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COURT OF APPEALS

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[1] To August 31, 2017.

[2] From August 14, 2017.

[3] From October 2, 2017.

[4] From October 2, 2017.

[5] To October 14, 2017.

TABLE OF CASES REPORTED

PAGE

PAGE

L

M

O

P

JUDGE

THOMAS C. CAMERON

Judge Thomas C. Cameron was appointed to the Michigan Court of Appeals in 2017. He served as a judge of the Wayne Circuit Court from 2014 until his appointment to the Court of Appeals.

Previously, Judge Cameron worked for the Michigan Department of Attorney General, where he supervised several large civil and criminal divisions for the Attorney General, including the Civil Rights Division, the Corrections Division, the Criminal Division, the Alcohol and Gambling Division, and several other divisions. Before serving as a senior manager, he served as an Assistant Attorney General, where he litigated high-profile public corruption and cold case homicides. He is a former Chairman of the Michigan Commission on Law Enforcement Standards.

Judge Cameron currently serves as a member of the Michigan Domestic Violence and Sexual Assault Treatment Board, as a member of the Board of Advisors of the Michigan Chapter of the Federalist Society, and also as cochair of the Criminal Justice Committee for the Michigan Judges Association. He is a member of the Detroit Metropolitan Bar Association, the Catholic Lawyer's Society, the Incorporated Society of

Irish-American Lawyers, and the University of Detroit Mercy Inns of Court. He serves as an adjunct professor for the University of Toledo School of Law.

Judge Cameron is a graduate of Western Michigan University and Wayne State University Law School.

COURT OF APPEALS CASES

WADE v UNIVERSITY OF MICHIGAN

Docket No. 330555. Submitted March 8, 2017, at Lansing. Decided June 6, 2017, at 9:00 a.m. Leave to appeal sought.

Joshua Wade brought an action in the Court of Claims against the University of Michigan (University), alleging that he was entitled to declaratory and injunctive relief from a University ordinance that prohibited firearms on any University property. In February 2001, the University revised the weapons provision (Article X) of the ordinance and made all properties owned, leased, or controlled by the University weapons-free. Section 4(1)(f) of Article X states that the prohibition does not apply when the director of the University's Department of Public Safety has waived the prohibition based on extraordinary circumstances. Plaintiff's request for a waiver of the prohibition under § 4(1)(f) was denied, and plaintiff subsequently filed suit, alleging two counts: (1) that the ban on firearms violated his federal and state constitutional rights to keep and bear arms as set forth in the Second Amendment of the United States Constitution and Article 1, § 6, of the 1963 Michigan Constitution and (2) that Article X was invalid because MCL 123.1102, which prohibits local units of government from establishing their own limitations on the purchase, sale, or possession of firearms, preempts the ordinance. The University moved for summary disposition, arguing that the Second Amendment does not reach sensitive places, including the University's property, and that even if the Second Amendment applied, Article X did not violate it because the ordinance was substantially related to important governmental interests. The University further argued that Article X did not violate the Michigan Constitution because Article X is a reasonable exercise of the University's authority under Article 8, § 5, to control its property, maintain safety on that property, and to cultivate a learning environment. Moreover, the University argued that MCL 123.1102 did not apply to the University because the University is not a "local unit of government" as defined in MCL 123.1101(b) but rather a constitutional corporation that is coordinate with and equal to the Legislature; therefore, the University argued that it has the exclusive authority to manage and control its property, including the day-to-day operations of the institution

with regard to the issue of firearm possession on its property. The Court of Claims, CYNTHIA D. STEPHENS, J., granted summary disposition in favor of the University, holding that the University is a sensitive place as contemplated by *Dist of Columbia v Heller*, 554 US 570 (2008), that the University's ordinance did not fall within the scope of the right conferred by the Second Amendment or Const 1963, art 1, § 6, and that because MCL 123.1102 only applies to a local unit of government and the University is not a local unit of government as defined in MCL 123.1101(b), the prohibitions set forth in MCL 123.1102 did not apply to the University. The Court of Claims also held that even if the University was considered a local unit of government, MCL 123.1102 specifically provides that local units of government may enact regulations "as otherwise provided by federal law or a law of this state," and because Article 8, § 5, of the Michigan Constitution grants the University "general supervision of its institution," the University had the right to promulgate firearm regulations for the safety of its students, staff, and faculty consistent with its right to educational autonomy and its mission to educate. Plaintiff appealed.

The Court of Appeals *held*:

1. The Second Amendment of the United States Constitution provides, in pertinent part, that the right of the people to keep and bear arms shall not be infringed. Historically, the scope of this right has not extended to certain individuals or certain places. A two-part test is applied with respect to Second Amendment challenges to firearm regulations. The threshold inquiry is whether the challenged regulation regulates conduct that falls within the scope of the Second Amendment right as historically understood. If the regulated conduct has historically been outside the scope of Second Amendment protection, then the activity is not protected and no further analysis is required; however, if the challenged conduct falls within the scope of the Second Amendment, then an intermediate level of constitutional scrutiny is applicable and requires the showing of a reasonable fit between the asserted interest or objective and the burden placed on an individual's Second Amendment right. In this case, the inquiry was whether Article X regulated conduct that was historically understood to be protected by the Second Amendment at the time of the Fourteenth Amendment's ratification in 1868. Sensitive places, including schools, are categorically unprotected by the Second Amendment pursuant to the Supreme Court's decision in *Heller*, and because the 1828 edition of Webster's Dictionary included the term "school" in the definition of "university" as well

as included the term "university" in the definition of "school," universities were not historically protected by the Second Amendment during the relevant historical period. Accordingly, as a matter of law, Article X did not burden conduct protected by the Second Amendment, and no further analysis was required. The Court of Claims properly dismissed plaintiff's Second Amendment claim.

2. Article 8, § 5, of the 1963 Michigan Constitution provides, in relevant part, that the regents of the University and their successors in office shall constitute a body corporate and shall have general supervision of the institution. The University Board of Regents is a constitutional corporation of independent authority that, within the scope of its functions, is coordinate with and equal to the Legislature. The first inquiry is whether the conduct being regulated is within the exclusive power of the University or whether it is properly the province of the Legislature. Matters involving the University's management and control of its institution or property are properly within the Board of Regents' exclusive authority, and the Legislature may not interfere; the Legislature's promulgated laws must yield to the University's authority. Conversely, matters outside the confines of the University's exclusive authority to manage and control its property are the province of the Legislature. In this case, plaintiff did not claim that the University exceeded its constitutional authority in promulgating Article X; instead, plaintiff claimed that MCL 123.1102 preempted the University's ordinance. MCL 123.1102 provides that a local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols, other firearms, or pneumatic guns, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state. MCL 123.1101(b) defines "local unit of government" as a city, village, township, or county. A university, as that term is commonly understood, is not a city, village, township, or county. Therefore, the Court of Claims properly held that MCL 123.1102 was not applicable to the University and did not preempt Article X.

3. This case was distinguishable from caselaw holding that the Legislature occupied the field of firearms regulation under MCL 123.1102 because the proffered caselaw involved ordinances of a local governmental unit or the policies of an entity created by two local governmental units encompassed by the plain terms of

MCL 123.1101(b) as opposed to an ordinance of a constitutional corporate body that is coequal with the Legislature and an agency of the state. The Legislature clearly limited the reach of MCL 123.1102 to firearm regulation enacted by cities, villages, townships, and counties, and because the University is not a lower-level or inferior-level governmental entity but rather is a state-level governmental entity, the Court of Claims properly held that MCL 123.1102 was not applicable to the University and did not preempt Article X.

Affirmed.

SAWYER, J., dissenting, did not believe it necessary to reach the constitutional question presented and instead would have resolved the case on the basis of the preemption issue alone. Focusing solely on the University's authority to regulate the possession of firearms by members of the general public who are legally carrying the firearm under the provision of state law in areas of the University's campus that are open to the general public, Judge SAWYER would have held that the University exceeded its authority by enacting Article X because the Legislature has completely occupied the field of firearms regulation, as stated in *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220 (2012) (*CADL*). Accordingly, binding precedent compelled the conclusion that the Legislature has preempted the regulation of the field of firearm possession, and the majority in this case as well as the Court in *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 318 Mich App 338 (2016), violated the requirements of MCR 7.215(J)(1). Judge SAWYER further would have held that the Court's decision in *CADL* applies to all units of government in Michigan subject to being preempted by state law, and therefore the question that had to be decided in this case was whether the University, because of its special constitutional status, was subject to preemption at all. Caselaw analyzing the special status of constitutional universities has established that while the Constitution grants a certain degree of autonomy to universities, universities are not exempt from all legislative enactments. Legislative regulation that clearly infringes the University's educational or financial autonomy must yield to the University's constitutional power, but the University is not allowed to thwart the clearly established public policy of the people of Michigan beyond those confines. Because the Legislature's decision to preempt the field of firearms regulation could not be deemed an invasion of the University's educational or financial autonomy,

Judge SAWYER would have held that the University exceeded its authority by enacting the restrictions on the possession of firearms on its campus.

WEAPONS — FIREARMS — CONSTITUTIONAL LAW — UNIVERSITIES — CONSTITUTIONAL CORPORATE BODIES — PREEMPTION.

MCL 123.1102 provides that a local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols, other firearms, or pneumatic guns, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state; under Article 8, § 5, of the 1963 Michigan Constitution, the University of Michigan Board of Regents, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors each amounts to a constitutional corporate body that is coequal with the Legislature and an agency of the state; because each of these three boards constitutes a state-level governmental entity, MCL 123.1102 is not applicable and does not preempt an ordinance prohibiting firearms on university property that is promulgated by one of these three boards.

The Law Offices of Steven W. Dulan, PLC (by *Steven W. Dulan*), for Joshua Wade.

Honigman Miller Schwartz & Cohn LLP (by *Leonard M. Niehoff*, *John D. Pirich*, and *John J. Rolecki*) and *Timothy G. Lynch* for the University of Michigan.

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

CAVANAGH, P.J. Plaintiff, Joshua Wade, appeals as of right an order granting summary disposition in favor of defendant, University of Michigan (University), and dismissing plaintiff's complaint seeking declaratory and injunctive relief from a University ordinance that prohibits firearms on any University property. We affirm.

In February 2001, the University revised the weapons provision, Article X, of its "Ordinance to Regulate Parking and Traffic and to Regulate the Use and Protection of the Buildings and Property of the Regents of the University of Michigan" and made all properties owned, leased, or controlled by the University weapons-free. Article X, titled "Weapons," provides:

> **Section 1. Scope of Article X**
>
> Article X applies to all property owned, leased or otherwise controlled by the Regents of the University of MIchigan [sic] and applies regardless of whether the Individual has a concealed weapons permit or is otherwise authorized by law to possess, discharge, or use any device referenced below.
>
> **Section 2. Possession of Firearms, Dangerous Weapons and Knives**
>
> Except as otherwise provided in Section 4, no person shall, while on any property owned, leased, or otherwise controlled by the Regents of the University of Michigan:
>
> (1) possess any firearm or any other dangerous weapon as defined in or interpreted under Michigan law or
>
> (2) wear on his or her person or carry in his or her clothing any knife, sword or machete having a blade longer than four (4) inches, or, in the case of knife with a mechanism to lock the blade in place when open, longer than three (3) inches.
>
> **Section 3. Discharge or Use of Firearms, Dangerous Weapons and Knives**
>
> Except as otherwise provided in Section 4, no person shall discharge or otherwise use any device listed in the preceding section on any property owned, leased, or otherwise controlled by the Regents of the University of Michigan.
>
> **Section 4. <u>Exceptions</u>**
>
> (1) Except to the extent regulated under Subparagraph (2), the prohibitions in this Article X do not apply:

(a) to University employees who are authorized to possess and/or use such a device . . . ;

(b) to non-University law enforcement officers of legally established law enforcement agencies . . . ;

(c) when someone possess [sic] or uses such a device as part of a military or similar uniform or costume In [sic] connection with a public ceremony . . . ;

(d) when someone possesses or uses such a device in connection with a regularly scheduled educational, recreational or training program authorized by the University;

(e) when someone possess [sic] or uses such a device for recreational hunting on property . . . ; or

(f) when the Director of the University's Department of Public Safety has waived the prohibition based on extraordinary circumstances. Any such waiver must be in writing and must define its scope and duration.

(2) The Director of the Department of Public Safety may impose restrictions upon individuals who are otherwise authorized to possess or use such a device pursuant to Subsection (1) when the Director determines that such restrictions are appropriate under the circumstances.

Section 5. Violation Penalty

A person who violates this Article X is guilty of a misdemeanor, and upon conviction, punishable by imprisonment for not less than ten (10) days and no more than sixty (60) days, or by a fine of not more than fifty dollars ($50.00) or both.

Subsequently, plaintiff sought a waiver of the prohibition as set forth in § 4(1)(f) of Article X. After his request was denied, plaintiff filed this action. In Count I, plaintiff alleged that the ban on firearms violates his federal and state constitutional rights to keep and bear arms as set forth in the Second Amendment of the United States Constitution and Article 1, § 6, of the Michigan Constitution. In Count II, plaintiff alleged that Article X is invalid because MCL 123.1102, which

prohibits local units of government from establishing their own limitations on the purchase, sale, or possession of firearms, preempts the ordinance. Plaintiff requested the Court of Claims to declare that Article X is unconstitutional and preempted by MCL 123.1102, and that defendant was enjoined from its enforcement.

The University responded to plaintiff's complaint with a motion for summary disposition under MCR 2.116(C)(8). The University argued that the Second Amendment does not reach "sensitive places," which includes schools like the University property.[1] But even if the Second Amendment applied, Article X did not violate it because the ordinance was substantially related to important governmental interests, including maintaining a safe educational environment for its students, faculty, staff, and visitors as well as fostering an environment in which ideas—even controversial ideas—can be freely and openly exchanged without fear of reprisal. The University further argued that Article X did not violate the Michigan Constitution because Article X is a reasonable exercise of the University's authority under Article 8, § 5, of the Michigan Constitution to control its property, maintain safety on that property, and to cultivate a learning environment. Moreover, MCL 123.1102 did not apply to the University because the University is not a "local unit of government"; rather, it is a constitutional corporation that is coordinate with and equal to the Legislature. Therefore, the University has the exclusive authority to manage and control its property, including the day-to-day operations of the institution with regard to the issue of firearm possession on its property. Accordingly, the University argued, plaintiff's complaint

[1] See *Dist of Columbia v Heller*, 554 US 570, 626-627; 128 S Ct 2783; 171 L Ed 2d 637 (2008).

failed to state a claim upon which relief could be granted and should be dismissed.

Plaintiff responded to the University's motion for summary disposition, arguing that Article X violates the Second Amendment of the United States Constitution, which, as explained in *Dist of Columbia v Heller*, 554 US 570, 592, 595; 128 S Ct 2783; 171 L Ed 2d 637 (2008), guarantees to individuals the right to keep and bear arms for self-defense. And contrary to the University's claim, the University is not a "sensitive place" under *Heller* because it is "not a school as that word is commonly understood. It is a community where people live and work, just as any community." Further, plaintiff argued, even if Article X is not unconstitutional, the Michigan Legislature "has closed off the field of firearms regulations by any other governmental actor . . . ." That is, the ordinance is preempted by MCL 123.1102 because the same principles of preemption apply to the University as apply to a municipality or quasi-municipal corporation. And the University is a " 'lower-level government entity' than the state legislature when it comes to conflicts of legislative authority." Accordingly, plaintiff argued, the University's motion for summary disposition should be denied.

The Court of Claims agreed with the University. First, the court held that the University is a public educational institution—a school—and, thus, a "sensitive place" as contemplated by the *Heller* Court. Regulations restricting firearms in such places are presumptively legal; consequently, the University's "ordinance does not fall within the scope of the right conferred by the Second Amendment or Const 1963, Art 1, § 6." Therefore, Count I of plaintiff's complaint was dismissed for failure to state a claim. Second, the court held that MCL 123.1102 plainly applies only to a

"local unit of government," which is defined by MCL 123.1101(b) as "a city, village, township, or county." Because the University is not a "local unit of government," the prohibitions set forth in MCL 123.1102 do not apply to it. However, even if the University was considered a "local unit of government," the court held, MCL 123.1102 specifically provides that such governmental units may enact regulations "as otherwise provided by federal law or a law of this state." Because the Michigan Constitution, pursuant to Article 8, § 5, grants the University "general supervision of its institution," the University had the right to promulgate firearm regulations for the safety of its students, staff, and faculty consistent with its right to educational autonomy and its mission to educate. Therefore, Count II of plaintiff's complaint was also dismissed. Accordingly, the University's motion for summary disposition was granted. This appeal followed.

Plaintiff argues that the Court of Claims erred when it ruled that the complete ban of firearms on University property in Article X did not violate his Second Amendment rights.[2] We disagree.

