while still meeting his or her obligation to properly perform the work demanded by the employer. A reasonable juror could find that such was the situation in the instant case and that an injury was certain to occur.

We emphasize, however, that our conclusion must not be understood to mean that evidence of a failure to repair, despite warnings, is sufficient circumstantial evidence that an employer knew an injury was certain to occur. The trial court here found that "since the hot coal and ash had already injured workers prior to April 28, 2006, . . . plaintiff[s have] presented evidence that, if believed by the jury, will establish that the injury was certain to occur as required under the statute." A mere allegation of a prior injury, standing alone, is not enough to meet the rigorous standard set forth in MCL

418.131(1) because it does not demonstrate absolute certainty. Thus, in this regard, the trial court's ruling was erroneous as a matter of law. However, while the trial court's reasoning on this element was in error, it reached the right result, and we will not reverse its ultimate decision. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

C. WILLFUL DISREGARD

Finally, plaintiffs must show that defendant willfully disregarded its knowledge that injury was certain to occur. As noted, plaintiffs presented evidence that defendant failed to remedy the condition that caused plaintiffs' injuries, despite defendant's knowledge of the condition and the opportunity to remedy it during an outage. Management was fully apprised of the danger, but cited budgetary constraints as a reason for not repairing Boiler 19. Thus, viewing the evidence in a light most favorable to plaintiffs, they have introduced sufficient evidence that defendant knew of an inherent danger and willfully disregarded it.

V. CONCLUSION

Under the particular circumstances of this case, plaintiffs have made the requisite showing in support of their intentional tort claim for purposes of avoiding summary disposition. To state our holding succinctly, if the plaintiff can show that the plaintiff's employer subjected the plaintiff to a continuously operative dangerous condition that it knew would cause an injury, that the employer knew that its employees were taking insufficient precautions to protect themselves against that inherent danger, and that the employer took no action to remedy the situation, a jury may conclude that the employer knew the injury was certain to occur

under MCL 418.131(1). This holding should not be construed in any way as derogating from the rigorous burden that the Legislature has imposed on plaintiffs seeking redress under the intentional tort exception of the WDCA.

The trial court did not err by denying defendant's motion for summary disposition.

Affirmed.

AMERICAN HOME ASSURANCE COMPANY
v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION

ACE AMERICAN INSURANCE COMPANY
v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION

Docket Nos. 287153 and 292539. Submitted April 13, 2010, at Detroit. Decided June 15, 2010, at 9:05 a.m.

American Home Assurance Company brought an action in the Oakland Circuit Court against the Michigan Catastrophic Claims Association (MCCA), seeking indemnification pursuant to MCL 500.3104(2)(c) for personal protection insurance (PIP) benefits it paid in excess of $325,000 under a no-fault policy issued to the Cassens Transport Company. The MCCA moved for summary disposition, contending that American Home was not entitled to indemnification because its "ultimate loss" did not meet the statutory threshold of $325,000. According to the MCCA, because Cassens had paid a $500,000 deductible, American Home's actual loss was only $205,863. The MCCA further asserted that even if American Home's losses had initially exceeded the statutory threshold for indemnification, once American Home received the deductible payment, American Home would have been required under article X, § 10.06 of the MCCA's plan of operation to transfer the deductible payment to the MCCA until American Home sustained an ultimate loss exceeding $325,000. American Home also requested summary disposition. American Home contended that the MCCA's indemnification obligation had been triggered irrespective of the deductible paid by Cassens, and further asserted that § 10.06 was inapplicable because Cassens was not a "third party" under that section. The court, Michael D. Warren, Jr., J., granted the MCCA's motion for summary disposition, concluding that the MCCA was permitted under MCL 500.3104 to consider the deductible paid by a policyholder in calculating the insurer's ultimate loss, that an insured is a third party within the meaning of § 10.06, and that American Home's ultimate loss was only $205,863 when its receipt of the deductible was properly considered—an amount that did not meet the applicable statutory threshold for indemnification. American Home appealed (Docket No. 287153).

ACE American Insurance Company (AAIC) brought an action in the Oakland Circuit Court against the MCCA, seeking a declaratory

judgment that it was entitled to indemnification pursuant to MCL 500.3104(2)(e) for PIP benefits it paid in excess of $375,000 under a no-fault policy issued to Waste Management, Inc. The MCCA moved for summary disposition, contending that its statutory indemnification obligation had not been triggered by an ultimate loss exceeding the applicable statutory threshold given AAIC's decision not to enforce a large deductible provision in Waste Management's insurance policy and additional provisions that rendered Waste Management responsible for paying a significant portion of any PIP claim arising under the policy. AAIC also moved for summary disposition, contending that the MCCA was obligated to indemnify it without consideration of Waste Management's contractual obligations. The court, Mark Goldsmith, J., granted summary disposition in favor of the MCCA, concluding that AAIC's ultimate loss was the actual financial detriment it suffered and that AAIC's financial detriment did not include the amount that it was contractually entitled to receive from Waste Management, but was limited to AAIC's share of the claim exceeding the statutory threshold of $375,000. AAIC appealed (Docket No. 292539). The appeals were consolidated.

The Court of Appeals *held*:

1. The MCCA is an indemnitor for its member insurers in the event of catastrophic injury claims. Its duty to indemnify member insurers is triggered by different threshold amounts, which are based on the date the insurance policy was issued or renewed. Under MCL 500.3104(2), when indemnification is triggered, the MCCA must pay 100 percent of the insurer's "ultimate loss" in excess of the threshold amount.

2. MCL 500.3105(1) requires member insurers to pay PIP benefits without regard to the existence of a deductible clause in the insurance policy. Accordingly, an insurer's ultimate loss includes amounts the insurer received from the policyholder as a deductible. Thus, American Home's ultimate loss was $705,863.60, which exceeded the applicable statutory threshold for indemnification, and the trial court erred by concluding otherwise.

3. The trial court, however, ultimately reached the correct result in Docket No. 287153 because under article X, § 10.06 of the MCCA's plan of operation, a member insurer must transfer to the MCCA any amount it recovers from a third party for which the insurer had already been reimbursed by the MCCA. Thus, had the MCCA indemnified American Home for its losses exceeding the applicable statutory threshold, it would have been entitled to receive that amount back in reimbursement from the $500,000 American Home received from Cassens. Cassens was a third party under § 10.06 because the plan of operation addressed the rela-

tionship between the MCCA and its member insurers rather than the contractual relationship between an insurer and its policyholders. Because the parties' obligations canceled each other out, the trial court properly granted summary disposition to the MCCA, having reached the right result, although for the wrong reason.

4. AAIC's ultimate loss exceeded the applicable statutory threshold because its ultimate loss included the full PIP amounts payable to the claimant without regard to the existence of the deductible and loss-sharing provisions in its insurance policy. However, when an insurer elects not to enforce a deductible provision rendering its policyholder responsible for paying a significant portion of any PIP claim arising under the policy, the MCCA is subrogated to the insurer's rights and it may bring an action against the policyholder to recover the amount of the deductible. The MCCA may also recover the costs of that action from the insurer. The trial court erred by granting summary disposition to the MCCA because the MCCA was obligated to indemnify AAIC for the amounts it paid in excess of the applicable statutory threshold. The case must be remanded for the trial court to determine whether AAIC can or will receive the contractually required reimbursement from Waste Management and to enter an order in accordance with its determination.

Order granting summary disposition in Docket No. 287153 affirmed; order granting summary disposition in Docket No. 292539 reversed and case remanded.

INSURANCE — NO-FAULT — CATASTROPHIC CLAIMS — INDEMNIFICATION BY MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION — CALCULATION OF ULTIMATE LOSS-DEDUCTIBLES.

No-fault insurers may include amounts that a policyholder is required to pay as a deductible in calculating their ultimate loss for purposes of indemnification by the Michigan Catastrophic Claims Association (MCCA) of personal protection insurance benefits paid in excess of the statutory threshold; under the MCCA's plan of operation, its member insurers must turn over to the MCCA all deductible amounts received by those insurers, up to the amount they received as reimbursement from the MCCA, and the MCCA may initiate an action against a policyholder for payment of a deductible if the insurer fails to do so and may seek reimbursement for the costs of that action from the insurer (MCL 500.3104[2]).

Dean & Fulkerson, P.C. (by *Jerry R. Swift*), for American Home Assurance Company.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor*, *David N. Campos*, and *Caryn A. Gordon*), for ACE American Insurance Company.

Dykema Gossett PLLC (by *Joseph K. Erhardt*, *K. J. Miller*, and *Lauren M. London*) for the Michigan Catastrophic Claims Association.

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM. These consolidated appeals involve the extent to which defendant, the Michigan Catastrophic Claims Association (MCCA), is required to indemnify member insurers for no-fault personal protection insurance (PIP) benefits paid to or on behalf of an injured claimant when the policyholder is responsible to pay a deductible pursuant to a term of the insurance contract between the member insurer and the policyholder. In each of these consolidated appeals, the trial court determined that the member insurer cannot include amounts that the policyholder is required to pay as a deductible in calculating the member insurer's "ultimate loss" to determine if it has reached the statutory threshold to be considered a catastrophic claim and therefore eligible for indemnification from the MCCA. In Docket No. 287153, plaintiff American Home Assurance Company appeals as of right an order granting summary disposition in favor of the MCCA under MCR 2.116(C)(10). In Docket No. 292539, plaintiff ACE American Insurance Company (AAIC) also appeals as of right an order granting summary disposition in favor of the MCCA under MCR 2.116(C)(10). For the reasons set forth in this opinion, we hold that member insurers may include amounts that a policyholder is required to pay as a deductible in calculating their ultimate loss. However, the MCCA is entitled to reimbursement up to

the entire amount paid to member insurers for all deductible monies received by the member insurers, and the MCCA may initiate an action against policyholders for payment of a deductible if the insurer fails to do so. Accordingly, we affirm in Docket No. 287153, but we reverse and remand for further proceedings consistent with this opinion in Docket No. 292539.

I. FACTS AND PROCEDURAL HISTORY

A. DOCKET NO. 287153

On December 26, 2007, American Home filed a complaint against the MCCA, seeking reimbursement of $380,863.66 in PIP benefits paid to an injured claimant. According to the complaint, American Home issued a no-fault policy to Cassens Transport Company for the period of September 30, 2003, through September 30, 2004. American Home alleged that between August 23, 2004, and June 20, 2007, it paid PIP benefits totaling $705,863.60 to claimant Jeffrey Olson after Olson was injured when the motorcycle he was driving struck a Cassens vehicle insured under the no-fault policy. American Home alleged that pursuant to MCL 500.3104(2)(c), the MCCA was obligated to reimburse it for the portion of the "ultimate loss" exceeding $325,000 and that it was therefore entitled to reimbursement in the amount of $380,863.66. According to American Home, the MCCA denied its claim for reimbursement because "the existence of a deductible in an insurance policy decreases the 'ultimate loss' specified in the No-Fault Act . . . ." American Home sought a judgment against the MCCA in the amount of $380,863.66, which included the entire amount it paid the claimant over the statutory threshold of $325,000 applicable to the policy at issue, without any reduction for the deductible paid by Cassens.