We review de novo a court's decision on a motion for summary disposition. *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 445; 886 NW2d 445 (2015). A motion brought under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Id*. (quotation marks and citation omitted). A challenge to the constitutionality of a regulation presents a question of law that this

[2] Plaintiff's argument on appeal focuses solely on his rights under the Second Amendment; therefore, we consider any claim premised on the Michigan Constitution abandoned. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Court also reviews de novo on appeal. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999).

The Second Amendment of the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *Heller*, 554 US 570, the United States Supreme Court undertook, for the first time, an in-depth examination of the scope of Second Amendment rights, primarily determining whether the amendment guaranteed individual or collective rights. At issue was the District of Columbia's handgun ban, which criminalized the registration of handguns and permitted possession of such guns only upon the chief of police's approval of a one-year license. *Id*. at 574-575. The law also required that lawfully owned guns, such as registered long guns, be rendered inoperable while in the home. *Id*. at 575. In determining that the Second Amendment guaranteed individual rights, the *Heller* Court focused on the original meaning of the Second Amendment, relying on historical materials to discern how the public understood the amendment at the time of its ratification, *id*. at 595-600, and noting that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *id*. at 634-635. Review of these materials led the *Heller* Court to conclude that the Second Amendment codified a preexisting right to bear arms, that the right was not limited to the militia, and that the central component of this right was self-defense, primarily in one's own home. *Id*. at 595, 599-600.

With regard to the District of Columbia's handgun ban, the *Heller* Court held that the Second Amendment precludes the "absolute prohibition of handguns held and used for self-defense in the home." *Id*. at 636. And

with regard to the District's requirement that firearms in the home be kept inoperable, the *Heller* Court stated, "This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id*. at 630. However, the *Heller* Court also clarified that "the right secured by the Second Amendment is not unlimited" and that individuals may not "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626. The *Heller* Court then identified a nonexhaustive list of "presumptively lawful regulatory measures," stating:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [*Id*. at 626-627, 627 n 26.][3]

In other words, the Court recognized that the scope of the right did not, historically, extend to certain individuals or to certain places.

The United States Supreme Court considered the Second Amendment again in *McDonald v Chicago*, 561 US 742, 750; 130 S Ct 3020; 177 L Ed 2d 894 (2010), in which it considered the validity of a handgun ban, similar to that in *Heller*, in the cities of Chicago and Oak Park. The cities argued that the ban was constitutional because the Second Amendment did not apply to the states. *Id*. The *McDonald* Court disagreed,

[3] Plaintiff's attempt to characterize this passage as dicta is unpersuasive. As defendant points out, this language is an explanation of what the Court held and did not hold in *Heller*.

declaring that the Second Amendment applies to the states by virtue of the Fourteenth Amendment. *Id*. at 778. The *McDonald* Court reiterated that laws forbidding the carrying of firearms in sensitive places are presumptively lawful regulatory measures. *Id*. at 786. Further, in analyzing whether the cities' handgun bans were within the scope of the Second Amendment's protected activity, the Court again considered the historical and traditional understanding of the Second Amendment at the time the Fourteenth Amendment was adopted. *Id*. at 768-778. Thus, "*McDonald* confirms that if the claim concerns a state or local law, the 'scope' question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified." *Ezell v Chicago*, 651 F3d 684, 702 (CA 7, 2011).

The holdings in *Heller* and *McDonald* have led to the application of a two-part test with respect to Second Amendment challenges to firearm regulations. The threshold inquiry is whether the challenged regulation "regulates conduct that falls within the scope of the Second Amendment right as historically understood." *People v Wilder*, 307 Mich App 546, 556; 861 NW2d 645 (2014), quoting *People v Deroche*, 299 Mich App 301, 308-309; 829 NW2d 891 (2013) (quotation marks and citation omitted). If the regulated conduct has historically been outside the scope of Second Amendment protection, the activity is not protected and no further analysis is required. *Wilder*, 307 Mich App at 556. If, however, the challenged conduct falls within the scope of the Second Amendment, an intermediate level of constitutional scrutiny is applicable and requires the showing of "a reasonable fit between the asserted interest or objective and the burden placed on an individual's Second Amendment right." *Id*. at 556-557.

In this case, plaintiff's complaint alleged that the complete ban of firearms on University property in Article X violates his Second Amendment rights. The relevant question in light of plaintiff's complaint and the applicable analytical framework is whether Article X regulates conduct that was historically understood to be protected by the Second Amendment at the time of the Fourteenth Amendment's ratification, i.e., 1868. See *Ezell*, 651 F3d at 702-703. While the Supreme Court in *Heller* indicated that certain "sensitive places," including schools, are categorically unprotected, we must consider whether a "university" was considered a "school" in 1868.[4] And it appears to have been so. That is, Webster's *An American Dictionary of the English Language* (1828) defines "university" as:

> An assemblage of colleges established in any place, with professors for instructing students in the sciences and other branches of learning, and where degrees are conferred. A *university* is properly a universal school, in which are taught all branches of learning, or the four faculties of theology, medicine, law and the sciences and arts. [*Webster's Dictionary 1828: Online Edition* <http://webstersdictionary1828.com/Dictionary/university> [https://perma.cc/S29K-F88X].]

Likewise, the term "school" in 1828 was defined, in part, to include "universities":

> A place of education, or collection of pupils, of any kind; as the schools of the prophets. In modern usage, the word *school* comprehends every place of education, as university, college, academy, common or primary schools, dancing schools, riding schools, etc.; but ordinarily the word is applied to seminaries inferior to universities and colleges. [*Webster's Dictionary 1828: Online Edition* <http://

[4] The Court of Claims did not consider the historical meaning of "university" and whether it was understood as a "sensitive place."

> webstersdictionary1828.com/Dictionary/school> [https://perma.cc/L4U3-BUFC].]

Given that at the historically relevant period, universities were understood to be schools and, further, that *Heller* recognized that schools were sensitive places to which Second Amendment protections did not extend, we conclude as a matter of law that Article X does not burden conduct protected by the Second Amendment. Therefore, no further analysis is required. Stated differently, Article X does not infringe on Second Amendment rights. No factual development could change this result. Because plaintiff has not made a cognizable Second Amendment claim, summary disposition under MCR 2.116(C)(8) was proper.

Next, plaintiff argues that the Court of Claims erred by concluding that MCL 123.1102 did not preempt the University's ordinance that banned all firearms from University property. After reviewing this question of statutory interpretation de novo, we disagree. See *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

Article 8, § 5, of the 1963 Constitution provides, in relevant part:

> The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan[.] . . . [The Regents] shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds.

The Board of Regents of the University of Michigan has a unique legal character as a constitutional corporation possessing broad institutional powers. It has long been recognized that the University Board of Regents "is a separate entity, independent of the State as to the management and control of the university

and its property, [while at the same time] a department of the State government, created by the Constitution . . . ." *Regents of Univ of Mich v Brooks*, 224 Mich 45, 48; 194 NW 602 (1923). Although the University Board of Regents has at various times been referred to as part of the executive branch that may be affected by the Legislature's plenary powers, it has also been recognized that the Board is " 'the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature.' " *Federated Publications, Inc v Mich State Univ Bd of Trustees*, 460 Mich 75, 84 n 8; 594 NW2d 491 (1999), quoting *Regents of Univ of Mich v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911); see also *Brooks*, 224 Mich at 48 (recognizing that the University is a state agency within the executive branch of state government).

Given the unique character of the University Board of Regents and its exclusive authority over the management and control of its institution, we generally first consider whether the conduct being regulated is within the exclusive power of the University or whether it is properly the province of the Legislature. As this Court held in *Branum v Regents of Univ of Mich*, 5 Mich App 134, 138-139; 145 NW2d 860 (1966):

> [T]he legislature can validly exercise its police power for the welfare of the people of this State, and a constitutional corporation such as the board of regents of the University of Michigan can lawfully be affected thereby. The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island.

Thus, for example, matters involving the University's management and control of its institution or property are properly within the Board of Regents' exclusive

authority, and the Legislature may not interfere; the Legislature's promulgated laws must yield to the University's authority. See, e.g., *Federated Publications, Inc*, 460 Mich at 88 (holding that Michigan's Open Meetings Act, MCL 15.261 *et seq*., is inapplicable to the internal operations of the University in selecting a president because it infringes on the University's constitutional power to supervise the institution). Conversely, matters outside the confines of the University's exclusive authority to manage and control its property are the province of the Legislature, and the University may be affected thereby. See, e.g., *Regents of Univ of Mich v Employment Relations Comm*, 389 Mich 96, 108-110; 204 NW2d 218 (1973) (holding that the Michigan public employment relations act, MCL 423.201 *et seq*., applies to the University and does not infringe on its constitutional autonomy so long as the scope of public-employee bargaining under the Act does not infringe on the University's autonomy in the educational sphere); see also *W T Andrew Co, Inc v Mid-State Surety Corp*, 450 Mich 655, 662, 668; 545 NW2d 351 (1996) (holding that the public works bond statute, MCL 129.201 *et seq*., applied to the University as a valid "exercise of the Legislature's police power to protect the interests of contractors and materialmen in the public sector" and promoted the state's general welfare).

Plaintiff contends that Article X has nothing to do with the management or control of university property or the promotion of the University's objectives, but instead "pick[s] away" at the constitutional rights of Michigan's citizens "as they walk down the street." Plaintiff cites no authority in support of this claim, and his complaint makes no allegation in this regard. That is, plaintiff did not claim that the University exceeded its constitutional authority in promulgating Article X.

Instead, plaintiff's complaint makes a claim based on preemption pursuant to MCL 123.1102; thus, we turn to that matter.

Chapter 123 of the Michigan Complied Laws relates to local governmental affairs and "governs everything from the power of municipalities to operate a system of public recreation and playgrounds to their authority to establish and maintain garbage systems and waste plants." *Capital Area Dist Library v Mich Open Carry, Inc*, 298 Mich App 220, 230; 826 NW2d 736 (2012) (*CADL*). Beginning in 1990, Chapter 123 was amended to also govern the regulation of firearms. Specifically, MCL 123.1102 provides:

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols, other firearms, or pneumatic guns, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

MCL 123.1101(b) defines "local unit of government" as "a city, village, township, or county." When a statute defines a term, that definition controls. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Plainly, a "university," as that term is commonly understood, is not a city, village, township, or county. The Legislature's intent is clearly expressed and, thus, must be enforced as written. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Therefore, as the Court of Claims held, the statute is not applicable to the University and, thus, does not preempt Article X.

But, plaintiff argues, the Court of Claims erred by failing to follow caselaw holding that the Legislature

fully occupied the field of firearms regulation under MCL 123.1102. For example, plaintiff notes, in *Mich Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 403; 662 NW2d 864 (2003), this Court considered an ordinance of the city of Ferndale that prohibited "the possession or concealment of weapons in all buildings located in Ferndale that are owned or controlled by the city." This Court held that MCL 123.1102 "stripped local units of government of all authority to regulate firearms by ordinance or otherwise . . . except as particularly provided in other provisions of the act and unless federal or state law provided otherwise." *Id*. at 413. But clearly that case involved an ordinance of the city of Ferndale that regulated firearms—a local governmental unit encompassed by the plain terms of MCL 123.1101(b); it did not involve an ordinance of a constitutional corporate body that is coequal with the Legislature and an agency of the state.

The same analysis applies to plaintiff's reliance on *CADL*, 298 Mich App 220. There, the Capital Area District Library (CADL) was jointly established by the city of Lansing and Ingham County, and its operating board enacted a weapons policy banning all weapons from the library premises. *Id*. at 224-225. This Court held that "field preemption bars CADL's regulation of firearms." *Id*. at 230. In doing so, this Court acknowledged that the library did not fit within the definition of "local unit of government." *Id*. at 231. However, because the CADL was a quasi-municipal corporation created by two local units of government, this Court concluded that the library is a lower-level governmental entity subject to the principles of preemption with regard to the regulation of firearms. *Id*. at 231-233, 241. Plaintiff argues that the definition of a "local unit of government" should similarly be expanded to in-

clude the University. This argument ignores that the University was not created by two local units of government but finds its origins in the Constitution as a corporate body that is coequal with the Legislature and an agency of the State.[5]

Further, in *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 318 Mich App 338, 341-343; 897 NW2d 768 (2016), this Court recently rejected a similar claim that MCL 123.1102 applied to the Ann Arbor Public Schools and prevented their policies banning the possession of firearms on school property as set forth in *CADL*, 298 Mich App 220. This Court noted that MCL 123.1102 only applies to a "local unit of government," which is defined under MCL 123.1101(b) as "a city, village, township, or county." *Mich Gun Owners, Inc*, 318 Mich App at 348. And unlike the district library that was established by "two local units of government" in the *CADL* case, school districts, like the Ann Arbor Public Schools, "are not formed, organized, or operated by cities, villages, townships, or counties; school districts exist independently of those bodies." *Id*. Likewise, the University of Michigan is not formed, organized, or

[5] We note and reject our dissenting colleague's mischaracterization of the holding in *CADL* as "binding precedent" that we have "ignore[d]" in violation of MCR 7.215(J)(1). The district library at issue in that case was considered an "inferior level of government" and a "quasi-municipal corporation" which could only exercise powers " 'expressly conferred by the Legislature.' " See *CADL*, 298 Mich App at 231-233 (citation omitted). But, as discussed in our opinion, the University is not remotely similar to a district library created by two municipalities that specifically come within the ambit of MCL 123.1102. Moreover, contrary to the dissent's position, we do not consider the University's autonomy with regard to its regulation of dangerous weapons as tantamount to having the "authority to enact criminal laws." Rather, like numerous other regulations the University enacts pursuant to its constitutional mandate of "general supervision," the objective of Article X is to create a safe environment for its students in furtherance of its educational mission.

operated by a city, village, township, or county; the University exists independently of those bodies.

We conclude, again, that the Legislature clearly limited the reach of MCL 123.1102 to firearm regulations enacted by cities, villages, townships, and counties. MCL 123.1101(b). The University is not similarly situated to these entities; rather, it is a state-level, not a lower-level or inferior-level, governmental entity. More specifically, it is "a constitutional corporation of independent authority . . . ." *Federated Publications, Inc*, 460 Mich at 84 n 8 (quotation marks and citation omitted). Plaintiff has failed to cite to a single case holding that the Board of Regents of the University of Michigan is a "lower-level governmental entity" or an "inferior level of government" subject to state-law preemption. See *CADL*, 298 Mich App at 233. Therefore, contrary to plaintiff's argument on appeal, this case is not "an ideal target" for the preemption analysis set forth in *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977)—that test presupposes that a "lower-level governmental entity" has enacted or seeks to enact a regulation in an area of law that the Legislature has regulated. See *CADL*, 298 Mich App at 233. But even if the University Board of Regents was subject to state-law preemption, in *Mich Gun Owners, Inc*, 318 Mich App at 349-354, this Court considered the *Llewellyn* factors and rejected the claim "that MCL 123.1102 impliedly preempts any school-district-generated firearm policy because the statute fully occupies the regulatory field." While in that case the regulations were promulgated by a public school district and in this case the regulations were promulgated by the University Board of Regents, the analysis of the *Llewellyn* factors would be sufficiently similar to reach the same result—the Legislature did not intend to completely preempt the field of firearm regulation.

In summary, MCL 123.1102 does not prohibit the University from regulating the possession of firearms on University property through the enactment of Article X; thus, Count II of plaintiff's complaint was properly dismissed for failure to state a cognizable claim for relief. Accordingly, the Court of Claims properly granted defendant's motion for summary disposition under MCR 2.116(C)(8) and dismissed plaintiff's entire complaint.

Affirmed. In light of the public question involved, defendant—although the prevailing party—may not tax costs. See MCR 7.219(A).

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

SAWYER, J. (*dissenting*). I respectfully dissent.

First, I do not believe it necessary to reach the constitutional question presented in this case because I believe it can be resolved on the preemption issue. Accordingly, I will focus solely on the preemption issue. Additionally, I wish to make clear that my opinion only relates to the specific question before the Court: the authority of defendant to regulate the possession of firearms by members of the general public who are legally carrying the firearm under the provisions of state law in areas of defendant's campus that are open to the general public. I leave for another case the questions of defendant's authority to regulate the possession of firearms by its students or employees, or in areas to which the general public is prohibited access.

I do not disagree with the majority that this case is not strictly controlled by the preemption provision in MCL 123.1102. That statute bans local units of government from enacting their own laws regulating fire-

arms. But, as the majority points out, "local unit of government" is defined under MCL 123.1101(b) as "a city, village, township, or county." And, of course, defendant is none of those. But that does not end the analysis. Rather, in looking to this Court's decision in *Capital Area Dist Library v Mich Open Carry, Inc* (*CADL*),[1] I conclude that both the trial court and the majority misapprehend the effect of field preemption in resolving this case.

In *CADL*, this Court rejected the direct application of the preemption provisions of MCL 123.1102 because a district library was not contained within the definition of a "local unit of government" under MCL 123.1101(a).[2] The opinion then goes on to provide a detailed analysis of the applicability of field preemption and the application of the factors under *People v Llewellyn*.[3] I need not extensively review the issue of field preemption here; the *CADL* opinion does an admirable job of doing just that. I need only refer to its ultimate conclusion: "the pervasiveness of the Legislature's regulation of firearms, and the need for exclusive, uniform state regulation of firearm possession as compared to a patchwork of inconsistent local regulations indicate that the Legislature has completely occupied the field that CADL seeks to enter."[4] I would only add that this conclusion is strengthened with respect to colleges and universities inasmuch as the Legislature, in the concealed-pistol-license statute, has addressed the issue of concealed firearms on college campuses. Specifically, MCL 28.425o(1)(h) prohibits, with some exceptions, individuals with a concealed

[1] 298 Mich App 220; 826 NW2d 736 (2012).

[2] 298 Mich App at 231.

[3] 401 Mich 314; 257 NW2d 902 (1977).

[4] *CADL*, 298 Mich App at 241.

pistol license from carrying a concealed pistol in a college or university dormitory or classroom. This fact further reflects the Legislature's intent to preempt this field of regulation, even with respect to colleges and universities.

The majority attempts to distinguish *CADL* on the basis that *CADL* relied on the fact that a district library is created by two local units of government, as defined in MCL 123.1101(b), and defendant here was not created by two local units of government. The majority relies on this Court's decision in *Mich Gun Owners, Inc v Ann Arbor Pub Sch*[5] to reject the field-preemption argument. I respectfully submit that both the majority in this case and the Court in *Mich Gun Owners* ignore the binding precedent of *CADL* and violate the requirements of MCR 7.215(J)(1). As discussed earlier, this Court in *CADL* concluded that the Legislature intended to completely occupy the field of the regulation of firearm possession and prevent a patchwork of local regulations in the state. The fact that CADL was established by two local units of government establishes that it was itself a governmental agency subject to preemption.[6] It does not, however, limit the application of the field-preemption doctrine to only those governmental entities created by two local units of government.

That is, once a court reaches the conclusion that field preemption applies, then field preemption applies to all units of government that attempt to invade the Legislature's regulation of that field. Indeed, the entire concept of field preemption is that it demands "exclusive state regulation to achieve the uniformity neces-

[5] 318 Mich App 338; 897 NW2d 768 (2016), lv app pending.

[6] *CADL*, 298 Mich App at 231-232.

sary to serve the state's purpose or interest."[7] It is patently absurd to conclude that the Legislature intended to preempt an entire field of regulation, yet it only applies to some, but not all, governmental entities. That is, if certain governmental entities are allowed to impose their own regulations, then the field is not actually preempted and the Legislature's interest in establishing uniformity is defeated.

Accordingly, I conclude that our decision in *CADL* compels the conclusion that the Legislature has preempted the regulation of the field of firearm possession and that that decision applies to all units of government in Michigan subject to being preempted by state law. Thus, the question that must be decided in this case is whether the University of Michigan, because of its special constitutional status, is subject to preemption at all.[8]

The special status of the three "constitutional universities"[9] has been considered by the courts many times, including in *Federated Publications, Inc v Mich State Univ Bd of Trustees*.[10] In *Federated Publications*, the Court considered whether the Open Meetings Act[11] applied to Michigan State University's (MSU) presidential search committee or whether, because of MSU's special constitutional status, it was exempt from the legislation. The Court concluded that only the formal

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[7] *Llewellyn*, 401 Mich at 324.

[8] I note that this is a different question than whether public schools are exempt from preemption. Therefore, even if we were to conclude that the University of Michigan is not subject to preemption, *Mich Gun Owners* was nevertheless incorrectly decided because it failed to follow the binding precedent of *CADL*.

[9] University of Michigan, Michigan State University, and Wayne State University. See Const 1963, art 8, § 5.

[10] 460 Mich 75; 594 NW2d 491 (1999).

[11] MCL 15.261 *et seq*.

trustees' meeting at which the board ultimately voted on the selection of the president was subject to the Open Meetings Act.[12] The Court explained that while the Constitution grants a certain degree of autonomy to the universities, the universities are not exempt from all legislative enactments:

> This Court has long recognized that Const 1963, art 8, § 5 and the analogous provisions of our previous constitutions limit the Legislature's power. "The Legislature may not interfere with the management and control of" universities. [*Regents of the Univ of Mich v Michigan*, 395 Mich 52, 65; 235 NW2d 1 (1975).] The constitution grants the governing boards authority over "the absolute management of the University, and the exclusive control of all funds received for its use." [*State Bd of Agriculture v Auditor General*, 226 Mich 417, 424; 197 NW 160 (1924).] This Court has "jealously guarded" these powers from legislative interference. *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561, 565; 184 NW2d 921 (1971).
>
> This Court has not, however, held that universities are exempt from all regulation. In *Regents of the Univ of Michigan v Employment Relations Comm*, 389 Mich 96, 108; 204 NW2d 218 (1973), we quoted *Branum v Bd of Regents of the Univ of Michigan*, 5 Mich App 134, 138-139; 145 NW2d 860 (1966):
>
> > It is the opinion of this Court that the legislature can validly exercise its police power for the welfare of the people of this State, and a constitutional corporation such as the board of regents of the University of Michigan can lawfully be affected thereby. The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without those confines,

[12] *Federated Publications*, 460 Mich at 92.

> however, there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan.
>
> Legislative regulation that clearly infringes on the university's educational or financial autonomy must, therefore, yield to the university's constitutional power.[13]

The Court then goes on to consider its earlier decision in the *Regents*[14] case. The *Regents* case considered whether the University was subject to the public employees relations act (PERA)[15] with respect to medical employees who formed a union. The *Federated Publications* opinion[16] offered the following observation of the *Regents* case:

> Thus, although a university is subject to the public employees relations act, MCL 423.201 *et seq*.; MSA 17.455(1) *et seq*., the regulation cannot extend into the university's sphere of educational authority:
>
> > Because of the unique nature of the University of Michigan . . . the scope of bargaining by [an association of interns, residents, and post-doctoral fellows] may be limited if the subject matter falls clearly within the educational sphere. Some conditions of employment may not be subject to collective bargaining because those particular facets of employment would interfere with the autonomy of the Regents. [*Regents*, 389 Mich at 109.][17]

The *Regents* decision itself used the example that PERA would require the University to negotiate the salaries of the unionized employees, but the University would not be required to negotiate whether interns

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[13] *Federated Publications*, 460 Mich at 86-87 (citation omitted).

[14] 389 Mich 96.

[15] MCL 423.201 *et seq*.

[16] *Federated Publications*, 460 Mich at 87-88.

[17] Alterations by the *Federated Publications* Court.

could be required to work in the pathology department if the University determined that spending time in the pathology department was necessary to the interns' education.[18] The former does not invade the University's educational autonomy, while the latter does.

Clearly, the decisions of our courts on this topic do not support a proposition that defendant has free rein to determine which enactments of the Legislature it chooses to follow and which it chooses to ignore. Nor do these decisions grant the University the authority to enact criminal laws. Turning to the issue at hand, I do not view applying preemption to the issue of firearm possession as invading either the University's educational or financial autonomy. That is, by recognizing the Legislature's decision to preempt the field of firearm possession and keep to itself the enactment of those regulations, there is no invasion of the University's autonomy. This is not, for example, a case of the Legislature mandating that all University students must take a course in firearm safety in order to be awarded a degree. Nor has the Legislature mandated that the University expend money on such training for students who wish it.

For these reasons, I would reverse the trial court and hold that defendant exceeded its authority by enacting the restrictions on the possession of firearms on its campus.

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[18] *Regents*, 389 Mich at 109.

PEOPLE v GARAY

Docket No. 329091. Submitted March 7, 2017, at Grand Rapids. Decided April 11, 2017. Approved for publication June 8, 2017, at 9:00 a.m. Leave to appeal sought.

Victor M. Garay was convicted following a jury trial in the Kalamazoo Circuit Court, Alexander C. Lipsey, J., of first-degree murder, MCL 750.316, conspiracy to commit murder, MCL 750.157a; MCL 750.316, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for the shooting death of Michael Day in the Edison neighborhood of Kalamazoo, Michigan. Day had been a member of one neighborhood gang, and defendant admitted a relationship with the rival neighborhood gang. Defendant, who was 16 years old at the time of trial, was tried with his two adult male codefendants before separate juries. Testimony was received from many live witnesses; however, two juvenile girls, whose preliminary-examination testimony placed defendant in the proximity of the shooting, were declared unavailable for trial over the defense's objection, and neither the girls nor their father were examined regarding their unavailability in open court. The court admitted the girls' preliminary-examination testimony, finding that their refusal to testify because of intimidation made them unavailable. The court sentenced defendant to life imprisonment without the possibility of parole for the murder and conspiracy convictions and to two years' imprisonment for the felony-firearm convictions. After trial, a juror informed the court of two instances of potential juror misconduct: the jurors had used cell phones during the trial proceedings, and a juror who was acquainted with a testifying police officer vouched for that officer's expertise in weapons matters to the other jurors. The court held a hearing regarding the potential juror misconduct and declined to order a new trial. Defendant appealed, arguing that the trial court erred by declaring the girls unavailable as witnesses, by admitting the girls' preliminary-examination testimony, by failing to order a new trial, and by sentencing defendant to life in prison without the possibility of parole for the murder and conspiracy convictions.

The Court of Appeals *held*:

1. Under MRE 804(a)(2), a declarant is unavailable when the declarant refuses to testify despite an order of the court to do so. In this case, the juvenile girls appeared on the fourth day of trial; however, they left the courthouse and refused to return to testify, which constituted a refusal to testify despite a court order to do so. Furthermore, testimony at trial regarding the dangerous character of the Edison neighborhood, a Facebook threat directed toward one of the girls, and their father's refusal to allow them to testify out of fear for their safety showed that the reason for the girls' refusal to testify was self-preservation. While the better practice would have been to make a record of their unavailability by examining each as to any threats received and the factors that influenced their refusal to testify, the trial court's decision to declare the girls unavailable was within the range of reasonable and principled outcomes. Accordingly, the trial court did not abuse its discretion by declaring the girls to be unavailable.

2. Under MRE 804(b)(1), when a declarant is unavailable, testimony given by the declarant as a witness at another hearing of the same or a different proceeding is not excluded by the hearsay rule if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. First, there was no dispute that the preliminary-examination testimony was given at another hearing of the same or a different proceeding. Second, defendant had an opportunity and similar motive to develop the testimony at the preliminary examination. The prosecutor's purpose in presenting the testimony of the girls at the preliminary examination, i.e., to show that defendant conspired with a codefendant to shoot at members of the rival gang and that defendant was the person who shot Day, was the same purpose that the prosecutor had in presenting their testimony at trial. Although the burden of proof was lower at the preliminary examination, defendant had a similar motive to cross-examine the girls at both proceedings, i.e., defendant was motivated to show that their testimony regarding what they saw and heard lacked credibility or was not accurate, and defendant did, in fact, cross-examine the girls with regard to their credibility. The trial court's decision to admit the preliminary-examination testimony of the girls fell within the range of reasonable and principled outcomes. Accordingly, the trial court did not abuse its discretion by admitting the preliminary-examination testimony of the girls under MRE 804(b)(1). Furthermore, the admission of the preliminary-examination testimony did not violate defendant's

constitutional right of confrontation, US Const, Am VI, because the girls were unavailable for trial and because defendant cross-examined them at the preliminary examination.

3. A jury's consideration of extraneous facts not introduced into evidence deprives a defendant of his or her constitutional rights of confrontation, of cross-examination, and to the effective assistance of counsel. When there is evidence to suggest that the jury verdict was affected by an influence external to the trial proceedings, a court may consider juror testimony to impeach a verdict; however, when the alleged misconduct relates to influences internal to the trial proceedings, a trial court may not invade the sanctity of the deliberative process. External matters include publicity and information related specifically to the case the jurors are meant to decide, while internal matters include the general body of experiences that jurors are understood to bring with them to the jury room. In this case, the juror who informed the court of the potential juror misconduct testified that jurors used their cell phones on breaks; the testifying juror used his cell phone for text messaging, and he had no personal knowledge for what purposes the other jurors used their cell phones. Accordingly, defendant did not establish that the jury was subject to any extraneous influence through the use of cell phones. Similarly, defendant did not establish that the jury was subject to any extraneous influence through the juror acquainted with the testifying officer because that juror's statements regarding the officer were based on his own personal knowledge and experience, which constituted an internal matter. While the juror should have disclosed his relationship with the officer during voir dire, the juror's statements did not provide him or the other jurors with any knowledge regarding Day's murder. Even if the juror's statements were an extraneous influence, and assuming that there was a real and substantial possibility that the statement could have affected the jury's verdict, the error was harmless because the evidence of defendant's guilt—offered by many testifying officers and fact witnesses—was overwhelming.

4. The Eighth Amendment of the United States Constitution forbids a sentencing scheme that mandates life-without-parole sentences for all juvenile offenders. Such sentences may only be imposed on the rarest of juvenile offenders whose crimes reflect irreparable corruption. In sentencing a juvenile, a trial court must begin its analysis with the understanding that life-without-parole sentences are, unequivocally, appropriate only in rare cases. The trial court must consider the factors set forth in *Miller v Alabama*, 567 US 460, 477-478 (2012). *Miller* also provided that

the distinctive attributes of youth diminish the penological justifications—which it identified as retribution, deterrence, incapacitation, and rehabilitation—for imposing a life-without-parole sentence on juvenile offenders. Although a trial court's decision to impose a life-without-parole sentence is reviewed for an abuse of discretion, an appellate court must view such a sentence as inherently suspect. In this case, the trial court stated that it had to be satisfied that whatever sentence it imposed maximized the goals of sentencing and further stated that defendant's sentence served to protect the public and to deter other individuals who might engage in similar gang-related conduct. The trial court committed an error of law by considering the general goals of sentencing. Furthermore, nothing said by the trial court indicated that it understood the rarity with which such sentences should be imposed and that such sentences were reserved for the rarest of juvenile offenders whose crimes reflect irreparable corruption. Because the trial court made an error of law in considering the goals of sentencing a youth when it sentenced defendant to life without parole, and because the trial court did not sentence defendant to life without parole with the understanding that such sentences are reserved for the rare juvenile offender whose crime reflects irreparable corruption, defendant's sentences for life without parole were reversed and the case was remanded for resentencing. On remand, the trial court was directed to not only consider the *Miller* factors and place its findings on the record, but it was also directed to decide whether defendant is the rare juvenile offender who is incapable of reform, keeping in mind that, more likely than not, a life-without-parole sentence is a disproportionate sentence for defendant.

Affirmed in part; reversed in part; case remanded for resentencing. Jurisdiction retained.

CONSTITUTIONAL LAW — JUVENILES — HOMICIDE — SENTENCES — LIFE WITHOUT PAROLE — CONSIDERATION OF THE GOALS OF SENTENCING NOT PERMITTED.

The Eighth Amendment of the United States Constitution forbids a sentencing scheme that mandates life-without-parole sentences for all juvenile offenders; such sentences may only be imposed on the rarest of juvenile offenders whose crimes reflect irreparable corruption; in sentencing a juvenile, a trial court must begin its analysis with the understanding that life-without-parole sentences are, unequivocally, appropriate only in rare cases; the trial court must consider the factors set forth in *Miller v Alabama*, 567 US 460, 477-478 (2012), and place its findings on the record; when sentencing a juvenile to life in prison without parole, a trial court

> commits an error of law by considering the general goals of sentencing: rehabilitation, punishment, deterrence, protection, and retribution.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

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

STEPHENS, P.J. Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; conspiracy to commit murder, MCL 750.157a; MCL 750.316; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life imprisonment without the possibility of parole for the murder and conspiracy convictions and to two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm defendant's convictions, reverse the life-without-parole sentences, and remand for resentencing.

I. BACKGROUND

This case involves the shooting death of 13-year-old Michael Day on May 26, 2014, on Race Street in the Edison neighborhood of Kalamazoo, Michigan. The Edison neighborhood was home to two gangs: Trapp Money and the Washington Street Boys. Day was a member of the Washington Street Boys, and defendant admitted a relationship with Trapp Money.

Defendant, who was 16 years old at the time of trial, was tried with his two adult male codefendants before

separate juries. Testimony was received from many live witnesses. However, two juvenile sisters, N and T, whose preliminary-examination testimony placed defendant in the proximity of the shooting, were declared unavailable for trial over the defense's objection. The parties made a record of the objection, but neither the sisters nor their father were examined regarding their unavailability in open court. Instead, the court received information regarding threats made to the witnesses on Facebook, and the prosecution provided information that the father of the two girls communicated that he would not allow them to testify when he brought them to court under subpoena. The court admitted their preliminary-examination testimony, finding that their refusal to testify because of intimidation made them unavailable. Numerous other fact witnesses testified. Several police officers also testified, including Officer Gary Latham from the crime laboratory, who provided testimony regarding the weapon used to shoot the victim, the direction of weapon fire, and other related issues.