In May 2008, the MCCA moved for summary disposition under MCR 2.116(C)(10), arguing that American Home was not entitled to indemnification under MCL 500.3104(2)(c) because it had not incurred an ultimate loss in excess of $325,000. According to the MCCA, the no-fault policy issued by American Home to Cassens required the insured to pay a $500,000 deductible. The MCCA further asserted that American Home could not include the amount of the deductible, which Cassens had paid, to achieve the statutory threshold of $325,000 under MCL 500.3104(2)(c) and that because Cassens paid the $500,000 deductible,[1] American Home's financial loss was only $205,863. Thus, the MCCA argued that it had no statutory responsibility to reimburse American Home because American Home's ultimate loss did not reach the statutory threshold of $325,000. The MCCA also argued that even if American Home had initially paid PIP benefits to Olsen that exceeded the $325,000 statutory threshold and had been reimbursed by the MCCA, once it received payment of the deductible from Cassens, American Home would have been required under article X, § 10.06 of the MCCA's plan of operation to turn the deductible payment over to the MCCA until American Home sustained an ultimate loss exceeding $325,000.

American Home filed a brief in response to the MCCA's motion for summary disposition, asserting that it was obligated to pay PIP benefits to the claimant irrespective of any deductible that Cassens was required to pay under the terms of the no-fault insurance policy. Predicated on this analysis of its statutory obligation, American Home asserted that it was entitled to

[1] The MCCA submitted documentary evidence that American Home admitted that the insurance policy had a $500,000 deductible and that Cassens paid the deductible in full.

summary disposition and entry of a judgment in the amount of $380,863.66 against the MCCA because the MCCA's indemnification obligation under MCL 500.3104(2)(c) had been triggered. In addition, American Home argued that article X, § 10.06 of the MCCA's plan of operation did not apply to deductible reimbursements that it received from Cassens because Cassens was not a "third party" under § 10.06.

The trial court granted the MCCA's motion for summary disposition and denied summary disposition for American Home. In so doing, the trial court determined that the MCCA's indemnification obligation was only owed to its member insurers and that the MCCA was permitted, under MCL 500.3104, to consider the deductible paid by a policyholder in calculating the ultimate loss subject to indemnification. The trial court reasoned that the insurer's ultimate loss could not include amounts that the insurer received from the policyholder as payment for a deductible because the deductible reduced the amounts actually paid by the insurer. The trial court also determined that § 10.06 of the MCCA's plan of operation confirmed that a member insurer must sustain an actual loss in excess of the statutory threshold. In reaching that determination, the trial court reasoned that an insured is a third party within the meaning of § 10.06 because the plan of operation addresses the relationship between the member insurer and the MCCA, not the relationship between an insurer and its insured. Therefore, the trial court stated, "Any other entity is a third party, including the insured." Ultimately, the trial court concluded that American Home's receipt of the $500,000 deductible reduced its ultimate loss to $205,863, which did not meet the statutory threshold of $325,000 under MCL 500.3104(2)(c).

B. DOCKET NO. 292539

On May 2, 2008, AAIC filed a complaint for declaratory relief against the MCCA after the MCCA denied AAIC's claim for indemnity under MCL 500.3104(2). According to the complaint, AAIC had issued a no-fault insurance policy to Waste Management, Inc.[2] for a one-year period on January 1, 2006. Alice Cobb, a pedestrian, was injured on July 25, 2006, when a vehicle that was owned and operated by Waste Management struck her. AAIC alleged that it had paid more than $2 million in PIP benefits to or on behalf of Cobb since 2006. AAIC sought indemnification from the MCCA for amounts greater that the $375,000 statutory threshold applicable to the policy under MCL 500.3104(2)(e). However, the MCCA denied AAIC's claim. In a letter written to AAIC on January 15, 2008, the MCCA stated, "Please note that we do not reimburse for allocated loss expenses which appear to be considered in your deductibles." The MCCA further stated that in light of the deductibles in Waste Management's insurance policy, AAIC had not reached the statutory threshold, and the MCCA was not yet required to begin reimbursements. In its complaint, AAIC claimed that the MCCA was required under MCL 500.3104(2) and the MCCA's plan of operation to reimburse it for payments over $375,000. Accordingly, AAIC sought a declaratory judgment that it was entitled to reimbursement from the MCCA.

The MCCA moved for summary disposition under MCR 2.116(C)(10). It argued that it was not required to reimburse member insurers for amounts that the insurer was not obligated to pay. According to the MCCA, Waste Management's insurance policy contained provi-

[2] We observe that neither of the policyholders in this case, Cassens and Waste Management, was self-insured.

sions requiring it to pay a deductible, which AAIC elected not to enforce. Thus, the MCCA contended that to the extent that the deductible was not collected because of AAIC's decision not to enforce a contractual right to reimbursement from Waste Management, AAIC's statutory obligation to pay the claimant's PIP benefits was not triggered. The MCCA also contended that AAIC's decision not to enforce the deductible meant that AAIC did not suffer an "ultimate loss" that was reimbursable under MCL 500.3104(2).

The MCCA attached to its motion portions of the insurance policy issued by AAIC to Waste Management. According to the "quota share deductible endorsement," Waste Management was required to pay a $1 million deductible for each accident. The endorsement also provided that AAIC's quota share limit for the first $4 million per accident in excess of the $1 million deductible was 40 percent, while Waste Management's corresponding quota share deductible was 60 percent. The endorsement further stated that for the next $5 million in excess of the $4 million, AAIC's quota share limit was 50 percent, and Waste Management's corresponding quota share deductible was also 50 percent. Additionally the endorsement provided that AAIC's "obligation to pay damages under this policy applies only to the amount of 'losses' in excess of the 'Deductible per Accident' and within the 'Quota Share Limit' stated in the Schedule . . . ." To secure its deductible obligations under the insurance policy, Waste Management agreed to provide AAIC with an irrevocable letter of credit.

In support of its motion for summary disposition, the MCCA also submitted documentary evidence in which AAIC claimed a total loss of $2,168,193.22. According to

the MCCA, because of the $1 million deductible, and because of Waste Management's responsibility to pay its quota share deductible of 60 percent of the first $4 million after the $1 million deductible, AAIC was only obligated to pay $467,277.29 of the claimed $2,168,193.22 loss.[3] Although AAIC elected to pay the $1 million deductible and Waste Management's 60 percent of the first $4 million, AAIC was under no legal obligation to do so. Therefore, the MCCA argued, those amounts could not be included in determining AAIC's ultimate loss.

AAIC also moved for summary disposition. In relevant part, AAIC argued that the MCCA was obligated by MCL 500.3104(2) to indemnify it for PIP payments paid or payable to or on behalf of the claimant, without consideration of Waste Management's contractual obligation to pay a deductible. AAIC alleged that, at the time of the motion, it had paid more than $2,659,883.76 to the claimant. AAIC further argued that the MCCA's plan of operation did not permit it to refuse to reimburse AAIC.

The trial court granted summary disposition in favor of the MCCA. In so ruling, the trial court determined that AAIC's ultimate loss under MCL 500.3104 "refer[s] to the no-fault insurer's actual financial detriment" and that "[b]ecause Plaintiff has the right to seek reimbursement from its insured for most of the PIP benefits it has paid for Ms. Cobb's claim, Plaintiff has suffered a financial detriment only for its share of the claim, as determined by the Quota Share Deductible endorsement, that exceeds $375,000." The trial court

[3] $2,168,193.22 less $1 million for Waste Management's "Deductible Per Accident" equals $1,168,193.22. AAIC's 40 percent share of $1,168,193.22 is $467,277.29. Waste Management's 60 percent share of $1,168,193.22 is $700,915.93.

further stated that the language of the insurance policy issued to Waste Management "places the ultimate financial obligation for a significant portion of Ms. Cobb's benefits on Waste Management, not [AAIC]," and that AAIC

> would be obligated to pay the portion of the claim subject to the deductibles only if [AAIC] is unable to obtain reimbursement from its insured—a scenario that is highly unlikely given that the policy required Waste Management to provide an irrevocable letter of credit as security for its obligations.

The trial court also articulated the mathematical formula to be used to calculate the MCCA's obligation to reimburse AAIC. However, because AAIC's complaint sought a declaratory judgment regarding the MCCA's obligation to reimburse it, not money damages, the trial court did not calculate the amount of reimbursement the MCCA owed AAIC.

II. STANDARD OF REVIEW

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary

> evidence presented to the trial court 'in the light most favorable to the nonmoving party.' " *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exch*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded on other grounds 477 Mich 1067 (2007).]

To the extent that the issues in this case require this Court to interpret insurance contracts and engage in statutory interpretation, these are questions of law that we review de novo. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

III. ANALYSIS

The first issue that this Court must decide involves the scope of the MCCA's statutory responsibility under MCL 500.3104(2) to indemnify member insurers for PIP benefits paid to or on behalf of their policyholders; specifically, we must decide whether the MCCA can consider the payment of a deductible by a policyholder or the insurer's failure to demand compliance with a deductible provision in an insurance contract in determining whether the member insurer has sustained an ultimate loss that meets the applicable statutory threshold under MCL 500.3104(2).

The Michigan no-fault act, MCL 500.3101 *et seq*., requires Michigan drivers to maintain automobile insurance. MCL 500.3101(1) provides, "The owner or registrant of a motor vehicle required to be registered in

this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." Under the no-fault act, insurers are required to pay or reimburse their insured's lifetime medical expenses. *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454, 456; 651 NW2d 428 (2002). Furthermore, "[t]here is no dollar limit on an insurer's liability for medical, hospital, and rehabilitation benefits under the statute[.]" *League Gen Ins Co v Mich Catastrophic Claims Ass'n*, 435 Mich 338, 340; 458 NW2d 632 (1990). The lack of a dollar limit on insurers' liability for PIP benefits potentially exposes insurers to enormous liability in cases in which injuries are severe. *Id*. Therefore, the Legislature created the MCCA "in response to concerns that Michigan's no-fault law provision for unlimited personal injury protection benefits placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims." *In re Certified Question (Preferred Risk Mut Ins Co v Mich Catastrophic Claims Ass'n)*, 433 Mich 710, 714; 449 NW2d 660 (1989). The MCCA is not a no-fault insurer of its member insurers; rather, it is an indemnitor for benefits paid by member insurers in excess of the statutory thresholds established in MCL 500.3104(2). *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 17-18; 773 NW2d 243 (2009). An insurer must belong to the MCCA in order to write insurance in this state, MCL 500.3104(1); *In re Certified Question*, 433 Mich at 715, and the insurer must pay premiums to be a member of the MCCA, MCL 500.3104(7)(d) and (e).

The MCCA's duty to indemnify its member insurers is triggered by different threshold amounts, which are based on the date the insurance policy was issued or

renewed. MCL 500.3104(2)(a) through (k). In relevant part, MCL 500.3104(2) provides:

> The [MCCA] shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence:
>
> * * *
>
> (c) For a motor vehicle accident policy issued or renewed during the period July 1, 2003 to June 30, 2004, $325,000.00.
>
> * * *
>
> (e) For a motor vehicle accident policy issued or renewed during the period July 1, 2005 to June 30, 2006, $375,000.00.

MCL 500.3104(7)(a) provides that "[t]he [MCCA] shall . . . [a]ssume 100% of all liability as provided in [MCL 500.3104(2)]." "Ultimate loss" is defined as "the actual loss amounts that a member is obligated to pay and that are paid or payable by the member, and do not include claim expenses." MCL 500.3104(25)(c).

We must construe portions of MCL 500.3104 in order to determine whether the MCCA can consider payment of a deductible by a policyholder or an insurer's failure to demand compliance with a deductible provision in an insurance contract when calculating whether a member insurer has sustained an ultimate loss sufficient to meet the statutory threshold for indemnification.

A. DOCKET NO. 287153

In the case of American Home, American Home paid the claimant PIP benefits totaling $705,863.60. Al-

though the insurance policy between American Home and Cassens contained a clause requiring Cassens to pay a $500,000 deductible, MCL 500.3105(1)[4] obligates insurers to pay PIP benefits regardless of a policyholder's payment of a deductible or the existence of a deductible clause in the insurance policy. Because American Home was obligated to pay and did pay $705,863.60, the ultimate loss under MCL 500.3104(25)(c) was $705,863.60. That amount clearly exceeded the $325,000 statutory threshold, which would have obligated the MCCA to pay American Home the excess amount of $380,863.80. Thus, the trial court erred by concluding that an insurer's ultimate loss did not include amounts the insurer received from the policyholder as payment for the deductible.

However, we conclude that the trial court's result was ultimately correct because under article X, § 10.06 of the MCCA's plan of operation,[5] a member insurer must turn over to the MCCA any amount it recovers from a third party for which the member has already been reimbursed by the MCCA. Section 10.06 provides:

> **Recovery from Other Sources.** Whenever a Member recovers from a third party an amount for which it has already been reimbursed by the Association, the Member

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[4] "The no-fault act mandates that insurers 'pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.' " *Cruz v State Farm Mut Auto Ins Co*, 241 Mich App 159, 164; 614 NW2d 689 (2000), aff'd 466 Mich 588 (2002), quoting MCL 500.3105(1).

[5] MCL 500.3104(17) provides:

> Not more than 60 days after the initial organizational meeting of the board [of directors of the MCCA], the board shall submit to the commissioner for approval a proposed plan of operation consistent with the objectives and provisions of this section, which shall provide for the economical, fair, and nondiscriminatory administration of the association and for the prompt and efficient provision of indemnity.

> shall promptly turn such recovered monies over to the Association to the extent of any reimbursement theretofore received, provided that the Board may permit a Member to retain therefrom such amount as the Board deems reasonable and necessary attorney fees and litigation costs incurred in connection with obtaining the recovery from the third party.

Thus, because Cassens paid the $500,000 deductible pursuant to its contract with American Home, had the MCCA indemnified American Home for the $380,863.80 American Home paid above the statutory threshold, it would have been entitled to receive that amount back in reimbursement from the $500,000 American Home received from Cassens.

We disagree with American Home's argument that Cassens is not a third party under § 10.06. We conclude that for purposes of indemnification by the MCCA of a member insurer, an insurer's policyholder is a third party and that member insurers are required to turn over to the MCCA amounts received from their policyholders as payment of a deductible.

The plan of operation does not address the contractual relationship between an insurer and a policyholder. The plan of operation is required by statute and mandates that the MCCA's board establish a plan of operation to "provide for the economical, fair, and nondiscriminatory administration of the association and for the prompt and efficient provision of indemnity." MCL 500.3104(17). Furthermore, under MCL 500.3104(1), insurers in Michigan "shall be a member of the [MCCA] and shall be bound by the plan of operation of the [MCCA] . . . ." Similarly, MCL 500.3104(20) provides that insurers in Michigan are "bound by and shall formally subscribe to and participate in the plan approved as a condition of maintaining [their] authority to transact insurance in this state." Thus, the plan of operation addresses the relationship between the

MCCA and its member insurers rather than the contractual relationship between an insurer and its policyholder.

Policyholders are not members of the MCCA and are not bound by its plan of operation. Thus, at least for the purposes of § 10.06, a policyholder constitutes a "third party."[6] Because policyholders are third parties under § 10.06, any amounts received by an insurer as a deductible from a policyholder must be turned over to the MCCA if it indemnified the insurer for an ultimate loss amount that included amounts that the policyholder was required to pay as a deductible. Therefore, Cassens is a third party and its payment of its deductible constituted recovered monies that American Home was required to turn over to the MCCA up to the amount that American Home was reimbursed.

Therefore, we hold that although American Home's ultimate loss was $705,863.60, which obligated the MCCA to pay that portion of the loss above the $325,000 statutory threshold, MCL 500.3104(2)(c), to American Home, American Home's receipt of the $500,000 deductible from Cassens required American Home to reimburse the same amount to the MCCA, § 10.06, thereby cancelling out both obligations. Accordingly, we conclude that the trial court properly granted summary disposition to the MCCA, having reached the right result, albeit for the wrong reason. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

B. DOCKET NO. 292539

The case involving AAIC is factually different from the case involving American Home. The insurance

[6] This Court has previously implicitly found that an insurer constitutes a "third party" under § 10.06. See *Farmers Ins Exch*, 251 Mich App at 458-459 (holding that § 10.06 applies to an insurer's recoupment of money from another insurer).

contract between American Home and its policyholder contained a deductible, and the insured in that case paid the deductible as required by the insurance contract. In contrast, although the insurance contract between AAIC and its policyholder required the payment of a deductible, AAIC did not seek to enforce that provision, and the policyholder did not, in fact, pay the deductible.

AAIC argues that the deductible must be included in calculating its ultimate loss because the full PIP amounts are payable by AAIC to the claimant regardless of the existence of the deductible provision in the insurance policy. As discussed above, this is the proper understanding of "ultimate loss," so AAIC's ultimate loss was the more than $2 million in benefits that it paid. Thus, AAIC's payments exceeded the $375,000 statutory threshold in MCL 500.3104(2)(e), thereby triggering the MCCA obligation to repay AAIC the amounts above that threshold. However, given that AAIC *elected* not to recover these monies, this is not the end of the analysis because such a result would allow insurance companies to claim that they have no duty to reimburse the MCCA for monies that the insurer is legally entitled to receive pursuant to its contract with its policyholder. This would permit insurers to offer commercial policies with high deductibles and lower premiums and advise potential insureds that they would never have to pay the deductible because the MCCA would ultimately be responsible for those amounts. The MCCA was not set up to subsidize large commercial deductibles, and we decline to create a system that would require it to do so.

Insurers and policyholders are free to negotiate the terms of their insurance contracts. In this case, AAIC negotiated a policy that required the policyholder to pay

a large deductible and to assume the risk of a large percentage of any loss in excess of the deductible. AAIC therefore negotiated a policy that rendered the policyholder responsible for paying a significant portion of any PIP claim arising under the policy. The policyholder was contractually bound to comply with these provisions of the policy. Under such circumstances, we hold that the MCCA is subrogated to the rights of the insurer and may bring an action against the policyholder for the amount of the deductible if the insurer fails to do so and that the MCAA may recover the costs of such an action from the insurer.[7]

Because we hold that the MCCA was obligated to repay AAIC for the amounts it paid out in excess of the $375,000 statutory threshold, we must reverse the trial court's grant of summary disposition. Although the trial court noted that Waste Management was required to provide AAIC with an irrevocable letter of credit to secure its contractual obligations under the insurance policy, whether AAIC can or will receive reimbursement has not been briefed, and we cannot determine this issue on the record before us. Accordingly, we remand this case back to the trial court for such a determination. If it is clear that AAIC will receive the $1 million

[7] We believe that our holding is not only consistent with the statutory and contractual provisions at issue, but carefully balances the interests of the parties and protects both sides from various inequities. By our concluding that the ultimate loss includes deductible amounts, the MCCA is required to make payment regardless of the deductible provisions, so that if a deductible is unrecoverable, the insurer has not lost those funds. Thus, insurers are protected when they are unable to collect a deductible because of the policyholder's insolvency. At the same time, however, by holding that deductible amounts received by an insurer are reimbursable to the MCCA and that the MCCA may initiate an action to recover the deductible from the policyholder if the insurer fails to do so, we protect the MCCA from having to pay out amounts for which it is rightfully entitled to reimbursement.

deductible and the additional 60 percent of the next $4 million in benefits due from Waste Management under its policy and, therefore, would be required to reimburse the MCCA, the trial court may decline to order the MCCA to make payment only to have it reimbursed. In the event that it is not clear, the trial court may order the MCCA to make payment to AAIC. Using the formula articulated by the trial court to calculate the MCCA's obligation to indemnify AAIC, AAIC would be entitled to indemnification from the MCCA in the amount of $288,954.[8] Should AAIC fail to seek its deductible from Waste Management, the MCCA may elect to take action against Waste Management and seek reimbursement of the costs of that action from AAIC.

IV. CONCLUSION

For the reasons stated, we hold that the ultimate loss to an insurer under MCL 500.3104 includes deductible amounts due from the policyholder under the insurer's PIP policy. However, to the extent that the insurer has received or in the future receives payment for the deductible, article X, § 10.06 of the MCCA's plan of operation requires that those monies be returned to the MCCA up to the amount that the MCCA reimbursed the insurer. Finally, to the extent that an insurer fails to

[8] The trial court ordered that the MCCA use the following formula to determine its obligation to reimburse AAIC:

> (i) subtracting the $1,000,000 Waste Management deductible;
>
> (ii) calculating 40% of the next $4,000,000 in benefits; and
>
> (iii) subtracting $375,000 from that 40% share.

Application of this formula is as follows: $2,659,883.76 minus $1,000,000 equals $1,659,883.76. Forty percent of $1,659,883.76 is $633,954; $633,954 minus $375,000 equals $288,954.

seek payment of a deductible due and owing under its insurance contract, the MCCA is subrogated to the rights of the insurer and may bring an action against the policyholder for the amount of the deductible and may seek reimbursement of the costs involved from the insurer.

Accordingly, we affirm in Docket No. 287153 and reverse and remand for additional proceedings consistent with this opinion in Docket No. 292539. No taxable costs are awarded under MCR 7.219, a question of public significance being involved. We do not retain jurisdiction.

BROWN v MARTIN

Docket No. 289030. Submitted April 13, 2010, at Grand Rapids. Decided June 15, 2010, at 9:10 a.m.

Lloyd and Linda Brown and others brought an action in the Hillsdale Circuit Court against Bradley J. and Lisa A. Martin, seeking declaratory and injunctive relief to enforce a covenant contained in the deeds for all lots in the parties' subdivision, including the parties' respective deeds, that restricted the use of the real property in the subdivision to single-family residential purposes only. The initial 25-year effective period for the covenant ran until June 27, 1997. It was automatically extended from that date until June 27, 2007, and again automatically extended from that date another 10 years. In November 2007 defendants began operating a hair salon in their home, prompting complaints by plaintiffs. On March 9, 2008, a majority of the then lot owners passed an amendment of the covenant that allowed hair salons. Plaintiffs contended that although the deeds allowed a majority of the then lot owners to change the covenant, the change could not take effect until the end of the current 10-year extension period in June 2017. The trial court, Michael R. Smith, J., agreed with defendants that the covenant could be changed effective any time after the initial 25-year period and granted summary disposition in favor of defendants. The Browns appealed.

The Court of Appeals *held*:

The deeds provided for automatic 10-year renewals "unless an instrument signed by a majority of the then owners of the lots has been recorded," thereby prescribing a definite period of 10 years for modification by a majority of the then lot owners. The 10-year automatic extension language would be rendered meaningless if the covenant could be amended by a majority, but less than unanimous, vote at anytime during an automatic 10-year extension. The reference to extensions for successive periods of 10 years in the covenant is a restriction regarding the frequency of amendment by less than a unanimous vote. The amendment will not be effective until the end of the current 10-year extension in June 2017. The hair salon violates the covenant, and the court erred by granting summary disposition in favor of defendants. That order

must be reversed, and the case must be remanded to the trial court for the entry of an order granting summary disposition in favor of the Browns and enjoining defendants from operating the hair salon until the expiration of the current 10-year covenant extension or a unanimous vote of the then lot owners that permits such use.

Reversed and remanded.

Biringer, Hutchinson, Lillis, Bappert & Angell, P.C. (by *John D. Hutchinson*), for Lloyd and Linda Brown.

Parker, Hayes & Lovinger, P.C. (by *John P. Lovinger*), for Bradley J. and Lisa A. Martin.