After the jury trial, the court was apprised of potential juror misconduct. Specifically, a juror reported that another juror was acquainted with Officer Latham and vouched for his expertise in weapons matters to the jury. Additionally, the juror reported that members of the jury used cell phones during the trial proceedings. The court held a hearing on this issue and placed the reporting juror under oath. At the conclusion of that hearing, the court declined to order a new trial.

II. ADMISSION OF THE PRELIMINARY-EXAMINATION TESTIMONY OF N AND T

On appeal, defendant argues that the trial court erred by declaring sisters N and T unavailable as

witnesses under MRE 804(a) and admitting their preliminary examination testimony under MRE 804(b)(1). We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. at 217.

During trial, the prosecution asked the trial court to declare that N and T were unavailable as witnesses under MRE 804(a) and to admit their preliminary-examination testimony. According to the prosecution, N and T were subpoenaed and had been contacted a number of times. Their father informed the members of the Kalamazoo Department of Public Safety, who had made the contact, that N and T would not appear because they had been threatened. However, N and T were brought to court by their father on the day that they were to appear, but their father stated that their presence was "a courtesy." The sisters, who had been threatened, would not testify. Detective Corey Ghiringhelli checked the Facebook page of either N or T, and he saw a picture of the girl testifying at the preliminary examination with the comment "that bitch should die." The trial court declared the two sisters unavailable and allowed the jury to hear their preliminary-examination testimony. The trial court noted that telephone messages left by its staff with the father of N and T had not been returned.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible unless it falls within an exception to the hearsay rule. MRE 802; *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013). MRE 804 provides exceptions to

the hearsay rule that apply when the declarant is deemed unavailable as a witness. *People v Duncan*, 494 Mich 713, 724; 835 NW2d 399 (2013). MRE 804(a) lists situations in which a declarant is unavailable. Under MRE 804(b)(1), when a declarant is unavailable, testimony given by the declarant "as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," is not excluded by the hearsay rule. Factors that a trial court should consider in determining whether the party had a similar motive to develop the testimony include:

> (1) whether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue"; (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities). [*People v Farquharson*, 274 Mich App 268, 278; 731 NW2d 797 (2007), quoting *United States v DiNapoli*, 8 F3d 909, 914-915 (CA 2, 1993) (en banc).]

The trial court did not abuse its discretion by declaring N and T to be unavailable. The decision of N and T's father not to allow the two sisters to testify is not expressly addressed under MRE 804(a), but it is of the same character as other situations outlined in the rule. See *People v Adams*, 233 Mich App 652, 658; 592 NW2d 794 (1999). Additionally, because N and T appeared on the fourth day of trial pursuant to a subpoena, their departure from the courthouse and their refusal to return to testify constituted a refusal to testify "despite an order of the court to do so." MRE 804(a)(2); *Adams*,

233 Mich App at 659 n 6.[1] Given their father's refusal to allow them to testify and his refusal to respond to the trial court's attempts for contact, N and T were certainly unavailable according to the ordinary meaning of the word. *Adams*, 233 Mich App at 657-659. Furthermore, testimony at trial regarding the dangerous character of the Edison neighborhood, the Facebook threat, and the father's refusal to allow N and T to testify out of fear for their safety shows that the reason for the refusal to testify was self-preservation. *Id*. at 658. While the better practice would have been to make a record of their unavailability by examining each as to any threats received and the factors that influenced their refusal to testify, the trial court's decision to declare N and T unavailable was within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

The trial court also did not abuse its discretion by admitting the preliminary-examination testimony of N and T under MRE 804(b)(1). First, there is no dispute that the preliminary-examination testimony was given "at another hearing of the same or a different proceeding . . . ." MRE 804(b)(1). Second, defendant had "an opportunity and similar motive to develop the testimony" at the preliminary examination. *Id*. The purpose of a preliminary examination is "to determine if a crime has been committed and, if so, if there is probable cause to believe the defendant committed it." *People v Johnson*, 427 Mich 98, 104; 398 NW2d 219 (1986) (citation and quotation marks omitted). The prosecution's purpose in presenting the testimony of N and T at the preliminary examination, i.e., to show

[1] We find no merit to defendant's argument that the trial court should have ordered N and T to testify. Because the prosecution had subpoenaed them, there was already an order for them to testify.

that defendant conspired with codefendant Rashad Perez to shoot at members of the Washington Street Boys and that defendant was the person who shot Day, was the same purpose that the prosecution had in presenting their testimony at trial. Therefore, defendant had an "interest of substantially similar intensity" in proving or disproving the testimony of N and T. *Farquharson*, 274 Mich App at 278 (citation and quotation marks omitted). Additionally, although the burden of proof was lower at the preliminary examination, see *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003), defendant had a similar motive to cross-examine N and T at both proceedings—defendant was motivated to show that their testimony regarding what they saw and heard from their porch lacked credibility or was not accurate, *Farquharson*, 274 Mich App at 278. And defendant did, in fact, cross-examine N and T with regard to their credibility. Under these circumstances, the trial court's decision to admit the preliminary-examination testimony of N and T fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant also argues that the admission of the preliminary-examination testimony of N and T violated his right of confrontation. We review constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

A defendant shall enjoy the right to be confronted with the witnesses against him. US Const, Am VI. Under the Confrontation Clause, the testimonial statements of witnesses who are absent from trial are not admissible unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Testimony given at a preliminary examination is a testimonial statement. *Id*. at 68. "The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988) (quotation marks, citation, and brackets omitted).

"Former testimony is admissible at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). Because N and T were unavailable for trial and defendant cross-examined them at the preliminary examination, the admission of their preliminary-examination testimony did not violate defendant's right of confrontation. *Crawford*, 541 US at 59; *Garland*, 286 Mich App at 7.

III. JUROR MISCONDUCT

Defendant next argues that his convictions should be reversed because the jury was subject to extraneous influences. We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Armstrong*, 305 Mich App 230, 241; 851 NW2d 856 (2014).

A defendant has a right to be tried by a fair and impartial jury. *Duncan v Louisiana*, 391 US 145, 153; 88 S Ct 1444; 20 L Ed 2d 491 (1968). Consistent with this right, a jury may only consider the evidence that is presented in court. *People v Stokes*, 312 Mich App 181, 187; 877 NW2d 752 (2015). A jury's consideration of extraneous facts not introduced into evidence deprives a defendant of his or her constitutional rights of

confrontation, of cross-examination, and to the effective assistance of counsel. *Id*. To establish that an extraneous influence was error requiring reversal, a defendant must prove two points: (1) the jury was exposed to an extraneous influence and (2) the extrinsic material created a real and substantial possibility that it could have affected the jury's verdict. *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). To prove this second point, the defendant must "demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id*. at 89. If the defendant proves these two points, then the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt. *Id*. The prosecution may do so by proving that "the extraneous influence was duplicative of evidence produced at trial or the evidence of [the defendant's] guilt was overwhelming." *Id*. at 89-90.

Defendant sought to show that the jury was subject to extraneous influences through the affidavit and testimony of Juror DG. Firmly established in the common law is a prohibition against the admission of juror testimony to impeach a jury verdict. *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). The only recognized exception to this rule relates to situations in which the jury verdict was affected by an extraneous influence. *Id*. Thus, when there is evidence to suggest that the verdict was affected by an influence external to the trial proceedings, a court may consider juror testimony to impeach a verdict. *Id*. But when the alleged misconduct relates to influences internal to the trial proceedings, a court "may not invade the sanctity of the deliberative process." *Id*. The distinction between external and internal influences is not based on

the location of the alleged misconduct. *Budzyn*, 456 Mich at 91. "Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence." *Id*. "Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room." *Warger v Shauers*, 574 US ___, ___; 135 S Ct 521, 529; 190 L Ed 2d 422 (2014) (citation omitted).

Defendant claims that the jurors were subject to extraneous influences through their use of cell phones during deliberations. Juror DG testified that jurors, himself included, used their cell phones during breaks. Juror DG used his cell phone for text messaging, and he had no personal knowledge for what purposes the other jurors used their cell phones. Accordingly, defendant has not established that the jury was subject to any extraneous influence through the use of cell phones. *Budzyn*, 456 Mich at 88-89.

Defendant also claims that the jury was subject to extraneous influences through Juror 8. According to Juror DG, Juror 8 told the jurors that he knew Officer Gary Latham well, that Officer Latham was an expert in firearms, and that they could be extremely confident in Officer Latham's testimony. Defendant has not established that the jury was subject to an extraneous influence through Juror 8. *Id*. Internal matters include the general body of experiences that jurors are understood to bring with them to the jury room. *Warger*, 574 US at ___; 135 S Ct at 529. Juror 8's statements regarding Officer Latham were based on his own

personal knowledge of and experience with the officer. The statements were not based on anything that Juror 8 had read or heard about the case. While Juror 8 should have disclosed his relationship with Officer Latham during voir dire, Juror 8's statements did not provide him or the other jurors with any knowledge regarding Day's murder. *Id*. at ___; 135 S Ct at 529.

Even if Juror 8's statements were an extraneous influence, and assuming that there was a real and substantial possibility that the statement could have affected the jury's verdict, *Budzyn*, 456 Mich at 89, the error was harmless. Although the testimony of the three witnesses who were with Day when he was shot indicated that the only person they saw with a gun was Perez, Joshua Parker, who lived in the area, testified that, based on the different "pops" he heard, there were at least two, if not three, guns fired. Specifically, regarding defendant, Parker testified that he saw defendant, holding a gun, come down the alley from Race Street to James Street. He identified the gun that defendant had as the .16-gauge shotgun that was later found by Detective Frederick Hug at the basement landing of an abandoned house on James Street. Parker saw defendant put the shotgun in the grass or thickets. About 15 to 20 minutes later, Parker saw defendant run down the alley toward Race Street with the shotgun "laterally" by his knees. Parker then heard multiple gunshots. Within 15 to 20 seconds, Parker saw defendant run down the alley toward James Street. Defendant, who was still holding the shotgun, was "visibly in a hurry." T, who lived at the corner of Hays Park Avenue and James Street, testified that she heard defendant and Perez talking about "airing out" any members of the Washington Street Boys that they saw. T, as well as N, saw Perez and defendant split up. Perez went down Hays Park Avenue, while defendant

went down the alley. After N and T heard gunshots, defendant came to their house. According to them, as well as DeShawndra Spivey, who was visiting the two sisters, defendant was wearing gloves and had bullets with him. Spivey testified that defendant said, "[H]e shot." Lieutenant Jeffrey Crump, an expert in firearms identification, testified that the shotgun hull found in the alley by Officer Latham, which was a Hornady .20-gauge SST slug, was fired from the .16-gauge shotgun. Lieutenant Crump also testified that the bullet recovered from Day's chest and the sabot found by Officer Latham on the sidewalk south of the alley were consistent with the bullets and sabots in the Hornady .20-gauge SST slugs that Lieutenant Crump purchased. Additionally, Officer Latham testified that the bullet he recovered from the tire of the Cadillac, which was parked on Race Street in front of the area where Day was shot, was consistent with a Hornady .20-gauge SST slug and that, because of the location of the hole in the tire, the bullet had to have come from "the north, northeast" of where it had entered the tire. In light of this testimony, the alleged error that exposed the jury to extraneous influence was harmless beyond a reasonable doubt. *Budzyn*, 456 Mich at 89. The evidence of defendant's guilt was overwhelming.

IV. SENTENCING

Defendant argues that his sentences for life without parole must be reversed because the trial court's findings and reasons for those sentences did not reflect that he was incapable of rehabilitation. Our review of a trial court's decision to sentence a juvenile offender to life without parole is threefold: (1) any fact-finding by the trial court is reviewed for clear error; (2) any questions of law are reviewed de novo; and (3) the trial

court's ultimate determination regarding the sentence imposed is reviewed for an abuse of discretion. *People v Hyatt*, 316 Mich App 368, 423; 891 NW2d 549 (2016).

The United States Constitution forbids cruel and unusual punishment. US Const, Am VIII. In *Miller v Alabama*, 567 US 460, 465, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life-without-parole sentences for juvenile offenders. According to the United States Supreme Court, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id*. at 479. While the United States Supreme Court did not address whether the Eighth Amendment requires a categorical bar on sentences of life without parole for juvenile offenders, it believed that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty [as] noted in *Roper* [*v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005),] and *Graham* [*v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010),] of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id*. at 479-480 (citations and quotation marks omitted). Although the United States Supreme Court did not foreclose a trial court's ability to sentence a juvenile offender to life without parole, it now requires trial courts to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480.

The United States Supreme Court clarified what a trial court misses if every juvenile offender is treated as an adult:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id*. at 477-478 (citation omitted).][2]

In *Montgomery v Louisiana*, 577 US ___, ___; 136 S Ct 718, 734; 193 L Ed 2d 599 (2016), the United States Supreme Court held that *Miller* applied retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided, and the Court reiterated that a life-without-parole sentence is cruel and unusual punishment for all juvenile offenders except the "rarest of juvenile offenders" whose crimes reflect irreparable corruption.

Following *Miller*, the Legislature enacted MCL 769.25. *Hyatt*, 316 Mich App at 384. MCL 769.25 provides, in pertinent part:

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[2] These factors have been known as the "*Miller* factors." *Hyatt*, 316 Mich App at 381 n 2.

> (5) If the prosecuting attorney files a motion under subsection (2) requesting that the individual be sentenced to imprisonment for life without parole eligibility, the individual shall file a response to the prosecution's motion within 14 days after receiving notice of the motion.
>
> (6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in Miller v Alabama, [567] US [460]; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.
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> * * *
>
> (9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

In *Hyatt*, 316 Mich App at 376-377, this Court emphasized that the mandate of *Miller*—that a sentence of life without parole is reserved only for the rarest of juvenile offenders—affects not only the way a trial court is to exercise its discretion in sentencing a juvenile offender, but also the way an appellate court reviews a life-without-parole sentence. In sentencing a juvenile, a trial court must begin its analysis with the understanding that life-without-parole sentences are,

"unequivocally, appropriate only in rare cases." *Id*. at 420. This Court further stated:

> We note that nearly every situation in which a sentencing court is asked to weigh in on the appropriateness of a life-without-parole sentence will involve heinous and oftentimes abhorrent details. After all, the sentence can only be imposed for the worst homicide offenses. However, the fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without-parole sentence. The court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is the truly rare juvenile for whom life without parole is constitutionally proportionate as compared to the more common and constitutionally protected juvenile whose conduct was due to transient immaturity for the reasons addressed by our United States Supreme Court. And in making this determination in a way that implements the stern rebuke of *Miller* and *Montgomery*, the sentencing court must operate under the notion that more likely than not, life without parole is not proportionate. [*Id*. at 420-421.]

This Court stated that an appellate court's review of a life-without-parole sentence requires "a heightened degree of scrutiny . . . ." *Id*. at 424. Although a trial court's decision to impose a life-without-parole sentence is reviewed for an abuse of discretion, an appellate court must view such a sentence as inherently suspect. *Id*.

At the sentencing hearing, the trial court was aware of *Miller*. It knew that *Miller* prohibited mandatory sentences of life without parole for juvenile offenders and that, in sentencing defendant, it had to consider the *Miller* factors, but the trial court also stated that it had to consider the goals of sentencing: rehabilitation, punishment, deterrence, protection, and retribution.

The trial court committed an error of law in considering these goals.

In *Miller*, 567 US at 472, the United States Supreme Court stated, "[T]he distinctive attributes of youth diminish the penological justifications [which it identified as retribution, deterrence, incapacitation, and rehabilitation] for imposing the harshest sentences on juvenile offenders . . . ." This statement was repeated in *Montgomery*, in which the United States Supreme Court also stated that *Miller* "established that the penological justifications for life without parole *collapse* in light of the distinctive attributes of youth." *Montgomery*, 577 US at ___; 136 S Ct at 734 (citation and quotation marks omitted; emphasis added). There can be no doubt that the trial court's consideration of the goals of sentencing affected its decision to sentence defendant to life without parole. The trial court stated that it had to be satisfied that whatever sentence it imposed maximized the goals of sentencing. It further stated that it needed to address the attitude of defendant's peers that they could "engage in the law of the jungle." Then, when it sentenced defendant to life without parole, the trial court specifically stated that the sentence served to protect the public and to deter other individuals who might engage in similar conduct. The trial court's consideration of the goals of sentencing contravened *Miller* and *Montgomery*, which established that the goals of sentencing do not justify the imposition of a life-without-parole sentence for a juvenile offender.