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

FITZGERALD, J. In this action to enforce a restrictive covenant that was written into an original subdivision deed, and continued through automatic 10-year extensions of the covenant, plaintiffs Lloyd and Linda Brown[1] appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants. This case arose out of a dispute between the parties concerning the effective date of an amendment of the restrictive covenant that was approved by a majority of the then owners of the subdivision lots during the second automatic 10-year extension. We reverse.

The essential facts are not in dispute. Plaintiffs own lot 35 of Hilltop Terrace Number 2 Subdivision in Hillsdale, Michigan, and defendants own lot 32 in the same subdivision. All lots in the subdivision were originally subject to the following use restriction:

[1] Gary and Carolyn Freese were plaintiffs at the trial court level but are not parties to this appeal. References to "plaintiffs" throughout this opinion will be to Lloyd and Linda Brown only.

> 1. USE Each lot in this subdivision and any structure erected thereon shall be used as or in connection with a private residence or a necessary outbuilding incidental thereto and shall be used by the owner or the occupant for single-family residential purposes only.

The restrictive covenant runs with the properties and, pursuant to the covenant, may be amended as follows:

> 11. GENERAL PROVISIONS
>
> (A) Term: These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

The deed restrictions were recorded on June 28, 1972. The initial 25-year period ran from that date until June 27, 1997. The covenants were automatically extended for the first 10-year period from that date until June 27, 2007, at which point the covenants were automatically extended for an additional 10-year period.

Defendants remodeled their home and began operating a hair salon in the home in November 2007. Plaintiffs complained to defendants about the home-based business, asserting that operation of the business was in violation of the subdivision's land-use restrictions. In response to plaintiffs' complaints, on March 9, 2008, the required number of the then lot owners passed an amendment of the covenant allowing for certain home-based businesses, including hair salons.[2]

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[2] There is no dispute that the subdivision's original restrictive covenant allowed the construction, and use, of structures for residential

Plaintiffs filed a complaint seeking declaratory and injunctive relief to enforce the original restrictive-use covenant and to enjoin defendants from operating the hair salon in their home. Plaintiffs claimed that the covenant could be changed under ¶ 11(A) at the expiration of any automatic 10-year extension period. Defendants claimed that such changes could occur at any time after the initial 25-year period when a majority of the then owners of the lots agreed. Thereafter, both parties filed motions for summary disposition. The trial court agreed with defendants' position and granted summary disposition in favor of defendants.

Appellate review of a motion for summary disposition is de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007); *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim. This Court considers the pleadings, admissions, and other evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Brown*, 478 Mich at 551-552; *Lee v Detroit Med Ctr*, 285 Mich App 51, 59; 775 NW2d 326 (2009). In addition, the scope of a deed restriction is a question of law that this Court reviews de novo. *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007).

The issue before this Court is whether the amendment of the covenant, which was passed by the majority of then owners of the lots, took effect immediately upon recording of the amendment, or upon the commencement of the next 10-year automatic extension period.

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purposes only. Defendants' use of their home as a hair salon clearly violated the original restrictive covenant.

We conclude that the trial court erred by determining that the amendment took immediate effect.

In reviewing the language of restrictive covenants, this Court recognizes that "[b]uilding and use restrictions in residential deeds are favored by public policy." *Rofe v Robinson (On Second Remand)*,126 Mich App 151, 157; 336 NW2d 778 (1983). Judicial policy requires that we seek to protect property values as well as "aesthetic characteristics considered to be essential constituents of a family environment." *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211; 568 NW2d 378 (1997), quoting *Rofe*, 126 Mich App at 157 (quotation marks and citation omitted). This Court summarized the general rules for construing restrictive covenants in *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982):

> When interpreting a restrictive covenant, courts must give effect to the instrument as a whole where the intent of the parties is clearly ascertainable. Where the intent is clear from the whole document, there is no ambiguous restriction to interpret and the rules pertaining to the resolution of doubts in favor of the free use of property are therefore not applicable. In placing the proper construction on restrictions, if there can be said to be any doubt about their exact meaning, the courts must have in mind the subdivider's intention and purpose. The restrictions must be construed in light of the general plan under which the restrictive district was platted and developed. In attempting to give effect to restrictive covenants, courts are not so much concerned with the grammatical rules or the strict letter of the words used as with arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument. Moreover, the language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon. Covenants are to be construed with

> reference to the present and prospective use of property as well as to the specific language employed and upon the reading as a whole rather than from isolated words. [Citations omitted.]

The plain language used in ¶ 11(A) clearly and unambiguously provides for automatic 10-year renewals "unless an instrument signed by a majority of the then owners of the lots has been recorded . . . ." The covenant prescribed a definite period of 10 years for modification by a majority of the then lot owners. The 10-year automatic extension language would be rendered meaningless if the covenant could be amended by a majority vote (less than unanimous) at any time on or after June 27, 1997. Thus, the plain language of the covenant causes the reference to "periods of ten years" to be a restriction regarding the frequency of amendment by less than a unanimous vote. See *Scholten v Blackhawk Partners*, 184 Ariz 326; 909 P2d 393 (Ariz App, 1995) (holding that an amendment passed two years into a 10-year automatic extension period was not effective until the 10-year extension period expired and stating that to hold otherwise would render the extension provision meaningless); *Illini Fed S&L Ass'n v Elsah Hills Corp*, 112 Ill App 3d 356; 445 NE2d 1193 (1983) (holding that amendments of the restrictive covenants passed during the initial 20-year term would not take effect until the beginning of the automatic 10-year extension period); *In re Wallace's Fourth Southmoor Addition to the City of Enid v Rogers*, 874 P2d 818 (Okla App, 1994) (holding that an amendment of restrictive covenants, passed during the running of an automatic 10-year extension period, was not effective until the end of the 10-year extension period); *Mauldin v Panella*, 17 P3d 837 (Colo App, 2000) (holding that restrictive covenants were extended for automatic 10-year extension when the attempted amendment oc-

curred two days after the original term expired).[3] If, however, every then lot owner voted to amend or change the covenant, the restriction with regard to the frequency of amendment by a majority vote would not apply, and a change by unanimous vote could be made at any time.[4]

In sum, given that the amendment was by less than the unanimous vote of the then lot owners, the amendment will not take effect until the end of the current 10-year extension period, i.e., June 28, 2017. Thus, defendants' home-based hair salon violates the subdivision's existing restrictive covenant, and the trial court erred by granting summary disposition in favor of defendants. *Brown*, 478 Mich at 552; *Lee*, 285 Mich App at 59.

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[3] If the drafters of the initial restrictions had wished to allow amendments at any time following the initial 25-year period, the restrictive covenants could have simply been renewed in perpetuity unless an amendment was agreed on by the proper percentage of the then lot owners. *Id*.; *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

[4] Plaintiffs' reliance on this Court's prior rulings in *Lake Isabella Prop Owners Ass'n/Architectural Control Comm v Lake Isabella Dev, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 1998 (Docket No. 204954), p 4, and *Ardmore Park Subdivision Ass'n, Inc v Simon*, 117 Mich App 57, 59-62; 323 NW2d 591 (1982), is misplaced. In *Lake Isabella*, unpub op at 4, this Court held that changes could not be made to the restrictive covenants until after the initial 25-year period had elapsed. While this Court noted that the restrictive covenants could be modified after the initial 25-year period elapsed, the issue of the timing of any changes through the amendment process was neither before nor addressed by the Court. In *Ardmore Park*, 117 Mich App at 59, this Court held that properly passed and recorded changes to restrictive covenants are binding on all subdivision property owners in the same manner as those contained in the original restrictive covenants. The original deed restrictions ran with the land until January 1, 1975, and were "duly amended in 1975 by a majority of those persons then owning the property in Ardmore Park." *Id*. The Court apparently assumed that the restrictions were properly amended because the issue of the timing of any changes through the amendment process was not addressed.

We reverse the order granting summary disposition in favor of defendants and remand for entry of an order granting plaintiffs' motion for summary disposition and enjoining defendants from operating the hair salon in their home until after the expiration of the current 10-year covenant extension or a unanimous vote of the then lot owners that permits such use.

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

JANER v BARNES

Docket No. 298401. Submitted June 14, 2010, at Lansing. Decided June 17, 2010, at 9:00 a.m.

Mark Janer and Steven J. Jacobs brought an action in the Bay Circuit Court against Jennifer Cass Barnes and others, seeking a declaratory judgment, writ of mandamus, and injunctive relief to prevent Barnes from being designated an incumbent on the ballot for the position of 74th District Court Judge in the August 3, 2010, primary election. Plaintiffs argued that because Barnes had filed nominating petitions as a nonincumbent before the Governor appointed her to replace the judge who resigned and she assumed the duties of her office on June 1, 2010, Barnes was not entitled to the incumbency designation. The trial court, Fred L. Borchard, J., denied the requested relief, ruled that Barnes would be designated an incumbent, and dismissed the complaint with prejudice. Plaintiffs appealed.

The Court of Appeals *held*:

Const 1963, art 6, § 24, and MCL 168.467c(2) provide that incumbent judges must be given the incumbency designation on the ballot. They do not impose a time within which an incumbent judge must act in order to qualify for the incumbency designation. The only requirement for the incumbency designation on the ballot is the incumbent status of the judge. It is undisputed that Barnes attained that status on June 1, 2010, and was entitled to the incumbency designation.

Affirmed.

ELECTIONS — JUDGES — DISTRICT COURTS — BALLOTS — INCUMBENCY DESIGNATION.

An incumbent district court judge must be designated as an incumbent when a candidate for nomination or election to the same office; the only requirement for the incumbency designation on the ballot is the incumbent status of the judge; there is no time within which an incumbent candidate must act in order to qualify for the incumbency designation (Const 1963, art 6, § 24; MCL 168.467c[2]).

Kim A. Higgs for Mark Janer and Steven J. Jacobs.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Michael J. Hodge* and *Scott R. Eldridge*), for Jennifer Cass Barnes.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Ann M. Sherman* and *Denise C. Barton*, Assistant Attorneys General, for the Secretary of State and the Department of State, Bureau of Elections.

Braun Kendrick Finkbeiner P.L.C. (by *C. Patrick Kaltenbach* and *Matthew A. Tarrant*) for the Bay County Clerk.

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

PER CURIAM. Plaintiffs appeal as of right the trial court's order denying their request for a declaratory judgment, mandamus, and injunctive relief in this election case. We affirm.

In April 2010, plaintiffs and defendant Jennifer Cass Barnes timely filed nominating petitions to become candidates on the ballot for the position of 74th District Court Judge in the August 3, 2010, primary election. The position was designated a nonincumbent position, because incumbent Judge Scott J. Newcombe had announced his intention to resign on May 31, 2010. On April 23, 2010, Governor Jennifer M. Granholm appointed Barnes to replace Judge Newcombe and serve the remainder of his term. Barnes assumed the duties of her office on June 1, 2010.

Plaintiffs filed a complaint for a declaratory judgment, seeking a writ of mandamus and injunctive relief to prevent Barnes from receiving an incumbency designation on the primary election ballot. They argued that because Barnes filed nominating petitions to access the

ballot as a nonincumbent, and because her appointment occurred after the deadline for incumbent judges to access the ballot, she is not entitled to the incumbency designation on the ballot. The trial court denied the requested relief, ruled that Barnes will have the incumbency designation on the August primary election ballot, and dismissed the complaint with prejudice.