Additionally, we cannot say that the trial court began its analysis regarding whether to sentence defendant to life without parole with the understanding that a life-without-parole sentence is only appropriate in rare cases and that such a sentence is more likely

than not a disproportionate sentence. *Hyatt*, 316 Mich App at 419-420. Although the trial court knew that *Miller* prohibited mandatory life-without-parole sentences for juvenile offenders and that it was to consider the *Miller* factors, the trial court never acknowledged the circumstance in which the United States Supreme Court allowed for such a sentence to be imposed. And nothing said by the trial court indicated that it understood the rarity with which such sentences should be imposed and that such sentences were reserved for the rarest of juvenile offenders whose crimes reflect irreparable corruption. In fact, at one point, the trial court stated that none of the *Miller* factors were applicable to this case. The statement implies a belief that a life-without-parole sentence can or should be imposed unless there is a mitigating factor not to impose the sentence. Additionally, the trial court's discussion about gang warfare and the need to address the attitude of people involved in gang warfare reflects a misunderstanding about the rarity of life-without-parole sentences. The discussion was not relevant to whether defendant was and would remain wholly incapable of rehabilitation for the remainder of his life. *Hyatt*, 316 Mich App at 429. Instead, the court was focused on the punitive and deterrent aspects of sentencing.

In *Hyatt*, 316 Mich App at 418, this Court emphasized the United States Supreme Court's statement in *Roper*, 543 US at 573, that even expert psychologists have a difficult time differentiating between juvenile offenders whose crimes reflect irreparable corruption and those whose crimes reflect transient immaturity. At the sentencing hearing, Larry Howley—who held a master's degree in social work, had counseled children and adults since 1969, and had counseled defendant for about two years beginning in 2011—testified that he believed defendant had the potential to be rehabili-

tated. On the basis of a visit with defendant at the juvenile detention facility, Howley even believed that defendant's rehabilitation had already started. Howley testified that he believed defendant could thrive and learn in a more structured environment. The trial court gave little credence to Howley's testimony, stating that it was not convinced that there was sufficient information to give it a high level of confidence that defendant could internalize his acclimation to a structured environment to allow him to function in a non-structured world. But yet, the trial court gave no explanation for this statement. In its analysis, the trial court never explained why defendant should be considered one of the rare juvenile offenders whose crimes reflect irreparable corruption.

Because the trial court made an error of law in considering the goals of sentencing a youth when it sentenced defendant to life without parole, and because the trial court did not sentence defendant to life without parole with the understanding that such sentences are reserved for the rare juvenile offender whose crime reflects irreparable corruption, we reverse defendant's sentences for life without parole and remand for resentencing. On remand, the trial court must not only consider the *Miller* factors and place its findings on the record, but it must also decide whether defendant is the rare juvenile offender who is incapable of reform. *Hyatt*, 316 Mich App at 429. The trial court must be mindful that *Miller* and *Montgomery* caution against the imposition of a life-without-parole sentence except in the rarest of cases and operate with the understanding that, more likely than not, a life-without-parole sentence is a disproportionate sentence for defendant.[3]

[3] Because we remand for sentencing, we decline to address defendant's argument that a life-without-parole sentence violates the Michi-

Affirmed in part, reversed in part, and remanded for resentencing. We retain jurisdiction.

SHAPIRO and GADOLA, JJ., concurred with STEPHENS, P.J.

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gan Constitution. See *People v Eliason*, 300 Mich App 293, 316; 833 NW2d 357 (2013) ("[B]ecause it is unknown what sentence on remand will be imposed upon defendant, and for what reasons, it is best to leave this issue [whether a sentence of life in prison with or without the possibility of parole violates the state Constitution] to another day.").

HOME-OWNERS INSURANCE COMPANY v ANDRIACCHI

Docket Nos. 331260, 332457, 332640, and 333695. Submitted May 2, 2017, at Petoskey. Decided June 8, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 1030.

Home-Owners Insurance Company brought an action in the Marquette Circuit Court, seeking a declaratory judgment that it had no duty to cover the losses of its insured, Dominic F. Andriacchi, who filed a claim after his building sustained damage from earth movement that occurred when a nearby street was being repaired. The policy at issue contained an exclusion for "[a]ny earth movement . . . such as an earthquake, landslide or earth sinking, rising or shifting." Home-Owners moved for summary disposition under MCR 2.116(C)(8), (9), and (10), and it sought costs and attorney fees. Andriacchi moved for summary disposition under MCR 2.116(I)(2), arguing that the exclusion could be interpreted to apply only to earth movement caused by natural phenomena. Andriacchi also brought a counterclaim seeking $92,100 in damages and moved for attorney fees, costs, and interest. The court, Richard J. Celello, J., granted Home-Owners' motion for summary disposition. Andriacchi moved to disqualify Judge Celello, alleging bias and ex parte communications. Judge Celello denied the motion, and the denial was upheld by Judge Charles R. Goodman after a hearing. Home-Owners then moved to tax attorney fees and costs under MCR 2.114 and MCL 600.2591, for Andriacchi's having filed a frivolous defense, counterclaim, and motion to disqualify, and costs under MCR 2.625 because it prevailed on the motion for summary disposition. The trial court ruled that Andriacchi's motion to disqualify was frivolous, but it declined to award costs and attorney fees pursuant to MCR 2.114 and MCL 600.2591. A second order and judgment was entered granting Home-Owners' motion to tax costs of $821.76 pursuant to MCR 2.625.

In Docket No. 331260, Andriacchi appeals as of right the order granting Home-Owners' motion for summary disposition. In Docket No. 332457, Andriacchi appeals as of right the order granting fees and costs to Home-Owners under MCR 2.625. In Docket No. 332640, Home-Owners appeals as of right—and in

Docket No. 333695, Andriacchi appeals by delayed leave granted—the order denying Andriacchi's motion to disqualify the trial judge and determining the motion to be frivolous but declining to award Home-Owners sanctions under MCR 2.114 and MCL 600.2591. The cases were consolidated.

The Court of Appeals *held*:

1. The trial court properly granted Home-Owners' motion for summary disposition because the earth-movement exclusion plainly excluded coverage for loss caused by "any" earth movement and there was no material factual dispute that Andriacchi's loss was caused by earth movement. The word "any" was not defined in the insurance policy but is commonly understood to be all-encompassing, meaning "every" or "all." Therefore, "any earth movement" means every or all movement of the earth without restriction or distinction between natural and man-made. Because this language was clear, doctrines of interpretation, including *ejusdem generis*, did not apply. Further, the phrase "such as," which followed the phrase "any earth movement," conveyed that the cited examples were not all-inclusive or restrictive in nature, and therefore did not serve to narrow the types of earth movement excluded under the policy. Moreover, the cited examples of earth movement, including earthquakes and landslides, could be caused not only by natural phenomena but also by human activity.

2. The trial court did not err by failing to apply MCR 2.625(C) to limit Home-Owners' costs. MCR 2.625(C) provides that in an action brought for damages in contract or tort in which the plaintiff recovers less than $100, the plaintiff may recover costs no greater than the amount of damages. However, Home-Owners' action was not one for damages; it was for a declaratory judgment that it owed no duty to cover defendant's loss under the insurance policy. Accordingly, MCR 2.625(C) did not serve to limit Home-Owners' recoverable costs.

3. The trial court properly awarded Home-Owners costs for expert-witness fees. MCL 600.2164(1) provides that no expert witness shall be paid, or receive as compensation in any given case for his or her services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. The language "is to appear" applies to situations in which a case was dismissed before the party had a chance to call the proposed expert witnesses at trial. Furthermore, the trial court had the discretion to authorize expert witness fees, including preparation

fees. The costs sought by Home-Owners in connection with the expert's time were necessary for the expert to develop his opinion regarding the cause of the damages to Andriacchi's property.

4. The trial court abused its discretion when it awarded Home-Owners $35.20 as taxable costs for court-reporter fees incurred in ordering a hearing transcript. MCL 600.2543(2) provides that the amount of reporters' or recorders' fees paid for a transcript may be recovered as a part of the taxable costs of the prevailing party in the motion only if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal. Although the cost of trial transcripts constitutes a taxable cost in an appeal, it was inappropriate to include the cost of transcripts prepared for an appeal as costs recoverable by the prevailing party in a civil action. Therefore, the trial court lacked the authority to award the court-reporter fees. On remand, the trial court was required to enter an amended judgment excluding this cost from the amount of costs awarded.

5. The trial court had the authority to tax the motion fees that Andriacchi contested. Under MCL 600.2529(1)(e) and (2), motion fees are taxable as costs. While the trial court did not specifically address the requested motion fees at the hearing, it did indicate that Home-Owners was entitled to statutory fees, and it was apparently undisputed that Home-Owners actually paid $80 in motion fees. Andriacchi's arguments that the fees were improperly taxed were unsupported by authority.

6. The trial court abused its discretion by refusing to award Home-Owners sanctions after finding that Andriacchi's motion to disqualify the trial judge was frivolous under MCR 2.114. MCR 2.114(D) states that the signature of an attorney or party on a motion constitutes certification that he or she has read the document; that, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and that the motion was not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(E) provides that if a document was signed in violation of MCR 2.114, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it an appropriate sanction, which may include reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. Because the trial court failed to articulate a clear basis for its conclusion that the motion to disqualify the trial judge was frivolous, the court was ordered

on remand to do so in connection with Home-Owners' motion for sanctions and, if it found a violation of MCR 2.114, to impose an appropriate sanction under MCR 2.114(E).

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

1. INSURANCE — EXCLUSIONS — WORDS AND PHRASES — ANY EARTH MOVEMENT.

An insurance policy that excludes coverage for damage caused by "any earth movement" unambiguously excludes coverage for every or all movement of the earth without restriction or distinction between whether the movement was caused by natural phenomena or human activity, regardless of whether the phrase "any earth movement" is followed by examples of the types of movement that are excluded.

2. COSTS — LIMITATION OF COSTS — ACTIONS FOR DECLARATORY JUDGMENT.

MCR 2.625(C), which limits the recovery of costs in actions for damages in contract or tort under certain circumstances, does not apply in actions that seek only a declaratory judgment.

3. COSTS — TRANSCRIPTS — COURT-REPORTER FEES.

MCL 600.2543(2) provides that the amount of reporters' or recorders' fees paid for a transcript may be recovered as a part of the taxable costs of the prevailing party in the motion only if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal; although the cost of trial transcripts constitutes a taxable cost in an appeal, a trial court may not include the cost of transcripts prepared for an appeal as costs recoverable by the prevailing party in a civil action.

4. TRIAL — MOTIONS SIGNED IN VIOLATION OF MCR 2.114 — SANCTIONS.

A trial court's failure to impose a sanction on a person who signed a motion in violation of MCR 2.114 constitutes an abuse of discretion.

Bensinger, Cotant & Menkes, PC (by *Glenn W. Smith*), for plaintiff.

Dominic F. Andriacchi, PC (by *Dominic F. Andriacchi, Jr.*), for defendant.

Before: SAWYER, P.J., and MURRAY and GLEICHER, JJ.

MURRAY, J. In Docket No. 331260, defendant/counterplaintiff Dominic F. Andriacchi appeals as of right the circuit court order granting plaintiff/counterdefendant Home-Owners Insurance Company's motion for summary disposition under MCR 2.116(C)(10) in this declaratory judgment action regarding whether Home-Owners had a duty to provide insurance coverage for Andriacchi under a policy that excluded coverage for loss caused by any "earth movement." In Docket No. 332457, Andriacchi appeals as of right a subsequent order granting fees and costs to Home-Owners under MCR 2.625, while in Docket Nos. 332640 and 333695, Home-Owners appeals as of right, and Andriacchi appeals by delayed leave granted, that same order that also denied Andriacchi's motion to disqualify the trial judge and determined the motion to be frivolous, but declined to award Home-Owners sanctions under MCR 2.114 and MCL 600.2591. We affirm in part, vacate in part, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Home-Owners provided a "businessowners policy" of insurance to Andriacchi with effective dates of June 1, 2013, through June 1, 2014. The policy covered risks of physical loss unless the loss was "[e]xcluded in Section B., Exclusions" or "[l]imited in Paragraph A.4., Limitations." On March 1, 2014, Andriacchi sought coverage under the policy for damages to his building that occurred after a major street repair had taken place. A licensed professional engineer retained by Home-Owners determined that "[e]arth movement beneath the interior concrete floor slab has resulted in the observed structural damage at the subject law offices building." The preliminary engineering report stated:

> This earth movement resulted in the subsidence of supporting soils and interior concrete floor slab. The perimeter footings appear stable and undisturbed.
>
> * * *
>
> Supporting soils usually do not move and subside under older structures; any subsidence usually appears shortly after construction. However, a major infrastructure / street project that required long periods of dewatering and construction vibration was just completed per the insured. The interaction of original site soil preparation, fill quality, placement, and compaction under the interior concrete slab with recent dewatering and construction activity combined to create the recent earth movement event.

The claim was denied pursuant to an exclusion to coverage in Section B for "[a]ny earth movement." Home-Owners thereafter sought a declaration that it owed no duty to cover Andriacchi's losses because the losses were excluded under the policy.

Home-Owners eventually filed a motion for summary disposition under MCR 2.116(C)(8), (C)(9), and (C)(10), arguing that the language of the exclusion barring coverage for losses resulting from "any earth movement" is clear and unambiguous and fell squarely within the acknowledged operative facts of Andriacchi's loss. Home-Owners sought summary disposition on its declaratory judgment claim as well as on Andriacchi's counterclaims, and requested costs and attorney fees under MCR 2.114.

In response, Andriacchi maintained that the earth-movement exclusion in the policy applied only to natural earth movement, not to "man-made" earth movement. He contended that the words "any earth movement" must be read in context with those that surround them and, therefore, the exclusion was lim-

ited in application to natural phenomena; in the alternative, Andriacchi maintained that the exclusion was subject to more than one reasonable interpretation and was, therefore, ambiguous. Andriacchi sought summary disposition under MCR 2.116(I)(2), and requested statutory interest, prejudgment interest, actual attorney fees and costs, and damages in the amount of $92,100 to repair his damaged property.

The trial court held a hearing on the motion and, following the parties' arguments, concluded that "[a]ny earth movement means any earth movement. And I don't need Latin rules of statutory construction to turn that into anything else other than what it says." The trial court thereafter entered an order granting Home-Owners' motion for summary disposition on the basis "that [Home-Owners] has no duty to provide coverage for [Andriacchi's] losses" and dismissing Andriacchi's counterclaim.

Andriacchi thereafter filed a motion to disqualify the trial judge "for ex parte communication and bias" as a result of the court's reading of Home-Owners' reply brief that he had apparently not received before the hearing, and purported bias against him. The trial court denied the motion to disqualify, stating:

> I'm denying the motion for a disqualification. I'm finding that the communication -- so called communication or reply brief, which was accompanied by a proof of service, and not -- Mr. Andriacchi not objecting to the proceeding proceeding, and gave a nine- or ten-minute argument without benefit of the reply brief, and I'm not sure the reply brief would have helped him because it didn't change anything about what the plaintiff was arguing. So I'm finding that it was not an ex parte communication.
>
> . . . And the court rule has a 14-day window there for good reason. Number one, I don't think I've shown any bias or prejudice. Number two, as Mr. Smith pointed out,

> it's disingenuous to wait until you get an adverse ruling on a substantive motion, and then to raise all of these prejudicial allegations, going back to when the case was filed. But I allowed Mr. Andriacchi to make a record on all of those perceived -- he calls it scolding or evidence of prejudice. I think he's made a sufficient record.
>
> But to the extent that they go back more than 14 days from the filing of his motion, they're denied for that reason. They're also denied because I don't believe they're prejudicial. I was trying to provide some guidance.

The State Court Administrator assigned Judge Charles Goodman to review the motion for disqualification. After a hearing, Judge Goodman issued a detailed order affirming the denial of the motion to disqualify the trial judge, finding that "[t]he record before this Court shows no evidence of favoritism, prejudice, bias or improper conduct on the part of" the trial judge.

After Andriacchi filed his claim of appeal, Home-Owners filed a motion to tax attorney fees and costs under MCR 2.114, MCR 2.625, and MCL 600.2591, in the amount of $18,694.43. Home-Owners requested costs and fees under MCR 2.114 and MCL 600.2591, for Andriacchi's having filed a frivolous defense, counterclaim, and motion to disqualify, and costs under MCR 2.625, for prevailing on the motion for summary disposition. In response, Andriacchi argued that his position was not frivolous due to the lack of Michigan precedent and that Home-Owners was entitled at most to $20 in costs for the summary disposition motion, and he disputed the remainder of the costs requested.

At a subsequent hearing, Home-Owners conceded that it was not entitled to a $150 charge for statutory costs for proceeding to trial, as there was no trial. The trial court then ruled:

> I've never awarded costs -- actual attorney fees. I . . . came very close in this case, but I am not going to award them. I . . . am, frankly, uncomfortable awarding fees to a party defending my disqualification.
>
> And with respect to attorney fees on the underlying claim, I did grant a motion for summary disposition. I believe that the law is clear, but that Mr. Andriacchi was making an effort to establish Michigan precedent to the contrary on that . . . policy language.
>
> * * *
>
> I'm . . . finding that the statutory costs [under MCR 2.625], Mr. Smith, of course, can be imposed.