This Court reviews de novo a trial court's ruling in a declaratory judgment action. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008). This Court also reviews de novo issues of constitutional and statutory law. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

Incumbent judges must be given the incumbency designation on the ballot as a matter of constitutional and statutory law. Const 1963, art 6, § 24, provides: "There shall be printed upon the ballot under the name of each incumbent justice or judge who is a candidate for nomination or election to the same office the designation of that office." The Legislature codified this provision to require the incumbency designation on the ballot for incumbent district court judges: "There shall be printed upon the ballot under the name of each incumbent district judge who is a candidate for nomination or election to the same office the designation of that office." MCL 168.467c(2). The word "shall" denotes mandatory conduct. See *Hughes v Almena Twp*, 284 Mich App 50, 62; 771 NW2d 453 (2009) ("The word 'shall' as used in a statute is considered to require mandatory conduct."); *Goldstone v Bloomfield Twp Pub Library*, 268 Mich App 642, 657; 708 NW2d 740 (2005) ("[T]he term 'shall' . . . is universally recognized as requiring mandatory adherence."), aff'd 479 Mich 554 (2007).

Const 1963, art 6, § 24, and MCL 168.467c(2) are unqualified mandates. They do not impose a time

within which an incumbent candidate must act in order to qualify for the incumbency designation. Because the language is clear and unambiguous, judicial interpretation is not permitted, and the provisions must be enforced as written. *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001). The only requirement for the incumbency designation on the ballot is the incumbent status of the judge, which it is undisputed that Barnes attained on June 1, 2010. Accordingly, she is entitled to the incumbency designation.

Lastly, we note that our affirmance of the trial court's decision in this matter does not alter the ballot language and, accordingly, the issues presented by defendant Bay County Clerk are moot.

Affirmed. No costs are to be assessed, a public question being involved. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

PEOPLE v LEE

Docket No. 283778. Submitted June 2, 2010, at Grand Rapids. Decided June 17, 2010, at 9:05 a.m.

Kent A. Lee pleaded no contest in the Allegan Circuit Court to a charge of third-degree child abuse. At sentencing, the court, Harry A. Beach, J., left open the possibility that the prosecutor could set the matter for an evidentiary hearing so that the prosecutor could present testimony concerning whether defendant should be required to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. More than one year after the sentencing, but while defendant was still on probation, the prosecutor moved to have defendant placed on the sex offender registry. At the evidentiary hearing, defendant admitted that he was frustrated when the child in his care refused to put his pajamas on following a bath, and he acknowledged that he flicked the child's penis in order to get him to cooperate. Following the hearing, the court, William A. Baillargeon, J., ordered defendant to register as a sex offender. Defendant appealed.

The Court of Appeals *held*:

1. The circuit court did not err by reserving the ability to require defendant to register as a sex offender. Circuit courts have a great deal of leeway in applying SORA, and additional proofs may be presented if the evidence of record is insufficient to decide the matter. Judicial fact-finding outside the avenues of trial and admissions does not violate due process because SORA establishes a remedial regulatory scheme that furthers a legitimate state interest in public safety and requiring registration does not constitute punishment.

2. Even though registration under SORA is not a punishment, there must be an outside limit to its application. That outside limit is at the end of the trial court's jurisdiction over the case: as long as the circuit court has jurisdiction over the defendant's case, it may order registration. In this case, the court had jurisdiction because defendant was still on probation.

3. Defendant was not convicted of violating a statute that automatically requires registration under SORA. Thus, his crime must have fit within one of SORA's catchall provisions for regis-

tration to have been properly required. Under MCL 28.722(e)(*xi*), registration was required if defendant's crime constituted a sexual offense against an individual who was less than 18 years of age. The underlying facts of the crime govern whether an offense constitutes a sexual offense against an individual who was less than 18 years of age. In this case, defendant was originally charged with second-degree criminal sexual conduct, which involves sexual contact. The facts demonstrated that defendant intentionally touched the minor victim's intimate parts in a sexual manner for the purpose of inflicting humiliation. This constituted "sexual contact" under MCL 750.520a(q). Accordingly, the circuit court did not err by requiring defendant to register under SORA.

Affirmed.

CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — TIME LIMIT FOR REQUIRING SEX OFFENDER REGISTRATION — JURISDICTION OVER DEFENDANTS.

A circuit court may reserve its ability to require a defendant to register as a sex offender under the Sex Offenders Registration Act; as long as the court has jurisdiction over the defendant's case, it may order registration (MCL 28.721 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

Cunningham Dalman, *P.C.* (by *David M. Zessin*), for defendant.

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

PER CURIAM. In this third-degree child abuse case, MCL 750.136b, defendant Kent Allen Lee appeals by leave granted[1] the circuit court's order granting the prosecutor's motion to require defendant to register as

[1] Defendant originally filed a delayed application for leave to appeal with this Court on February 19, 2008. This Court denied the motion on April 18, 2008, for "lack of merit in the grounds presented." On October 21, 2009, our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v Lee*, 485 Mich 914 (2009).

a sex offender under Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. We affirm.

I. FACTS

Defendant entered a plea of no contest to a charge of third-degree child abuse as a second-offense habitual offender. The circuit court accepted the no contest plea. Defendant was sentenced to five years' probation, with the first 10 weekends to be served in jail. At sentencing, the prosecutor argued on the basis of information that she had received from the victim's family that defendant should be required to register as a sex offender. The circuit court left

> open to the prosecutor to set this matter for a hearing at which time if they wish we'll listen to testimony concerning what the nature of this particular act was so the Court can have a better basis to make a decision as to whether or not this should be a sex registry offense.

More than a year after defendant's original sentencing, the prosecutor filed a motion requesting that defendant be required to register as a sex offender. After hearing testimony on the motion, the circuit court ordered defendant to register as a sex offender under SORA.

II. ANALYSIS

Defendant argues that the circuit court erred by reserving the ability to require defendant to register as a sex offender. We disagree.

The construction and application of SORA presents a question of law that the Court reviews de novo on appeal. *People v Golba*, 273 Mich App 603, 605, 729 NW2d 916 (2007).

SORA requires an individual who is convicted of a listed offense after October 1, 1995, to be registered under its provisions. MCL 28.723(1)(a); *People v Haynes*, 281 Mich App 27, 30; 760 NW2d 283 (2008). The term "listed offense" is defined by MCL 28.722(e) to include violations of specific statutes. The definition also has two catchall provisions, MCL 28.722(e)(*xi*) and (*xiv*), that require registration:

> (*xi*) Any other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age.
>
> * * *
>
> (*xiv*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*xiii*) under a law of the United States, any state, or any country or under tribal or military law.

The prosecution urges this Court to view registration under SORA not as a punishment or a part of the sentence, but as "a remedial regulatory scheme furthering a legitimate state interest of protecting the public[.]" *Golba*, 273 Mich App at 620. Indeed, circuit courts have been given a great deal of leeway in the application of SORA. For instance, at sentencing, the court "may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence." *Id.* at 614.

In *In re Ayres*, 239 Mich App 8; 608 NW2d 132 (1999), this Court had to determine whether requiring juveniles who had been convicted of certain specified sex offenses to register as sex offenders violated Michigan's prohibition against cruel or unusual punishment. This

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

> "On its face, the notification scheme is purely regulatory or remedial. It imposes no requirement on the registered offender, inflicts no suffering, disability or restraint. It does nothing more than create a mechanism for easier public access to compiled information that is otherwise available to the public only through arduous research in criminal court files." [*Ayres*, 239 Mich App at 15.]

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

> "Dissemination of information about a person's criminal involvement has always held the potential for negative repercussions for those involved. However, public notification in and of itself, has never been regarded as punishment when done in furtherance of a legitimate government interest. . . . The registration and notification requirements can be more closely analogized to quarantine notices when public health is endangered by individuals with infectious diseases. . . . Whenever notification is directed to a risk posed by individuals in the community, those individuals can expect to experience some embarrassment and isolation. Nonetheless, it is generally recognized that the state is well within its rights to issue such warnings and the negative effects are not regarded as punishment." [*Ayres*, 239 Mich App at 18 (alterations in original).]

Therefore, caselaw clearly supports the circuit court's imposition of registration under SORA in a case such as defendant's, and even allows for presentation of additional proofs if the evidence of record is insufficient

to reach a determination on the matter. *People v Althoff*, 280 Mich App 524, 542; 760 NW2d 764 (2008). Judicial fact-finding outside the avenues of trial or admissions does not violate due process because SORA is a remedial regulatory scheme that furthers a legitimate state interest in public safety and compliance with the statute is not a punishment. *Id.* at 540-542. Therefore, registration under SORA is not a part of defendant's sentence, nor is it a condition of probation; rather, it is a ministerial function designed to protect the public from sex offenders.

The issue then becomes procedural: When must the circuit court make its decision requiring registration under SORA? Current caselaw and statutes are silent on this issue. However, we conclude that as long as the circuit court has jurisdiction over defendant's case, it may order registration under SORA.

While caselaw clearly states that registration under SORA is not a condition of probation, there is ample caselaw that stands for the proposition that once a defendant has been discharged from probation, a trial court no longer has jurisdiction over that defendant. See *People v Hodges*, 231 Mich 656, 660-661; 204 NW 801 (1925); *People v Valentin*, 220 Mich App 401, 407-408; 559 NW2d 396 (1996); *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991). Even though registration under SORA is regulatory and not a punishment, there must be an outside limit to its application. The most logical limit is at the end of the trial court's jurisdiction over the case. This way defendants are not left wondering whether they may be subject to sex offender registration at any time, even years after the commission of their crimes.

Because defendant in the present case remains on probation, the circuit court did not commit procedural

error when it ordered registration under SORA more than a year after imposing its sentence.

Next, defendant argues that the circuit court's factual findings were insufficient to establish that defendant committed a "violation of a law . . . that by its nature constitutes a sexual offense against an individual who is less than 18 years of age" for purposes of MCL 28.722(e)(*xi*). We disagree.

In *Golba*, 273 Mich App at 611, this Court concluded "that the underlying factual basis for a conviction governs whether the offense 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age.' " (Citation omitted.) In other words, the particular facts of a violation, and not just the elements of the violation, are to be considered. *Althoff*, 280 Mich App at 534. This determination can relate to uncharged conduct if supported by a preponderance of the evidence. *Golba*, 273 Mich App at 614.

Defendant was originally charged with second-degree criminal sexual conduct, which involves sexual contact. He later pleaded no contest to third-degree child abuse. MCL 750.520a(q) defines "sexual contact" as

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (*i*) Revenge.
>
> (*ii*) To inflict humiliation.
>
> (*iii*) Out of anger.

The prosecution argues that defendant's own testimony supports a finding that defendant intentionally

touched the victim's penis in order to inflict humiliation or out of anger. At the evidentiary hearing, the circuit court found that sufficient facts had been presented to require that defendant register under SORA.

At sentencing, the circuit court stated that defendant's crime was "a rather abusive assault on a young man's self-dignity and self value." *Random House Webster's College Dictionary* (1997) defines "humiliate" as "to cause (a person) a painful loss of pride, self-respect, or dignity[.]" Therefore, the circuit court had already, in essence, found that defendant inflicted humiliation upon the victim.[2] Defendant himself acknowledged that he flicked the victim's penis as a form of "bullying" and that the child cried as a result. Defendant also acknowledged that he was frustrated that the child would not put his pajamas on and that, as a result, defendant flicked his penis in order to get him to cooperate. We conclude that these facts demonstrated an intentional touching of the victim's intimate parts in a sexual manner for the purpose of inflicting humiliation. Therefore, we affirm the circuit court's order requiring defendant to register under SORA.

Affirmed.

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[2] Different circuit court judges presided over defendant's sentencing and the subsequent evidentiary hearing.

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 May 19, 2010:

KING v MCPHERSON HOSPITAL, Docket No. 284436*. The Court orders that a special panel will be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Farley v Carp*, 287 Mich App 1; 782 NW2d 508 (2010).