The trial judge clarified that Andriacchi's motion to disqualify was frivolous pursuant to MCR 2.114 and MCL 600.2591, and then entered an order and judgment (1) denying Home-Owners' motion "for violation of MCR 2.114 and MCL 600.2591 regarding the defense of the coverage issue" for reasons stated on the record, and (2) finding the defense motion to disqualify the judge to be frivolous pursuant to MCR 2.114 and MCL 600.2591, but declining to award costs and attorney fees. A second order and judgment was entered granting Home-Owners' motion to tax costs pursuant to MCR 2.625, in the amount of $821.76.[1]

II. ANALYSIS

A. DOES THE EXCLUSION APPLY ONLY TO NATURAL EARTH MOVEMENTS?

For the reasons explained below, we hold that the trial court properly granted Home-Owners' motion for summary disposition because the earth-movement ex-

[1] This Court granted defendant's motion for stay pending resolution of the appeal in an order entered on May 2, 2016.

clusion plainly excluded coverage for loss caused by "any" earth movement, and there is no material factual dispute that Andriacchi's loss was caused by earth movement.

Because the trial court considered documentary evidence in granting the motion for summary disposition, we review the trial court's order as one granted pursuant to MCR 2.116(C)(10). See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." In conducting the review de novo, this Court construes the "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties" in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009).

Home-Owners does not dispute that it insured Andriacchi's property with an "all-risk" policy. "Notwithstanding the presence of an 'all-risks' provision in an insurance policy, the loss will not be covered if it comes within any specific exclusion contained in the policy." 10A Couch, Insurance, 3d, § 148:68, p 164. Here, the policy provides for various exclusions, of which one, the earth-movement exclusion, is the focus of the parties. The exclusion provides, in pertinent part:

> B. EXCLUSIONS
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> * * *

> b. Earth Movement
>
> (1) Any earth movement (other than sinkhole collapse), such as an earthquake, landslide or earth sinking, rising or shifting. But if loss or damage by fire or explosion results, we will pay for that resulting loss or damage.

The interpretation of this particular insurance-contract clause appears to be a question of first impression in this state. Andriacchi takes the position that the exclusion is ambiguous and must be construed to apply only when the earth movement is due to natural, as opposed to man-made, causes. Home-Owners takes the opposite view, contending that the exclusion is unambiguous and covers earth movement, whether natural or man-made.

"[I]n reviewing an insurance policy dispute [courts] must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction," the predominant rule being that "an insurance contract must be enforced in accordance with its terms." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). Courts will "look to the plain language of the insurance policy in determining the scope of coverage . . . ." *Busch v Holmes*, 256 Mich App 4, 9; 662 NW2d 64 (2003). Although a court strictly construes exclusions in favor of an insured, *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992), "[c]lear and specific exclusions must be given effect," and "coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims," *id*. "Respect for the freedom to contract entails that we enforce only those obligations actually assented to by the parties." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 63; 664 NW2d 776 (2003). A court cannot rewrite a contract if

its terms are expressly stated. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

Again, the earth-movement exclusion refers to "any earth movement." The word "any" is not defined in the insurance policy, "but is commonly understood to be all-encompassing, meaning 'every' or 'all,' and can be 'used to indicate one selected without restriction' or 'to indicate a maximum or whole.' " *Ionia Ed Ass'n v Ionia Pub Sch*, 311 Mich App 479, 486; 875 NW2d 756 (2015), quoting *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, "any earth movement" means "every" or "all" movement of the earth without restriction or distinction as to the type (i.e., natural or man-made).

Relying on the doctrine of *ejusdem generis*, Andriacchi argues that the term "earth movement" is constricted by the words of limitation "such as." Because the exclusion only identifies natural events—"earthquake, landslide or earth sinking, rising or shifting"—Andriacchi argues that the term "earth movement" is limited to naturally occurring events. Reliance on this doctrine is misplaced. Under the *ejusdem generis* doctrine, "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Black's Law Dictionary* (10th ed).[2] But as the trial court recognized, that doctrine (or, for that matter, any other canon of statutory interpretation) does not apply where the language of the contract is clear, see, e.g., *Utica State Savings Bank v Village of Oak Park*, 279 Mich 568, 573; 273 NW 271 (1937), as is the case here. Further, the phrase

[2] This canon also applies to situations like this one, where the general word or phrase is followed by specific examples. See *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718; 629 NW2d 915 (2001).

"such as" conveys that the cited examples are not all-inclusive or restrictive in nature, and thus does not serve to narrow the types of earth movement excluded under the policy. Moreover, the cited examples of earth movement are not only caused by natural phenomena. For example, landslides can occur naturally or be caused by man, as can the "sinking, rising or shifting" of the earth.

Andriacchi relies on a Michigan Institute of Continuing Legal Education treatise and foreign authority in support of his argument that the exclusion is capable of two or more reasonable constructions and is, therefore, ambiguous. He cites Michigan Insurance Law and Practice, which provides as follows:

> ***Earth movement***. The earth movement exclusion applies only to naturally occurring phenomena such as earthquake; landslide; mine subsidence; earth sinking, rising, or shifting; and volcanic eruption or explosion. The exclusion does not apply to earth movement caused by nonnatural means. [Fabian et al, Michigan Insurance Law & Practice, ch 10, § 10.89, p 407.]

The authors, however, provide no authority in support of this statement. But they do appropriately recognize that, in insurance cases, what *is* dispositive is the actual language used in the policy, which can vary between insurers:

> This chapter is a basic summary of property insurance based on the ISO [Insurance Services Office, Inc.] forms, which are the most common forms used by insurance companies. The practitioner should be aware that many insurers, if not most, have modified many of the ISO forms and issue insurance policies that contain different language and requirements than the ISO forms. Therefore, the authors urge all readers to thoroughly review each policy of insurance before reaching any conclusions about the duties of the parties or the coverages afforded and to

> not assume that the policy of insurance provides the same coverages and duties as the ISO forms. [*Id*. at § 10.1, p 347.]

Of the foreign authority[3] cited by Andriacchi in support of his argument that the earth-movement exclusion is ambiguous, only three cases involve an earth-movement exclusion that contains language similar to the instant exclusion. *Rankin v Generali-US Branch*, 986 SW2d 237, 237 (Tenn App, 1998), involved a virtually identical exclusion. There, the front basement wall of a building partially collapsed and was damaged as the result of heavy machinery parked near the building. *Id*. The owner of the building sought coverage under his insurance policy, but the insurance company denied coverage in part under the earth-movement exclusion, *id*., which excluded coverage for " '[a]ny earth movement (other than sinkhole collapse), such as an earthquake, landslide, mine subsidence or earth sinking, rising or shifting,' " *id*. at 239. The court reviewed the exclusion and determined that because the exclusion included the terms "earthquake," "mine subsidence," and "landslide," all naturally occurring events, it was " 'apparent that the policy is intended to exclude only "occasional major disasters" . . . rather than "human action . . . occurring within the immediate vicinity of the damage." ' " *Id*., quoting *Winters v Charter Oak Fire Ins Co*, 4 F Supp 2d 1288, 1293

[3] Andriacchi also cites *Powell v Liberty Mut Fire Ins Co*, 127 Nev 156, 159; 252 P3d 668 (2011) (policy excluded loss due to "Earth movement"); *Fayad v Clarendon Nat'l Ins Co*, 899 So 2d 1082, 1084 (Fla, 2005) (policy excluded "Earth Movement"); *Murray v State Farm Fire & Cas Co*, 203 W Va 477, 484; 509 SE2d 1 (1998) (first policy excluded loss caused by "Earth movement, including, but not limited to . . ."; second policy excluded loss due to "Earth movement" that "includes but is not limited to . . ."); *Peters Twp Sch Dist v Hartford Accident & Indemnity Co*, 833 F2d 32, 33 (CA 3, 1987) (policy excluded loss due to "earth movement, including but not limited to . . .").

(D NM, 1988), quoting *Wyatt v Northwestern Mut Ins Co of Seattle*, 304 F Supp 781, 783 (D Minn, 1969). The court ultimately held that the earth-movement exclusion did not preclude coverage. *Id*. at 240.

In *Winters*, another often-cited case on this issue, a water line broke in the insured's clubhouse, causing subsequent shifting of the soil beneath the building, leading to structural damage. *Winters*, 4 F Supp 2d at 1290. The insurer contended that the damage fell within the exclusion for " '[a]ny earth movement (other than sinkhole collapse), such as an earthquake, mine subsidence, landslide, or earth sinking, rising or shifting.' " *Id*. at 1292. The *Winters* court concluded, based on the construction of the term "earth movement" in *United Nuclear Corp v Allendale Mut Ins Co*, 103 NM 480; 709 P2d 649 (1985), that "earth movement" includes only naturally occurring phenomena. *Winters*, 4 F Supp 2d at 1291. The policy provision at issue in *United Nuclear*, however, was not precisely the same as the earth-movement exclusion in *Winters*. In *United Nuclear*, 103 NM at 482, the policy provided coverage for " '[*c*]*ollapse* of buildings . . . , except that there shall be no liability for loss or damage caused by or resulting from flood, earthquake, landslide, *subsidence or any other earth movement*.' " The term "any other earth movement" was a general term following a list of specific terms. The *United Nuclear* court applied the doctrine of *ejusdem generis* to the term "earth movement" and construed it to cover only naturally occurring phenomena. *Id*. at 483-484.

In *Wyatt*, 304 F Supp at 782, the insurance company denied coverage under a homeowners' policy for damage to a house caused by excavation work on an adjacent property. The insurance company denied coverage under the earth-movement exclusion " 'for loss

caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, landslide, mud flow, earth sinking, rising or shifting; unless loss by fire or explosion ensues, and this Company shall then be liable only for such ensuing loss . . . .' " *Id*.

The homeowners argued that this provision was meant to exclude damage from "natural causes and natural phenomena" and that "where the proximate and efficient cause of damage definitely is the action of a third-party, this exclusion does not apply even though the actions of such third-party may incidentally have caused some 'earth movement.' " *Id*. at 782-783. They reasoned that the purpose of the exclusion was to relieve insurers from unpredictable "major disasters" that cause widespread damage. *Id*. at 783.

In resolving the issue, the *Wyatt* court looked to other provisions in the policy that it said gave force to the view that the exclusion was not intended to cover " 'earth movement' occurr[ing] under a single dwelling, allegedly due to human action of third persons in the immediate vicinity of the damage." *Id*. The "other" provisions excluded losses from "floods, tidal waves, a back up of water below the surface, changes in temperature and changes in the law," and the court noted that "[a]ll of these are phenomena likely to affect great numbers of people when they occur." *Id*.

At no time did the *Wyatt* court discuss the specific language in the policy or whether the words were ambiguous. Instead, the court announced its "interpretation" wholly apart from the express policy terms, which it then said created ambiguity in the exclusionary language. *Id*. at 783-784. However, the court did not conclude from the types of earth movement set forth in the exclusion that it was limited to "natural

phenomena." Rather, the court reached a much more narrow holding, i.e., that the exclusion did not cover what occurred in the case where the policy covered the acts of others:

> Certainly not all earth movements, or at least those where some human action causes such are included in the exclusion. If this interpretation creates an ambiguity in the language then it is necessary to decide what earth movements were intended to be covered. The class cited in the exclusionary clause is therefore held, if not limited to natural phenomena, at least not to exclude coverage in the case at bar.
>
> There is no dispute that the policy here involved covers acts of others than the owner. [*Id*. at 783.]

Home-Owners has, of course, found authority interpreting earth-movement exclusions using language similar to the exclusion at hand, but reaching results more palatable to its view. In *Stewart v Preferred Fire Ins Co*, 206 Kan 247; 477 P2d 966 (1970), the plaintiff's house sunk into a preexisting cavern or shaft area of a mining operation after soil under and around the foundation gave way. *Id*. at 248. The insurance policy excluded " 'loss caused by, resulting from, contributed to or aggravated by any earth movement, including but not limited to earthquake, landslide, mud flow, earth sinking, rising or shifting[.]' " *Id*. at 248. In challenging the denial of the claim based on the earth-movement exclusion, the plaintiff argued that the language was ambiguous and urged the court to apply the *ejusdem generis* doctrine to find that "the enumerated events, earthquake, landslide and earth sinking are all events which have their origin in nature, are 'acts of God . . . .' " *Id*. at 249.

The court declined to apply the doctrine because it found the policy was not ambiguous:

> Before the rule of *ejusdem generis* can be applied the clause must be ambiguous. The term 'earth movement' taken in its plain, ordinary and popular sense means any movement of earth whether it be up, down or sideways. The words 'earthquake, landslide, mud flow' and the term 'earth sinking, rising or shifting' all refer to vertical or horizontal movements of earth or soil, wet and dry. We fail to see how the exclusionary clause can be considered ambiguous. The words used may not reasonably be understood to have two or more possible meanings. [*Id*. at 249-250 (citations omitted).]

The *Stewart* court also observed that, even if it were to apply the *ejusdem generis* doctrine, this still would not lead to the narrow construction suggested by the plaintiff. It stated: "[W]e cannot agree that landslides, mud flows, earth sinking, rising or shifting are natural phenomena or 'acts of God'. . . . For the most part the events enumerated in the exclusionary clause originate from the negligence or carelessness of man in failing to follow proper conservation practices." *Id*. at 250. Thus, "[w]hen earthquakes, which fall within the legal definition of an 'act of God', are included along with landslides, mud flows and earth sinking there is no apparent basis for the restriction urged by appellants under the rule of *ejusdem generis*." *Id*.

In *Century Park East Homeowners Ass'n v Northbrook Prop & Cas Ins Co*, 21 F Appx 708, 708 (CA 9, 2001), the plaintiff brought an action against the insurer to recover for damages to a building caused by sinking of a slab. Like the policy in the present case, the insurance policy contained an exclusion for "any earth movement" and a list of examples prefaced by the phrase "such as." *Id*. at 709. The court concluded that the plain language of the "unqualified phrase 'any earth movement' includes all types of movement, both sudden and sluggish movement, and both natural and

artificial movement." *Id*. The court also held that "[t]he additional 'such as' language does not serve to limit that." *Id*. The court recognized that a policy provision that is capable of two or more constructions, both of which are reasonable, will be deemed ambiguous, but that "that certainly does not mean that a provision is ambiguous simply because a court, somewhere, has deemed it so." *Id*.

The cases cited by the parties contain, for the most part, reasonable interpretations of those varying earth-movement exclusions. Indeed, it is not unreasonable to read some of these exclusions as limited to naturally occurring events. But we cannot read the exclusion at issue in such a limited manner. For, as already discussed, the exclusion here applies to "any" earth movement, revealing that the parties clearly intended that coverage would not apply for any earth movement, be it the result of natural phenomena or the upshot of human activities. The trial court's conclusion that the exclusion applied to this damage was correct.

Further supporting this conclusion is the lead-in clause. As noted earlier, that clause states that any loss or damage caused by an earth movement "is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." This lead-in phrase, in conjunction with the broad earth-movement provision, reinforces the notion that the exclusion applies to any earth movement, because the exclusion applies even if it occurs in part because of a concurrent cause or event. See, e.g., *One Place Condo LLC v Travelers Prop Cas Co*, unpublished opinion of the United States District Court for the Northern District of Illinois, issued October 6, 2014 (Case No. 11 C 2520); *Gillin v Universal Underwriters Ins Co*, unpublished opinion of the United States District Court

for the Eastern District of Pennsylvania, issued March 4, 2011 (Case No. 09-5855). And there is certainly no limitation on what can cause the concurrent cause or event. Hence, as these and other courts have recognized, the plain language of the lead-in clause makes clear that the exclusion applies regardless of whether it occurs because of a concurrent event or cause, including a manmade occurrence.

B. COSTS AND FEES

This Court reviews for an abuse of discretion the trial court's ruling on a motion to tax costs under MCR 2.625. *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v Daimler-Chrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). However, "whether a particular expense is taxable as a cost is a question of law." *Guerrero*, 280 Mich App at 670. This Court reviews de novo questions about the correct interpretation and application of statutes and court rules. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Hess v Cannon Twp*, 265 Mich App 582, 589; 696 NW2d 742 (2005).

"Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(A)(1). "The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Guerrero*, 280 Mich App at 670.

As the prevailing party, Home-Owners sought to tax costs for the following expenses: (1) $20 for proceedings before trial under MCL 600.2441(2)(a), (2) $20 for the summary disposition motion under

MCL 600.2441(2)(b), (3) $150 for trial under MCL 600.2441(2)(c), (4) $35.20 for a court reporter fee, (5) a $516.56 expert-witness fee under MCL 600.2164, and (6) $80 for various motion fees under MCL 600.2441. At the hearing, Home-Owners acknowledged that it could not tax the $150 trial fee. The trial court ruled that Home-Owners could tax "statutory costs" under MCR 2.625(A), but did not expressly designate the items for which it allowed costs. It did, however, address Andriacchi's objections to the itemized invoice appended to Home-Owners' motion for attorney fees and costs, which included the same costs as the January 18, 2016 taxation-of-costs form with the exception of the removal of the $150 "trial" fee under MCL 600.2441(2)(c) and the inclusion of a $150 filing fee under MCL 600.2441(2)(c).