The Court further orders that the opinion in this case released on April 27, 2010, is vacated in its entirety. MCR 7.215(J)(5).

Appellant may file a supplemental brief within 21 days of the clerk's certification of this order. Appellees may file a supplemental brief within 21 days of the service of appellant's brief. Nine copies must be filed with the Clerk of the Court.

GLEICHER, J., did not participate.

KING v McPHERSON HOSPITAL

Docket No. 284436. Released April 27, 2010, at 9:00 a.m. Vacated May 19, 2010.

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

DONOFRIO, J. The issue in this case involves the wrongful death medical malpractice statute of limitations. Plaintiff, Timothy King, successor personal representative of the estate of Andrew Baker, appeals a March 4, 2008, order denying his motion to set aside the January 2007 dismissal of his claims against defendants, McPherson Hospital, also known as Trinity Health-Michigan ("McPherson"), Michael Briggs, D.O., Merle Hunter, M.D., and Emergency Physicians Medical Group, P.C. Plaintiff contends that the trial court's order is erroneous because his action was timely filed under *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins II*). This Court initially denied plaintiff's application for leave to appeal the March 4 order, *King v McPherson Hosp*, unpublished order of the Court of Appeals, entered July 10, 2008 (Docket No. 284436), but our Supreme Court, in lieu of granting leave to appeal, thereafter remanded the case to this Court for consideration as on leave granted. *King v McPherson Hosp*, 482 Mich 1154 (2008).

Because this Court's recent decision in *Farley v Carp*, 287 Mich App 1; 782 NW2d 508 (2010) (*Farley II*), is dispositive of this appeal, and we are bound to follow it by operation of MCR 7.215(C)(2) and MCR 7.215(J)(1), plaintiff's claim fails, and we affirm. However, in accordance with MCR 7.215(J)(2), which provides that the conflict resolution procedure is triggered when a panel of this Court "follows a prior published decision only because it is required to do so by subrule (1)" we indicate

* Opinion by special panel reported at 290 Mich App 299 (2010) —REPORTER.

our disagreement with the majority's holding in *Farley II*, and call for the convening of a special panel of this Court pursuant to MCR 7.215(J)(3).

I

Plaintiff's predecessor, Diana King ("King"),[1] filed her complaint on March 1, 2004, alleging that on September 6, 2001, her decedent, Baker, presented at McPherson Hospital complaining of vomiting and a fever. King alleged that defendants failed to diagnose Baker's encephalomyelitis, which led to his death on September 8, 2001. On March 12, 2004, King filed a first amended complaint correcting the board certifications of defendants Briggs and Hunter.

On September 20, 2004, defendants Hunter, Briggs, and Emergency Physicians Medical Group, P.C. ("the EPMG defendants"), filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing, in relevant part, that the statute of limitations barred King's complaint because she failed to file her complaint within two years after being appointed the personal representative of Baker's estate. The EPMG defendants relied on *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), reh den 470 Mich 1204 (2004), which held that sending a notice of intent under MCL 600.2912b does not toll the wrongful death saving period. The EPMG defendants also argued that *Waltz* applied retroactively. McPherson concurred with the EPMG defendants' motion.

On September 20, 2004, plaintiff was appointed successor personal representative. In response to the summary disposition motion, plaintiff argued, in pertinent part, that this case is distinguishable from *Waltz* because he mailed his notice of intent[2] within two years after the date of defendants' malpractice. Plaintiff also argued that *Waltz* cannot be applied retroactively and that his complaint was timely filed under *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), clarified and overruled in part in *Waltz*, 469 Mich at 652-655. Plaintiff further argued that the trial court should apply judicial tolling to the limitations period to save his cause of action. On October 27, 2004, the EPMG defendants filed a reply brief, arguing that plaintiff's interpretation of *Waltz* was erroneous and that *Waltz* applied retroactively. On October 28, 2004, the trial court denied defendants' motion, stating, "I'm satisfied that the case was timely filed."

On November 18, 2004, both McPherson and the EPMG defendants filed separate applications for leave to appeal with this Court in Docket Nos. 259136 and 259229, respectively. On January 25, 2005, this Court granted defendants' applications and consolidated the appeals. *King v Briggs*, unpublished order of the Court of Appeals, entered January 25, 2005 (Docket Nos. 259136 and 259229). On July 12, 2005, this Court reversed the trial court's decision on the basis that plaintiff's complaint

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[1] Plaintiff Timothy King is the successor personal representative of Andrew Baker's estate.

[2] For the sake of simplicity, we do not distinguish between actions taken by King, as the initial personal representative, and plaintiff, as the successor personal representative.

was untimely pursuant to *Waltz*.[3] *King v Briggs*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136 and 259229), slip op at 1-2. On August 2, 2005, plaintiff filed with this Court a motion for reconsideration, which this Court denied on August 25, 2005. *King v McPherson Hosp,* unpublished order of the Court of Appeals, entered August 25, 2005 (Docket Nos. 259136 and 259229). Thereafter, our Supreme Court denied plaintiff's application for leave to appeal, *King v Briggs*, 474 Mich 981 (2005), and his motion for reconsideration, *King v Briggs*, 474 Mich 1113 (2006).

On remand, the EPMG defendants filed a motion for entry of an order of dismissal. McPherson concurred with the motion. On January 26, 2007, the trial court granted the motion and dismissed plaintiff's claims. On February 15, 2007, plaintiff filed a claim of appeal with this Court, which this Court dismissed on jurisdictional grounds on April 11, 2007. *King v McPherson Hosp*, unpublished order of the Court of Appeals, entered April 11, 2007 (Docket No. 276287). Thereafter, plaintiff filed a motion for reconsideration, which this Court denied on June 1, 2007. *King v McPherson Hosp*, unpublished order of the Court of Appeals, entered June 1, 2007 (Docket No. 276287).

On November 28, 2007, our Supreme Court decided *Mullins II*, 480 Mich 948, stating, in pertinent part:

> We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 [677 NW2d 813] (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren,* 461 Mich 567 [609 NW2d 177] (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*.

On January 24, 2008, plaintiff filed a motion pursuant to MCR 2.612(C)(1) to set aside the trial court's order dismissing his claims relying on *Mullins II* and arguing that, with respect to this Court's previous opinion holding that plaintiff's claims were time-barred, the law of the case doctrine was inapplicable because an intervening change in the law existed. In response, McPherson argued that the trial court was required to deny plaintiff's motion pursuant to the law of the case doctrine, which it contended applied regardless of the intervening change in the law. McPherson also argued that the trial court lacked jurisdiction to grant relief under MCR 7.215(F)(1)(a) and that the holding in *Mullins II* did not reverse the previous appellate decisions in this case. Finally, McPherson argued that policy considerations favored the finality of

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[3] This Court also determined that plaintiff, as the successor personal representative, did not have an additional two years under the wrongful death saving statute within which to file a claim. *King v Briggs*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136 and 259229), slip op at 2. This issue, however, is not relevant to this appeal.

judgments. The EPMG defendants echoed McPherson's arguments and, in addition, contended that the trial court lacked authority to vacate a previous judgment of this Court and that MCR 2.612(C)(1)(a), (e), and (f) were inapplicable. At a February 21, 2008, hearing, the trial court denied plaintiff's motion, stating:

> The appellate courts have created a fine mess of this and—this case, it's an '04 case and it bounced around back and forth up and down with the appellate decisions. I am going to leave it to the appellate courts to tell me what—what to do. I do find that the law of the case is the Court of Appeals order telling me to dismiss the case. I am going to deny your relief. If the relief is to be granted it's going to be by the Court of Appeals, counsel.

Thereafter, the trial court entered a written order denying plaintiff's motion.

On March 25, 2008, plaintiff filed an application for leave to appeal, which this Court denied on July 10, 2008. *King v McPherson Hosp*, unpublished order of the Court of Appeals, entered July 10, 2008 (Docket No. 284436). On December 23, 2008, our Supreme Court remanded this case to this Court for consideration as on leave granted. *King*, 482 Mich 1154.

II

Plaintiff argues that the trial court erred by refusing to set aside its previous order dismissing his claims because his action was timely filed under *Mullins II*, 480 Mich 948. We review for an abuse of discretion a trial court's decision on a motion to set aside a judgment under MCR 2.612(C)(1). *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). "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). In addition, whether the law of the case doctrine applies in a particular case is a question of law that we review de novo. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

III

Under MCL 600.5805(6), a medical malpractice plaintiff has two years from the date the cause of action accrued in which to file suit. A medical malpractice claim generally "accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . ." MCL 600.5838a(1).[4] As recognized in *Farley v Advanced Cardiovascular*

[4] Although MCL 600.5838a(2) also gives a medical malpractice plaintiff until "6 months after the plaintiff discovers or should have discovered the existence of the claim" to file suit, the discovery rule is not at issue in this case.

Health Specialists, PC, 266 Mich App 566, 571; 703 NW2d 115 (2005) (*Farley I*), lv den 474 Mich 1020 (2006), reconsideration den 474 Mich 1132 (2006), "unless an exception applies, a malpractice action must be brought within two years of when the claim first accrued."

"The first exception involves the effect of filing a notice of intent to sue, which all plaintiffs alleging medical malpractice are required to do under MCL 600.2912b(1) 'not less than 182 days before the action is commenced.' " *Farley I*, 266 Mich App at 571. MCL 600.5856(c) provides:

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

Thus, MCL 600.5856(c) "tolls the applicable 'statute of limitations or repose' when a claimant, in compliance with MCL 600.2912b, provides written notice of her intent to commence a medical malpractice action." *Waltz*, 469 Mich at 644 n 1. This provision is commonly referenced as the "notice tolling provision." See *Farley I*, 266 Mich App at 571.

In addition, in wrongful death actions, the Legislature has afforded plaintiff personal representatives additional time in which to pursue legal action on behalf of a decedent's estate. The wrongful death saving statute, MCL 600.5852, provides as follows:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

In *Waltz*, 469 Mich at 648-651, 655, our Supreme Court held that under the clear and unambiguous language of MCL 600.5856, the giving of a notice of intent to sue during the two-year malpractice period of limitation in MCL 600.5805(6) operates to toll this period, but that the giving of notice does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, "an *exception* to the limitation period" and not a period of limitation itself. (Emphasis in original.) *Waltz* thus overruled *Omelenchuk* to the extent that *Omelenchuk* "might

be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision[.]" *Waltz*, 469 Mich at 655.

Following *Waltz*, our Supreme Court issued three separate orders stating that *Waltz* is to be given full retroactive application. *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005), reconsideration den 474 Mich 913 (2005); *Evans v Hallal*, 472 Mich 929 (2005); *Forsyth v Hopper*, 472 Mich 929 (2005). Thereafter, in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006) (*Mullins I*), rev'd 480 Mich 948 (2007), a special panel of this Court followed our Supreme Court's orders in *Wyatt*, *Evans*, and *Forsyth*, and concluded that *Waltz* applies with full retroactive effect.

As we previously recognized in our statement of the facts, our Supreme Court reversed this Court's decision in *Mullins I* and provided a window within which *Waltz* does not apply. Our Supreme Court's order in *Mullins II*, 480 Mich 948, states, in pertinent part:

> We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 [677 NW2d 813] (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 [609 NW2d 177] (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*.

The question presented in this appeal is whether the trial court abused its discretion by declining to set aside its previous dismissal of plaintiff's claims because plaintiff filed his action within the window identified in *Mullins II*, regarding which *Waltz* is inapplicable. This Court recently addressed this issue in *Kidder v Ptacin*, 284 Mich App 166, 170-171; 771 NW2d 806 (2009).