Andriacchi asserts that the trial court erred by failing to apply MCR 2.625(C) to limit Home-Owners' costs to "$0 or, at most, $100" because damages were not awarded. MCR 2.625(C), entitled "Costs in Certain Trivial Actions," provides that, "[i]n an action brought for damages in contract or tort in which the plaintiff recovers less than $100 (unless the recovery is reduced below $100 by a counterclaim), the plaintiff may recover costs no greater than the amount of damages." Here, Home-Owners' action was not one for "damages," it was for a declaratory judgment that it owed no duty to cover defendant's loss under the insurance policy. Andriacchi cites no authority for the argument that MCR 2.625(C) is applicable to an action seeking only a declaratory judgment. Because Home-Owners' action is not one for damages, MCR 2.625(C) does not serve to limit its recoverable costs.

Andriacchi also argues that Home-Owners was not entitled to expert-witness fees because MCL 600.2164

bars the assessment of expert-witness fees as a cost when the expert does not testify. MCL 600.2164(1) provides, in relevant part, "No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, *unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case*." (Emphasis added.)

Both the language of the rule and caselaw are against Andriacchi's position. In *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989), this Court concluded: "The language 'is to appear' in § 2164 applies to the situation at bar in which the case was dismissed before defendant had a chance to call its proposed expert witnesses at trial. Furthermore, the trial court was empowered in its discretion to authorize expert witness fees which included preparation fees." Hence, a party may recover expert fees under MCL 600.2164 where a case is dismissed before that expert can testify at trial.

Andriacchi further contends that the expert (an engineer) was hired and his report was completed 21 days before the lawsuit was filed and, therefore, that the report is "analogous to a 'critical assessment of the opposing party's position,' which is 'not regarded as [a] properly compensable expert witness fee[].' " (Quotation marks and citations omitted.) The record reveals that the engineer was retained to inspect Andriacchi's building and determine the cause of the damages to the building after Andriacchi initially objected to Home-Owners' determination that the damages were caused by earth movement. Home-Owners included with its motion for summary disposition the affidavit of the engineer, in which he opined regarding the cause of the

damages. The costs sought by Home-Owners in connection with the expert's time were necessary for the expert to develop his opinion regarding the cause of the damages. Indeed, Andriacchi relied on the expert's finding that the damages were caused by earth movement in opposing Home-Owners' motion for summary disposition. Costs for expert-witness fees were properly awarded.

We do agree with Andriacchi that the trial court abused its discretion when it awarded Home-Owners $35.20 as taxable costs for court-reporter fees incurred in ordering a hearing transcript, because the trial court could not award costs incurred in seeking the transcript for purposes of appeal. MCL 600.2543(2) provides, "Only if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal shall the amount of reporters' or recorders' fees paid for the transcript be recovered as a part of the taxable costs of the prevailing party in the motion, in the court of appeals or the supreme court." In *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 223; 823 NW2d 843 (2012), this Court held that "[a]lthough the cost of trial transcripts constitutes a taxable cost in an appeal, it is inappropriate to include the cost of transcripts prepared for an appeal as costs recoverable by the prevailing party in a civil action." Thus, the trial court lacked authority to award the court-reporter fees, and this cost should be subtracted from the costs awarded to Home-Owners. On remand, the trial court should enter an amended judgment excluding this cost from the costs awarded.

Next, Andriacchi contends that the trial court abused its discretion by awarding $80 for motion fees. Under MCL 600.2529(1)(e) and (2), motion fees are taxable as costs. The trial court did not specifically

address the requested motion fees at the March 14, 2016 hearing, but it did express that Home-Owners was entitled to the "statutory fees." It appears undisputed that Home-Owners actually paid $80 in motion fees.

According to Andriacchi, the $20 fee for the motion to set aside a default and the $20 fee for the motion to compel production of documents were not recoverable because Home-Owners did not request costs in those respective motions.[4] Andriacchi also asserts that the $20 fee for the motion for an order to show cause for his failure to turn over the settlement agreement pursuant to the court's June 25, 2015 order was not recoverable because "there was no basis for the motion." However, Andriacchi has provided no authority in support of these arguments, and the language of the statute does not provide him with relief. The trial court had authority to tax motion fees under MCL 600.2529.[5]

C. SHOULD SANCTIONS HAVE BEEN AWARDED FOR THE MOTION TO DISQUALIFY?

This Court reviews for clear error a trial court's decision regarding sanctions based on frivolous pleadings or claims. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). "A finding is clearly

[4] Andriacchi also asserts that he was entitled to taxable costs incurred in reliance on the default under MCR 2.603 and MCR 2.625. However, that issue is not the subject of the order from which this appeal is taken.

[5] Andriacchi argues that the $20 motion fee for Home-Owners' motion for summary disposition was awarded twice "as part of the $80 for motion fees and also as a motion resulting in dismissal (or judgment)." However, the lower court register of actions reveals that Home-Owners paid a $20 motion fee for its motion for summary disposition on July 27, 2015, and subsequently filed a $20 motion fee on September 14, 2015, for entry of an order on the court's ruling granting Home-Owners' motion for summary disposition. The $20 fee for the motion for summary disposition was not awarded twice.

erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

The trial court found that Andriacchi's motion to disqualify the trial judge was frivolous under both MCR 2.114 and MCL 600.2591. Home-Owners argues that sanctions are mandatory under MCL 600.2591(1) and MCR 2.114(E) if the trial court finds a violation of the statute or court rule.[6] Home-Owners is correct. Sanctions are mandatory if a court determines that a document was signed in violation of MCR 2.114. Andriacchi argues that MCR 2.114(E) is not mandatory, but the court rule clearly provides that

> [i]f a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, *shall impose upon the person who signed it* . . . an appropriate sanction, which may include . . . reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. [Emphasis added.]

Thus, the trial court abused its discretion by refusing to award sanctions. See *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996).[7]

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[6] Sanctions for the filing of a frivolous motion to disqualify must be evaluated under MCR 2.114, not under MCL 600.2591, because MCL 600.2591 provides for sanctions related to a frivolous *civil action or defense*. Thus, only MCR 2.114 is addressed here despite the fact that the trial court's order refers to both MCR 2.114 and MCL 600.2591.

[7] Andriacchi quotes MCL 600.2591(1) and argues that "[o]nly 'the court that conducts the civil action' has the authority to issue sanctions under MCL 600.2591." He appears to be asserting that the motion for disqualification was not part of the "civil action" after he sought review of the trial court's denial of the motion for disqualification. However, he has failed to sufficiently brief the argument that a chief judge's review of a trial judge's denial of a request for disqualification under MCR 2.003(C)(3) (and now under MCR 2.003(D)(3)) is the equivalent of an

D. WERE THE FINDINGS SUFFICIENT?

Andriacchi argues that the trial court failed to make any findings that would facilitate appellate review of the trial court's frivolousness determination and, therefore, this Court should vacate that part of the April 11, 2016 order holding that the defense motion to disqualify was frivolous.[8]

The lower court record reveals that Home-Owners sought to tax fees and costs under MCR 2.114 and MCR 2.625 "for a frivolous defense," arguing that "this is a frivolous defense where no further explanation is needed." Home-Owners subsequently filed a "supplemental brief for MCL 600.2591 sanctions" for Andriacchi's assertion of a frivolous defense and frivolous attempt to disqualify the trial judge. At the associated hearing, the trial court stated, "I'm finding that the motion to disqualify me for ex parte communication was frivolous, but I am uncomfortable in imposing actual attorney fees to a firm that was basically defending my position." Andriacchi thereafter filed objections to Home-Owners' proposed order, and a hearing was held. The trial court stated:

> I just want to clarify one point. In your first proposed order, you indicated that . . . I found the motion to disqualify frivolous, but refused to award costs. I believe -- and if I didn't say it, what I meant to say is that I don't think it was in my wheelhouse to make that call. When Judge Goodman had the case, I think he should have been asked to (inaudible) issue.

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appeal for which the trial court has no jurisdiction to award costs. This argument is abandoned. See MCR 7.212(C)(5); *In re ASF*, 311 Mich App 420, 440; 876 NW2d 253 (2015).

[8] The trial court did not award sanctions for filing a frivolous motion and, therefore, there is no award of sanctions to review. However, because Home-Owners is challenging the trial court's refusal to award sanctions after finding that the motion to disqualify was frivolous, Andriacchi's argument that the motion was not frivolous becomes relevant.

> So with that said, I am finding that the two proposed orders prompted by the defendant's [sic] bill of costs are proper, and the statutory costs that are involved, as far as the expert witness, he was clearly retained, and was going to testify in this case if it went any further. So (inaudible) case in my further discretion to award expert fees, I am awarding his costs and signing the orders as presented by Mr. Smith.

The trial court entered two separate orders, one making a finding of frivolousness and the other declining to award costs.

This Court has explained the issuance of sanctions under MCR 2.114(E)[9] as follows:

> Whenever an attorney or party signs a motion, that person's signature constitutes "certification" that he or she has "read the document" and, "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law," and that the motion was not made for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D). If a party brings a motion that has been signed in violation of MCR 2.114(D), the trial court must "impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ." MCR 2.114(E). The trial court may not assess punitive damages, but may order the person who signed it or a represented party to pay "the other party or parties the amount of the reasonable expenses incurred because of the filing . . . ." MCR 2.114(E). [*Kaeb v Kaeb*, 309 Mich App 556, 565; 873 NW2d 319 (2015).]

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[9] Again, the issue is being analyzed under MCR 2.114(E) alone. MCL 600.2591 is not applicable to a frivolous motion because a motion does not involve a claim or defense in a civil action.

The trial court denied Home-Owners' request for sanctions after the trial judge concluded, with no analysis, that "the motion to disqualify me for ex parte communication was frivolous." The trial court's subsequent written order gave no indication as to why it found that the motion was frivolous, though the reasons why it would make that conclusion are fairly apparent from the record. After all, the basis for the recusal motion was that the judge read a reply brief filed with the court that had a proof of service, but that defense counsel may not have received. This clearly is not a plausible theory for recusal. But because we employ the deferential "clearly erroneous" standard to the trial court's determination whether an action was frivolous, the trial court's failure to articulate a clear basis for its decision makes it impossible to ascertain whether the trial court clearly erred in finding the motion frivolous. We must vacate that portion of the order and remand for appropriate findings. See *Triple E Produce Corp v Mastronardi Produce Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). The trial court should decide Home-Owners' motion for sanctions, articulating on the record or in a written opinion the basis of its ruling. If the trial court finds a violation of MCR 2.114, it must "impose . . . an appropriate sanction . . . ." MCR 2.114(E). See *Cvengros*, 216 Mich App at 268. The $35.20 costs shall also not be included in any amended order.

Affirmed in part, vacated in part, and remanded for further proceedings. No costs, neither party having prevailed in full. MCR 7.219(A). We do not retain jurisdiction.

SAWYER, P.J., and GLEICHER, J., concurred with MURRAY, J.

PEOPLE v SHENOSKEY

PEOPLE v CRAWFORD

Docket Nos. 332735 and 333375. Submitted May 3, 2017, at Petoskey. Decided June 8, 2017, at 9:10 a.m.

In Docket No. 332735, Philip E. Shenoskey pleaded guilty in the Mackinac Circuit Court of operating a motor vehicle while intoxicated, third offense, MCL 257.625(9)(c). The Court, William W. Carmody, J., sentenced Shenoskey to 18 months to 5 years in prison and ordered him to pay certain costs, including costs under MCL 769.1j(1)(a) of $68. In Docket No. 333375, Jimmie E. Crawford pleaded guilty in the Mecosta Circuit Court of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). The court, Scott P. Hill-Kennedy, J., sentenced Crawford to probation for two years and to pay probation oversight fees in accordance with MCL 771.3c(1). Defendants appealed separately by delayed leave granted. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MCL 769.1j(1)(a) provides that if a court orders a person convicted of a felony to pay any combination of a fine, costs, or applicable assessments, the court shall order that the person pay costs of not less than $68. The trial court had authority to impose costs of $68 under MCL 769.1j(1)(a) because it imposed a combination of fines, costs, and other assessments when it ordered Shenoskey to pay other court costs, attorney fees, and a crime victims' rights assessment. For the reasons discussed in *People v Cameron*, 319 Mich App 215 (2017), involving a similar statute—MCL 769.1k(1)(B)(*iii*)—MCL 769.1j(1)(a) is a tax, the imposition of which does not violate the Separation of Powers Clause of the Michigan Constitution, Const, 1963, art 3, § 2. For the reasons discussed in *Cameron*, MCL 769.1j(1)(a) also does not violate Const 1963, art 4, § 32, which requires that every law imposing, continuing, or reviving a tax shall distinctly state the tax.

2. MCL 771.3c(1) requires a circuit court to collect a probation supervision fee when it orders a term of probation; the fee

is set on a graduated basis, depending on the defendant's projected income and financial resources, not on his or her actual income. The trial court correctly ordered Crawford to pay a $240 probation oversight fee, or $10 a month for the duration of his term of probation; defendant was ordered to obtain and maintain employment for at least 30 hours a week, and defendant's projected income exceeded the level of income necessary to justify the fee imposed.

3. MCL 600.4803(1) imposes a 20% penalty for any person who fails to pay a penalty, fee, or costs in full within 56 days after that amount is due. The 20% penalty that is imposed is a penalty, not interest, on any unpaid penalty, fee, or costs, and as such it cannot be usurious. The 20% penalty does not violate the Due Process or Equal Protection Clauses of the federal or state Constitutions. MCL 600.4803(1) grants the trial court authority to waive the 20% penalty. Because the statute provides a mechanism for the court to excuse the penalty for a defendant who is unable to pay the court-ordered costs or fees, the statutory provision does not violate due process. Crawford's equal-protection argument was without merit because MCL 600.4803(1) treats all persons subject to the penalty similarly.

Affirmed.

1. CRIMINAL LAW — SENTENCING — IMPOSITION OF COSTS — DETERMINATION OF TAX OR FEE.

The costs imposed under MCL 769.1j(1) are a tax.

2. CRIMINAL LAW — SENTENCING — CONSTITUTIONALITY — SEPARATION OF POWERS.

MCL 769.1j(1) provides that if a court orders a person convicted of a felony to pay any combination of a fine, costs, or applicable assessments, the court shall order that person to pay costs of not less than $68; although the costs imposed under MCL 769.1j(1) are a tax, the Legislature's delegation of taxing authority to the circuit courts does not violate the Separation of Powers Clause of the Michigan Constitution (Const 1963, art 3, § 2).

Docket No. 332735:

State Appellate Defender (by *Jeanice Dagher-Margosian*) for Phillip E. Shenoskey.

Docket No. 333375:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Amy C. Clapp*, Chief Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for Jimmie E. Crawford.

Before: SAWYER, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM. In Docket No. 332735, defendant Philip E. Shenoskey pleaded guilty to operating a motor vehicle while intoxicated, third offense, MCL 257.625(9)(c), and was sentenced to 18 months to 5 years in prison. In Docket No. 333375, defendant Jimmie E. Crawford pleaded guilty to possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), and was sentenced to two years' probation. Both defendants appeal by leave granted. This Court, on its own motion, consolidated the appeals. We affirm.

Both these cases raise questions of constitutional and statutory interpretation. Constitutional questions are reviewed de novo, *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007), as are matters of statutory construction, *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010). Additionally, none of the issues raised by defendants was properly preserved for appeal, so we review these issues for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

DOCKET NO. 332735

Defendant Shenoskey's sole issue on appeal is that the $68 in costs imposed under MCL 769.1j is an unconstitutional tax that violates the separation of powers, Const 1963, art 3, § 2, and also violates Const

1963, art 4, § 32. We disagree. MCL 769.1j(1)(a) provides as follows:

> Beginning October 1, 2003, if the court orders a person convicted of an offense to pay any combination of a fine, costs, or applicable assessments, the court shall order that the person pay costs of not less than the following amount, as applicable:
>
> (a) $68.00, if the defendant is convicted of a felony.

Defendant Shenoskey initially argues that he was not subject to the imposition of these costs because he was not sentenced to a combination of "a fine, costs, or applicable assessments." We disagree. The trial court imposed a crime victims' rights assessment, court costs, attorney fees and other unspecified costs. Therefore, because a combination of fines, costs, and other assessments were imposed, defendant was subject to MCL 769.1j(1)(a).