In *Kidder*, the trial court initially denied summary disposition for the defendants on statute of limitations grounds. *Id.* at 168. On appeal, this Court reversed on the basis that *Waltz* applied retroactively and that judicial tolling was not available to save the plaintiff's cause of action.[5] *Id*. at 168-169. This Court therefore remanded the case for entry of an order granting summary disposition for the defendants, and the trial court complied with this Court's directive on remand. *Id*. at 169. Thereafter, our Supreme Court decided *Mullins II*, on which the plaintiff relied in moving to reinstate her case pursuant to MCR 2.612(C)(1)(e) and (f). The trial court granted the motion. *Id*.

On appeal, this Court reversed the trial court's reinstatement of the case. *Id.* at 170-171. This Court reasoned that MCR 2.612(C)(1)(e) was inapplicable "because this Court's decision ordering the grant of summary disposition in favor of defendants has not been reversed or

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[5] See *Kidder v Ptacin*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No. 257703), slip op at 2-3.

otherwise vacated; its holding has been *overruled* by subsequent case-law." *Id.* at 170 (emphasis in original). This Court explained:

> Reversing or vacating a decision changes the result in the specific case before an appellate court. On the other hand, a decision to overrule a particular rule of law affects not only the specific case before the appellate court, but also future litigation. A decision to overrule is an appellate court's declaration that a rule of law no longer has precedential value. See *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 665; 633 NW2d 1 (2001). However, an appellate court's pronouncement that a rule of law no longer applies does not change the result of an effective judgment. *Id.* In the instant case, this Court's decision was in effect, as the time for filing an application with our Supreme Court had lapsed. MCR 7.215(F)(1)(a). Accordingly, the fact that this Court's decision in *Mullins* [*I*] was overruled, did not implicate this Court's earlier decision in the instant case. [*Id.* at 170-171.]

This Court also determined that MCR 2.612(C)(1)(f) was inapplicable because the plaintiff failed to seek leave to appeal this Court's decision directing the trial court to grant summary disposition for the defendants. *Kidder*, 284 Mich App at 171. Further, this Court opined that "MCR 2.612 envisions a court relieving a party from its own judgment, not the judgment of a higher authority." *Id*. This Court stated that nothing in the court rule allowed the trial court to relieve the plaintiff from this Court's judgment. Thus, this Court reversed the trial court's order reinstating the plaintiff's cause of action.

Recently, in *Farley II*, this Court determined the scope of *Kidder*, in the context of three separate cases that were consolidated in this Court, *Farley v Carp* (Docket Nos. 283405, 284681, and 283418), *Wren v Southfield Rehabilitation Co* (Docket Nos. 283726 and 283727), and *Ellis v Henry Ford Health Sys* (Docket No. 284319). *Kidder* involved the application of *Mullins II* to a case that this Court previously determined to be time-barred under *Waltz*. This Court determined that *Kidder* directly controlled the outcome in *Wren* because the procedural facts of both cases were nearly identical, including that neither plaintiff sought leave to appeal this Court's earlier adverse decision. *Farley II*, 287 Mich App at 6.

With respect to *Ellis*, this Court recognized that the procedural posture was different than *Kidder* and *Wren* because the plaintiffs in *Ellis* never sought to appeal the trial court's order dismissing their claims in light of *Waltz*. *Id.* at 6-7. This Court recognized that, technically, the law of the case doctrine did not apply because there did not exist a decision of a higher court that was binding on the trial court. *Id*. at 7. This Court nonetheless determined that the plaintiffs in *Ellis* should not be permitted to prevail when the plaintiffs in *Wren* and *Kidder* did not prevail. This Court stated that

> [i]f 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. [*Id.* at 8.]

Thus, this Court held 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." *Id*.

Turning to *Farley*, this Court recognized that the procedural posture was different from *Kidder* and *Wren* in two primary respects. *Id*. First, the plaintiff in *Farley* did not sit on her appellate rights, but rather sought leave to appeal this Court's adverse decision to our Supreme Court, which denied leave to appeal. Second, the trial court in *Farley* did not enter an order granting summary disposition in the defendants' favor as this Court had directed. *Id.* at 8-9. Accordingly, the trial court never granted the plaintiff relief from judgment following *Mullins II* because there existed no trial court judgment from which to grant relief. *Id*. at 9. Nevertheless, this Court concluded that neither of these factors warranted a different result. This Court stated:

> 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. 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.
>
> 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. [*Id.* at 9 (citations omitted).]

Thus, this Court vacated the trial court's orders reinstating the plaintiffs' claims in *Wren*, *Ellis*, and *Farley*. *Id*.

Judge BORRELLO dissented from the majority's opinion in *Farley II*. Judge BORRELLO stated that although he believed that this Court was bound by MCR 7.215(J)(1) to follow *Kidder* in *Wren* and *Ellis*, he would declare a conflict under MCR 7.215(J)(2) because he believed that *Kidder* was wrongly decided. *Farley II*, 287 Mich App at 10 (BORRELLO, J., dissenting). Judge BORRELLO opined that *Farley* was factually distinguishable from *Kidder* because the plaintiff in *Farley* did not sleep on her appellate rights, but rather sought to appeal this Court's decision to our Supreme Court, which denied leave. *Id*. at 10-11. Thus, Judge BORRELLO stated that *Kidder*'s reasoning for declining to apply MCR 2.612(C)(1)(f) was inapplicable and that the interests of justice did not militate against allowing the plaintiff to proceed with her cause of action. *Id*. at 11. Judge BORRELLO recognized that the trial court in *Farley* treated the plaintiff's motion as a motion to reinstate the case and concluded that the court did

not abuse its discretion in granting the motion. *Id* at 12. Judge BORRELLO's analysis in *Farley II*, states as follows in pertinent part:

> [T]he 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,* [284 Mich App] 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*, 284 Mich App 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 and appealed this Court's decision to the Supreme Court, which denied leave to appeal. 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.
>
> * * *
>
> 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. [*Farley II*, 287 Mich App at 10-12 (BORRELLO, J., dissenting) (citations omitted).]

IV

The facts of the instant case are on all fours with *Farley*. In both cases, the plaintiffs sought leave to appeal this Court's adverse decisions and our Supreme Court denied leave to appeal. *King v Briggs*, 474 Mich 981 (2005); *Farley v Advanced Cardiovascular Health Specialists, PC*, 474 Mich 1020 (2006). This Court stated in *Farley II* that the denial of leave meant that this Court's previous decision, directing that summary disposition be granted for the defendants, became the final adjudication, enforceable according to its terms. *Farley II*, 287 Mich App at 9; see also MCR 7.302(H)(3). The denial of leave in the instant case had the same effect. The *Farley II* Court also stated that once the trial court complied with its directive to grant summary disposition for the defendants in accordance with this Court's previous opinion, it would be precluded from granting relief from judgment under the law of the case doctrine. *Farley II*, 287 Mich App at 9. Similarly, under the *Farley II* rationale, the trial court in the instant case would be precluded from granting relief from its January 26, 2007, order granting summary disposition for defendants and dismissing plaintiff's claims. This case is not distinguishable in any meaningful way from the facts of *Farley*.

But, like the plaintiff in *Farley*, the plaintiff here cannot be said to have sat on his appellate rights. In fact, just the opposite occurred, plaintiff availed himself of the appellate process just as the plaintiff in *Farley* did. This being the case, like Judge BORRELLO in his well-reasoned dissent in *Farley II*, we would conclude that *Kidder* is distinguishable and MCR 2.612(C)(1)(f) applies authorizing relief from judgment without time limitation. Thus, we would hold that the trial court abused its discretion when it declined to set aside its previous order dismissing plaintiff's claims for the reasons set forth in Judge BORRELLO's dissent in *Farley II*.

Our Supreme Court's order in *Mullins II* established without equivocation a class of medical malpractice claimants entitled to relief from the retroactive application of *Waltz*. Our Supreme Court's order in *Mullins II*, 480 Mich 948, states, in pertinent part:

> We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 [677 NW2d 813] (2004), does not apply to *any causes of action* filed after *Omelenchuk v City of Warren*, 461 Mich 567 [609 NW2d 177] (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*. [Emphasis added.]

The Supreme Court in its use of the words, "any causes of action" did not limit the palliative nature of its order to only those cases still pending.

And it is incongruous to impose the use of a finality rule or law of the case rule to prohibit the utilization of the discretion provided in MCR 2.612(C)(1)(f), to avoid the mandate of the *Mullins II* order. While it is easy to understand the trial court's frustration with the appellate courts, it was still incumbent on the trial court to meaningfully exercise its discretion, especially when the Supreme Court's order provides its relief and remedy to "any causes of action" that come within the defined period. The *Mullins II* order requires the application of fairness, nothing else. We fail to see the fairness in allowing only pending actions to receive the benefit of the Supreme Court's order while denying that benefit to causes of action similarly situated but for the timing of the denial of the application for leave to appeal to the Supreme Court by the same Court that now provides the palliative relief of its order. Had the Supreme Court so intended, it would have said so.

Further, fairness is not the only basis on which to grant plaintiff relief. Both *Kidder*, 284 Mich App at 170, and *Farley II*, 287 Mich App at 9, rely on the law of the case doctrine. In *Kidder*, this Court quoted *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997), for the proposition that " '[u]nder the law of the case doctrine, an appellate court ruling on a particular issue binds . . . all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same.' " *Kidder*, 284 Mich App at 170. But, in *Webb*, this Court continued explicitly setting forth two exceptions to the law of the case doctrine. *Webb*, 224 Mich App at 210. Specifically, the *Webb* Court stated that "[t]wo exceptions to the doctrine exist: (1) when the decision would preclude the independent review of constitutional facts and (2) *when there has been an intervening change of law*." *Id.* (emphasis added). In the instant matter, as in *Farley,* plaintiff did not sleep on his rights. Rather, plaintiff pursued his rights continuously at every turn. *Mullins II* clearly represented a change in the law and at the same time provided relief to an identified class of claimants including plaintiff that were deserving of and entitled to relief from the retroactive application of *Waltz*. *Mullins II*, 480 Mich 948. Because the law of the case doctrine does not impose its bar when there has been an intervening change of law, we would conclude that plaintiff is entitled to the exercise of discretion pursuant to MCR 2.612(C)(1)(e) and (f) and the trial court's failure to provide relief from judgment was an abuse of discretion.

In any event, this Court's decision in *Farley II* is published and therefore constitutes binding precedent on this Court. MCR 7.215(C)(2); MCR 7.215(J)(1). Because the majority's analysis in *Farley II* controls the outcome of this case, we must decline to set aside the trial court's order dismissing plaintiff's claims, but do so only because we are required to by MCR 7.215(J)(1). MCR 7.215(J)(1) requires this Court to "follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . ." Therefore, in accordance with MCR 7.215(J)(2), which provides that the conflict resolution procedure is triggered when a panel

of this Court "follows a prior published decision only because it is required to do so by subrule (1)" we indicate our disagreement with the majority's holding in *Farley II* with regard to the facts of *Farley* only. Specifically, we believe that *Farley II*'s application of *Kidder* to the facts of *Farley* is erroneous as not in the interests of justice and commands the wrong decision on the nearly identical facts in the case at bar. We therefore call for the convening of a special panel of this Court pursuant to MCR 7.215(J)(3).

Affirmed.

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DE FACTO CORPORATIONS

2. The de facto corporation and the corporation by estoppel doctrines are separate and distinct doctrines; the former doctrine allows a defectively formed corporation to attain the legal status of a corporation while the latter doctrine prevents a party who dealt with an association as though it were a corporation from denying its existence. *Duray Development, LLC v Perrin*, 288 Mich App 143.

3. A de facto corporation instantly comes into being when its incorporators have proceeded in good faith under a valid statute for an authorized purpose and have executed and acknowledged articles of association pursuant to that purpose; a de facto corporation is an actual corporation that, with respect to all the world except the state, enjoys the status and powers of a de jure corporation. *Duray Development, LLC v Perrin*, 288 Mich App 143.

LIABILITY OF OFFICERS

4. An officer of a corporation may be held individually

in an attempt to commit a larceny, regardless of whether the act is completed; acts taken in the process of committing a larceny necessarily include steps or behaviors occurring at any point in the continuum, despite whether they are successfully completed (MCL 750.529, 750.530). *People v Williams*, 288 Mich App 67.

ARSON

2. The crime of burning other real property, i.e., property that is not a dwelling house, is a lesser included offense of the crime of burning a dwelling house; the necessary elements to prove either offense are the same, except that to prove the greater offense it must be shown that the building is a dwelling house, while to prove the lesser offense it is not necessary to prove that the building is not a dwelling house (MCL 750.72, 750.73). *People v Evans*, 288 Mich App 410.

ASSAULT WITH INTENT TO COMMIT MURDER

3. The elements of assault with intent to commit murder are (1) an assault (2) with an actual intent to kill, (3) which, if successful, would make the killing murder; the defendant's intent can be inferred from any facts in evidence, including the nature, extent, and location of any wounds inflicted on the victim (MCL 750.83). *People v Ericksen*, 288 Mich App 192.

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4. MCL 750.226 prohibits carrying a dangerous weapon with unlawful intent; the carrier's intent is not a factor in determining whether an instrument carried is covered by the statute; the phrase "any other dangerous or deadly weapon or instrument" following the list in the statute of weapons that are dangerous per se includes only other weapons that are dangerous per se within the statute's prohibition; the statute provides that knives with blades of more than three inches in length are dangerous weapons per se, while knives with shorter blades are not weapons that are dangerous per se; a blade length of more than three inches is an element of the crime in a prosecution involving a knife under MCL 750.226. *People v Parker*, 288 Mich App 500.

CHILD SUPPORT

5. A child support order imposed after the parent has been judicially determined to be able to pay support subjects

the parent to strict liability for failure to pay the required support at the required time; the parent may not defend against the criminal charge with evidence of an inability to pay given that the parent had the opportunity to contest the support order at the child support proceedings (MCL 750.165). *People v Likine*, 288 Mich App 648.

6. The elements of felony nonsupport are (1) the defendant was required to support a child or current or former spouse; (2) the defendant appeared in or received notice by personal service of the action in which the support was ordered, and (3) the defendant failed to pay the support at the time ordered or in the amount ordered; the crime of felony nonsupport is not a continuing crime, but is complete at the time that the individual fails to pay the ordered amount at the ordered time; the *actus reus* is the failure to pay the support as ordered (MCL 750.165). *People v Likine*, 288 Mich App 648.

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7. *People v Phelps*, 288 Mich App 123.

ENTRAPMENT

8. Entrapment occurs if the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or the police engage in conduct so reprehensible that the court cannot tolerate it; reprehensible conduct alone, without police instigation, can constitute entrapment. *People v Fyda*, 288 Mich App 446.

9. A court considering a defendant's claim of entrapment should consider the following factors in determining whether governmental activity impermissibly induced criminal conduct: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he or she was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any governmental pressure existed, (8) whether there were sexual favors, (9) whether there

were any threats of arrest, (10) whether there were any governmental procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. *People v Fyda*, 288 Mich App 446.

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10. *People v Mann*, 288 Mich App 114.

FIRST-DEGREE HOME INVASION

11. The statute prohibiting first-degree home invasion provides two alternate methods of establishing each of the three elements of the offense; the prohibition against double jeopardy forbids two separate convictions of first-degree home invasion following a single home invasion where each conviction is based on a different alternate method of establishing the same element of first-degree home invasion (US Const, Am V; Const 1963, art 1, § 15; MCL 750.110a[2]). *People v Baker*, 288 Mich App 378.

PROBATION

12. A sentencing court may revoke a defendant's probation if, during the probation period, the court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation; the "probation period" constitutes the particular term of probation imposed by a sentencing court, not the statutory maximum term of probation the court has authority to impose; probation revocation must occur, or must at least have been commenced, during the probation period (MCL 771.4). *People v Glass*, 288 Mich App 399.

PROSECUTORIAL MISCONDUCT

13. A prosecutor must be afforded great latitude regarding his or her arguments and conduct at trial, but a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury because such an argument undermines the defendant's presumption of innocence by suggesting that defense counsel does not believe the defendant, thereby impermissibly shifting the focus to the defense counsel's personality. *People v Fyda*, 288 Mich App 446.

14. A prosecutor may argue to the jury that the inculpatory evidence is undisputed or that the evidence is

uncontradicted, even if the defendant is the only person who could have contradicted the evidence; a prosecutor may not imply during closing argument that the defendant must prove something or must present a reasonable explanation for damaging evidence and may not comment on the defendant's failure to present evidence because such arguments tend to shift the burden of proof. *People v Fyda*, 288 Mich App 446.

RETROACTIVITY OF DECISIONS

15. A new rule for the conduct of criminal prosecutions must be applied retroactively to all cases pending on direct review or not yet final, even if the new rule constitutes a clear break from prior law. *People v Mungo (On Rem)*, 288 Mich App 167.

SECOND-DEGREE CRIMINAL SEXUAL CONDUCT

16. A defendant who is convicted of second-degree criminal sexual conduct for conduct committed while the defendant was 17 years of age or older against an individual less than 13 years old and who is sentenced to probation or a jail term, or both, may not be sentenced to lifetime electronic monitoring; only persons who are released on parole or from prison, or both, may be sentenced to lifetime electronic monitoring (MCL 750.520c, 750.520n, 791.285). *People v Kern*, 288 Mich App 513.

SEX OFFENDERS REGISTRATION ACT

17. A circuit court may reserve its ability to require a defendant to register as a sex offender under the Sex Offenders Registration Act; as long as the court has jurisdiction over the defendant's case, it may order registration (MCL 28.721 *et seq*.). *People v Lee*, 288 Mich App 739.

SOLICITATION TO COMMIT MURDER

18. Solicitation to commit murder is a specific intent crime that requires proof that the defendant intended that a murder would in fact be committed; the crime of solicitation to commit murder does not include solicitation to inflict great bodily harm or to act with a wanton and willful disregard of the likelihood that one's behavior is likely to cause death or great bodily harm (MCL 750.157b[2]). *People v Fyda*, 288 Mich App 446.

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vehicle that had been stolen before the injured person's involvement; use of the vehicle alone is insufficient; there must be evidence that the injured person engaged or participated in the unlawful taking for the statutory exclusion to apply (MCL 500.3113[a]). *Henry Ford Health System v Esurance Ins Co*, 288 Mich App 593.

5. No-fault insurers may include amounts that a policyholder is required to pay as a deductible in calculating their ultimate loss for purposes of indemnification by the Michigan Catastrophic Claims Association (MCCA) of personal protection insurance benefits paid in excess of the statutory threshold; under the MCCA's plan of operation, its member insurers must turn over to the MCCA all deductible amounts received by those insurers, up to the amount they received as reimbursement from the MCCA, and the MCCA may initiate an action against a policyholder for payment of a deductible if the insurer fails to do so and may seek reimbursement for the costs of that action from the insurer (MCL 500.3104[2]). *American Home Assurance Co v Michigan Catastrophic Claims Ass'n*, 288 Mich App 706.

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DOCTRINE OF SCRIVENER'S ERROR

1. The interpretive doctrine of statutory construction known as scrivener's error may be applied when on the face of a statute it is clear that a mistake of expression or clerical error, rather than of legislative wisdom, has been made; if the objective import of the statute is clear, it is not contrary to sound principles of statutory interpretation to give the totality of the context precedence over a single mistake of expression or clerical error. *Oshtemo Charter Twp v Kalamazoo County Rd Comm*, 288 Mich App 296.
2. Use of the phrase "MCL 247.671 to 247.675" in MCL 257.726(3), which was meant to incorporate the provisions of 1951 PA 51 that pertain to the designation of county primary roads, was a clerical error, but under the interpretive doctrine of statutory construction known as scrivener's error, the text of MCL 257.726(3) may be given effect if the phrase is interpreted instead as "MCL 247.651 to 247.675." *Oshtemo Charter Twp v Kalamazoo County Rd Comm*, 288 Mich App 296.

STATUTORY ARBITRATION—*See*

ARBITRATION 1

STRICT-LIABILITY OFFENSES—*See*

CRIMINAL LAW 5

SUBSEQUENT MOTIONS—*See*

MOTIONS AND ORDERS 1

SUBSTITUTION OF PARTIES—*See*

PLEADING 1

SUFFICIENCY OF THE EVIDENCE—*See*

CRIMINAL LAW 7

SUMMARY DISPOSITION—*See*

MOTIONS AND ORDERS 2

TACKING—*See*

EASEMENTS 1

have business activities (MCL 208.1 *et seq*., repealed effective December 31, 2007). *ONE's Travel Ltd v Dep't of Treasury*, 288 Mich App 48.

4. An incidental-to-service test may be applied to determine, for purposes of establishing a taxpayer's tax base under the Single Business Tax Act, whether a business transaction that involved both the transfer of tangible personal property and the provision of a service involved a transfer of tangible personal property that was incidental to the rendering of personal services; the test examines what the buyer sought as the object of the transaction, what the seller or service provider was in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the goods were available for sale without the service, the extent to which intangible services have contributed to the physical item that was transferred, and any other relevant factors (MCL 208.1 *et seq*., repealed effective December 31, 2007). *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334.
5. Contributions by an employer to a voluntary employees' beneficiary association trust created for the purpose of receiving reimbursement for the payment of employees' future health-care costs did not constitute compensation to employees that was taxable under the former Single Business Tax Act (26 USC 501[c][9]; MCL 208.4[3]). *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491.

TIME LIMIT FOR REQUIRING SEX OFFENDER REGISTRATION—*See*

CRIMINAL LAW 17

TORTURE—*See*

CRIMINAL LAW 19

TRESPASS-NUISANCE—*See*

GOVERNMENTAL IMMUNITY 1

TRIAL

WITNESSES

1. A trial court's decision to bar witness testimony after a party has failed to timely submit a witness list is reviewed for an abuse of discretion; the record should reflect that the trial court gave careful consideration to

the relevant factors involved and considered all of its options in determining what sanction was just and proper in the context of the case. *Duray Development, LLC v Perrin*, 288 Mich App 143.

TRUSTS

BUILDERS' TRUST FUND ACT

1. A plaintiff must show the following elements to establish a prima facie case of a violation of the builders' trust fund act: (1) that the defendant was a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and suppliers, and (5) that the laborers, subcontractors, and suppliers were engaged by the defendant to perform labor or furnish material for the specific construction project (MCL 570.151 *et seq*.). *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576.
2. An intent to defraud is shown for purposes of the builders' trust fund act simply by a contractor's appropriation of any moneys paid to the contractor for building operations before the contractor pays all moneys due or to become due to laborers, subcontractors, suppliers, or others entitled to payment; a reasonable inference of appropriation arises from the payment of construction funds to a contractor and the contractor's subsequent failure to pay laborers, subcontractors, suppliers, or others entitled to payment (MCL 570.153). *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576.

UNINSURED-MOTORIST BENEFITS—*See*

INSURANCE 1, 2

UNIQUE OR SPECIAL INJURIES—*See*

HIGHWAYS 1

UNITED STATES CORPORATIONS—*See*

TAXATION 2

UNJUST ENRICHMENT—*See*

BANKS AND BANKING 3