We then turn to defendant Shenoskey's primary claim, that MCL 769.1j(1)(a) is unconstitutional. Defendant Shenoskey first argues that the statute violates the separation-of-powers doctrine under Const 1963, art 3, § 2. We disagree. We find guidance in this Court's recent decision in *People v Cameron*, 319 Mich App 215; 900 NW2d 658 (2017), which considered the same argument with regard to a closely related statute, MCL 769.1k(1)(b)(*iii*). For the same reasons that *Cameron* found MCL 769.1k(1)(b)(*iii*) to be a tax, we conclude that the costs imposed under MCL 769.1j(1)(a) are also a tax. *Cameron*, 319 Mich App at 231-235, also addressed the separation-of-powers issue. We agree with the Court's observation that "even if our Legislature delegated some of its taxing authority to the circuit courts, the Michigan Constitution does not require an absolute separation of powers." *Id*. at 235. In sum, we conclude that the analysis of the separation-of-powers

issue in *Cameron* applies equally here and, for those reasons, we reject defendant Shenoskey's argument.

Additionally, defendant Shenoskey makes a brief argument that MCL 769.1j(1)(a) also violates the requirement of Const 1963, art 4, § 32, that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." Again, *Cameron*, 319 Mich App at 229-231, considered and rejected this argument. For the same reasons, we do so as well.

Finally, we note that defendant Shenoskey also argues that MCL 769.1j(1)(a) is problematic because it states that the cost imposed shall be "not less than" $68 without providing guidance to the trial court for imposing a greater amount. We need not address this point because in this case the trial court imposed the minimum assessment of $68.

DOCKET NO. 333375

Defendant Crawford raises two challenges to his sentence. First, he argues that the trial court erred by failing to consider his income at the time it imposed the probation oversight fees. We disagree.

MCL 771.3c(1) provides as follows:

> The circuit court shall include in each order of probation for a defendant convicted of a crime that the department of corrections shall collect a probation supervision fee of not more than $135.00 multiplied by the number of months of probation ordered, but not more than 60 months. The fee is payable when the probation order is entered, but the fee may be paid in monthly installments if the court approves installment payments for that probationer. In determining the amount of the fee, the court shall consider the probationer's projected income and financial resources. The court shall use the following table of projected monthly income in determining the amount of the fee to be ordered:

Projected Monthly Income	Amount of Fee
$0-249.99	$0
$250.00-499.99	$10.00
$500.00-749.99	$25.00
$750.00-999.99	$40.00
$1,000 or more	5% of projected monthly income, but not more than $135.00

> The court may order a higher amount than indicated by the table, up to the maximum of $135.00 multiplied by the number of months of probation ordered, but not more than 60 months, if the court determines that the probationer has sufficient assets or other financial resources to warrant the higher amount. If the court orders a higher amount, the amount and the reasons for ordering that amount shall be stated in the court order. The fee shall be collected as provided in section 25a of the corrections code of 1953, 1953 PA 232, MCL 791.225a. A person shall not be subject to more than 1 supervision fee at the same time. If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration.

Defendant Crawford was sentenced to two years' probation, and the trial court imposed probation oversight fees of $240, or $10 per month. This would correspond to a projected monthly income of at least $250.00. MCL 771.3c(1). Defendant Crawford's argument that the trial court failed to comply with the statute by not considering his income is flawed. First, the statute does not require the court to consider a defendant's *current* income, but, rather, his or her *projected* income. One of the conditions of defendant Crawford's probation is that he obtain employment and maintain employment for at least 30 hours per week. Even at minimum wage,

defendant Crawford's projected income would significantly exceed the $250 per month income necessary to justify the probation oversight fees imposed.

Defendant Crawford's second argument is that the MCL 600.4803 provision that imposes a 20% penalty for failure to pay a penalty, fee, or cost within 56 days of when it is due is unconstitutional. MCL 600.4803(1) provides as follows:

> A person who fails to pay a penalty, fee, or costs in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform a person subject to a penalty, fee, or costs that the late penalty will be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. A late penalty may be waived by the court upon the request of the person subject to the late penalty.

Defendant Crawford first argues that the 20% rate is usurious. This argument is nonsensical. First, it is a penalty, not interest. Second, even if we were to classify it as interest, usury limits are set by the Legislature and, obviously, in this instance the Legislature set it at 20%. That is, any interest rate set by the Legislature cannot, by definition, be deemed usurious. Defendant Crawford acknowledges that the Legislature has set a variety of different usury limits and interest rates for various purposes. But those limits or rates are not relevant to the issue at hand; rather, they reflect that the Legislature can, and does, set different rates for different purposes.

Defendant Crawford further argues that the 20% penalty, imposed "for no reason other than the inability to pay," violates the Equal Protection and Due Process Clauses of the federal and state Constitutions. See US Const, Am XIV, and Const 1963, art 1, § 17.[1] Defendant Crawford relies on *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983), for the proposition that a defendant cannot be subject to a greater penalty merely because of his or her inability to pay a fine or cost imposed by the court. But this concern is addressed by the last sentence in MCL 600.4803(1), which grants the trial court the authority to waive the penalty. Thus, a mechanism is in place to excuse the imposition of the penalty for a defendant who is unable, through no fault of his or her own, to pay the fine, fee, or cost upon which the 20% penalty is being imposed. Therefore, there is no due-process violation.

As for defendant Crawford's equal-protection argument, this argument is frivolous. The statute does not treat any person subject to the penalty different than any other person. That is, all persons who fail to pay the fine, fee, or cost within 56 days are subject to the 20% penalty. All are treated the same.

For these reasons, we conclude that neither defendant has demonstrated that the trial courts committed plain error in the issues presented in their respective appeals.

Affirmed.

SAWYER, P.J., and MURRAY and GLEICHER, JJ., concurred.

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[1] Defendant also relies on US Const, Am V. But that amendment, of course, only applies to the federal government. The Due Process Clause of the Fourteenth Amendment is the operative provision applying to the states.

In re JJW

In re WILLIAMS

Docket Nos. 334095 and 335932. Submitted April 5, 2017, at Detroit. Decided June 8, 2017, at 9:15 a.m. Judgment in Docket No. 335932 reversed and case remanded 501 Mich 289.

In 2012, the Department of Health and Human Services (DHHS) filed a petition in the Macomb Circuit Court, Family Division, under MCL 712a.2(b), requesting that the court take jurisdiction of two-year-old JJW and newborn ELW after ELW tested positive for controlled substances at birth; both children were eligible for membership in the Sault Ste. Marie Tribe of Chippewa Indians. The minor children were removed from the biological parents' care and placed with foster parents (petitioners) who later petitioned to adopt the children. In 2015, the biological parents released their rights to the minor children under MCL 710.28 and MCL 710.29 of the Michigan Adoption Code, MCL 710.21 *et seq*., stating that they could not provide for their children and that the placement with petitioners was working well; the biological parents acknowledged that there was no guarantee where the children would be placed. The court, Kathryn A. George, J., terminated the biological parents' rights to the children, continued the children's placement with petitioners, and committed the children to the Michigan Children's Institute (MCI) for further case planning. Even though respondent Hands Across the Water (HAW) had investigated a number of reports involving petitioners' care of the children, MCI voluntarily consented under MCL 710.43 to petitioners' adoption of the children, and the tribe approved the adoption with reservations. The Oakland Circuit Court, Family Division, Karen D. McDonald, J., placed the minor children with petitioners for adoption, concluding under MCL 710.51(1) that the consent to adoption was genuine, that it was given with legal authority, and that adoption by petitioners was in the minor children's best interests. HAW and the tribe subsequently requested that the court rescind the placement order and that the court not finalize the adoption. The court rescinded the consent to adoption, denied petitioners' adoption petition, and recommitted the children to MCI, concluding that

HAW and the tribe had standing to rescind their consent because the adoption order had not been finalized. The court reasoned that because the minor children were of Indian heritage, the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., controlled over the conflicting provisions of the adoption code. Respondent father then filed a notice in the Macomb Circuit Court to withdraw his prior consent to the termination of his parental rights and demanded the return of the children under MCL 712B.13(3) of MIFPA. The court denied respondent father's withdrawal request, reasoning that MCL 712B.13(3) did not apply because respondent father had not voluntarily consented to placement for purposes of adoption under MCL 712B.13(3) but instead had released his parental rights to the minor children to DHHS under MCL 710.28. In Docket No. 334095, petitioners appealed the Oakland Circuit Court order denying their adoption petition and the order rescinding the order that had placed the children with petitioners. In Docket No. 335932, respondent father appealed by delayed leave granted the Macomb Circuit Court order that denied his motion to withdraw his consent to terminate his parental rights and for return of the children. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Under MCL 710.51(1) of the adoption code, following a consent to adoption, the circuit court must enter an order terminating the rights of the child's parent or parents, if there was parental consent, or the rights of any person *in loco parentis*, if there was a consent by other than parents; the court must approve adoptive placement of the child with the petitioning party if the court is satisfied that the consent to adoption was genuine, that the person or persons signing the consent have legal authority to do so, and that the best interests of the child will be served by the adoption. MCL 710.51(3) provides that once the court enters an order terminating the rights of parents or a person *in loco parentis*, the consent to adoption executed under MCL 710.43 may not be withdrawn. Accordingly, while MCL 400.209(1) grants the MCI superintendent the power to consent to the adoption of a child committed to the institute, that consent may not be withdrawn after the court terminates its rights and enters an order placing the child for adoption. In this case, MCI lost authority to withdraw its MCL 710.43(1)(b) consent to petitioners' adoption of the children after the Oakland Circuit Court terminated the institute's rights in February 2016 and placed the children with petitioners.

2. Under 25 USC 1913(c) of ICWA, in any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the parent may withdraw his or her consent for any reason before a final order of termination or adoption is entered. In contrast, MCL 712B.13(1) of MIFPA provides that when an Indian child's parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption, the parent must execute a release under MCL 710.28 and MCL 710.29, or consent under MCL 710.43 and MCL 710.44. Under MCL 712B.13(3), if the placement is for purposes of adoption, a consent under MCL 712B.13(1) of the Indian child's parent must be executed in conjunction with either a consent to adopt, as required by MCL 710.43 and MCL 710.44, or a release, as required by MCL 710.28 and MCL 710.29. Under MCL 712B.13(3), a party who executes a consent under MCL 712B.13(1) may withdraw his or her consent at any time before the final order of adoption is entered. In this case, the Oakland Circuit Court correctly concluded that neither HAW nor the tribe had authority under ICWA to withdraw consent to petitioners' adoption of the minor children because 25 USC 1913(c) of ICWA grants that authority only to a child's parents. The Oakland Circuit Court erred, however, by concluding that HAW and the tribe had authority under MIFPA to withdraw their original consent to the adoption. Under MCL 712B.13(3) of MIFPA, only a parent has the power to withdraw his or her consent to an adoptive placement under MCL 712B.13(1), not an Indian custodian. Moreover, even if an Indian custodian could withdraw consent to an adoptive placement made under MCL 712B.13(1), neither HAW nor the tribe was an Indian custodian for purposes of MIFPA because the minor children were wards of the court after the Oakland Circuit Court terminated MCI's rights and placed the children with petitioners for purposes of adoption; HAW and the tribe never had custody of the children, a requirement under MCL 712B.3(n) to be an Indian custodian. Accordingly, the Oakland Circuit Court erred by rescinding the order that had placed the children with petitioners for adoption on the basis of HAW and the tribe's withdrawal of consent. HAW and the tribe did not have authority under ICWA and MIFPA to withdraw consent after the Oakland Circuit Court terminated MCI's rights and placed the children with petitioners for adoption, and MCL 710.51(3)—which precludes withdrawal of consent after MCI's rights were terminated—controlled. The Oakland Circuit Court also erred by relying on standing to support its decision to rescind the order that placed the children with petitioners for adoption; although HAW and the tribe had standing to intervene in this

case under ICWA, 25 USC 1911(c), and MIFPA, MCL 712B.7(6), their interest in the children's placement did not confer a statutory right to withdraw consent.

3. Under 25 USC 1915(a) of ICWA, when an Indian child is placed for adoption under state law, absent good cause to the contrary, a preference must be given to a placement with a member of the child's extended family, other members of the Indian child's tribe, or other Indian families. However, the ICWA adoptive placement preferences do not apply unless an alternative party formally sought to adopt the child. In this case, because there was no pending adoption petition of an alternative party who was eligible to be preferred under 25 USC 1915(a), the Oakland Circuit Court erred by relying on the ICWA adoptive placement preferences to support its decision to rescind the adoptive placement order.

4. MCL 712B.23 of MIFPA provides that absent good cause, adoptive placement of an Indian child must be with a member of the child's extended family, a member of the Indian child's tribe, or an Indian family, in that order of preference. However, MCL 712B.23(6) allows a tribe to establish a different order of preference that DHHS or the court must follow. In this case, the tribe's own order of preference included a placement for the best interests of the child if approved by the tribe's child welfare committee. Under MCL 712B.23(4), a circuit court must address efforts to place the children in accordance with MCL 712B.23 until the placement meets the requirements of Section 23. Because the child welfare committee concluded that it was in the minor children's best interests to be placed with petitioner for adoption, the Oakland Circuit Court complied with MCL 712B.23 when it placed the children with petitioners; the tribe's preferences and the MCL 712B.23 preferences were not relevant after the minor children were placed with petitioners for adoption.

5. The Oakland Circuit Court erred by granting HAW and the tribe's motion to withdraw consent on the basis that its decision was controlled by ICWA and also erred by rescinding the order that had placed the minor children with petitioners for adoption. On remand, when considering whether to approve placement of the minor children with petitioners, the court was required to determine under MCL 710.51(1)(b) whether petitioners' adoption of the minor children was in the children's best interests. Before entering an order of adoption, the court was also required to consider under MCL 710.56(1) whether circumstances had arisen that made the adoption undesirable. HAW and the tribe's motion to rescind the placement order was not a motion for rehearing

under MCR 3.806 and MCL 710.64(1), and the court was not excused from making the best-interest determination.

6. Under MCL 712B.13(1), a parent may consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under MCL 710.28 and MCL 710.29, or consent under MCL 710.43 and MCL 710.44. MCL 712B.13(3) provides that if the placement is for purposes of adoption, a parent's consent under MCL 712B.13(1) must be executed in conjunction with either a consent to adopt, as required by MCL 710.43 and MCL 710.44, or a release, as required by MCL 710.28 and MCL 710.29. The Legislature's use of the words "in conjunction with" indicates that executing consent under MCL 712B.13(1) is a separate obligation from executing consent to adopt under MCL 710.43 and MCL 710.44, or executing a release under MCL 710.28 and MCL 710.29. Under MCL 712B.13(3), a parent may withdraw a consent made under MCL 712B.13(1) at any time before a final order of adoption is entered. In this case, the Macomb Circuit Court reached the correct result by rejecting respondent father's request to withdraw his consent under MCL 712B.13(3) but for the wrong reason. Respondent father released his parental rights under MCL 710.28 and MCL 710.29; he did not execute a consent under MCL 712B.13(1). Accordingly, respondent father did not meet the MCL 712B.13(3) requirements, and the withdrawal provisions of that subsection did not apply.

7. MCL 712B.13(5) provides that a release executed under MCL 710.28 and MCL 710.29 during a child protective proceeding brought under MCL 712A.2(b) is subject to MCL 712B.15, and the court is required to make a finding that culturally appropriate services were offered. Because MCL 712B.13(5) and MCL 712B.15 of MIFPA do not contain provisions regarding whether a parent who executed a release under MCL 710.28 and MCL 710.29 during a child protective proceeding brought under MCL 712A.2(b) can withdraw the release, it was instructive to refer to the withdrawal provisions of ICWA and the adoption code because they address the same subject matter as, and share a common purpose with, MIFPA. Respondent father could not revoke the consent to release his parental rights under 25 USC 1913(c) of ICWA because the final adoption order had already been entered. Respondent father could not revoke the release of his parental rights under the adoption code either because he did not file a petition with DHHS or the child-placing agency requesting such revocation or timely file a motion as required by MCL 710.64; accordingly, he could not revoke the release under MCL 710.29(12). Because respondent

father did not have a right under MIFPA, ICWA, or the adoption code to revoke the release of his parental rights, the Macomb Circuit Court correctly denied his motion to withdraw the release and for return of the children.

In Docket No. 334095, order rescinding order that placed the children with petitioners vacated, order denying petitioners' adoption petition vacated, and case remanded for further proceedings. In Docket No. 335932, order affirmed.

1. ADOPTION — MICHIGAN CHILDREN'S INSTITUTE — WITHDRAWAL OF CONSENT TO ADOPTION — TIMING.

MCL 400.209(1) grants the superintendent of the Michigan Children's Institute the power to consent to the adoption of a child committed to the institute; the superintendent may not withdraw his or her consent under MCL 710.43 of the Michigan Adoption Code, MCL 710.21 *et seq*., to the adoption of a child after the court enters an order terminating the institute's rights to the child (MCL 710.51(3)).

2. ADOPTION — MICHIGAN INDIAN FAMILY PRESERVATION ACT — CONSENT TO ADOPTIVE PLACEMENT OR TERMINATION OF PARENTAL RIGHTS — WITHDRAWAL OF CONSENT.

Under MCL 712B.13(3) of the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., only a parent has the power to withdraw his or her consent to the adoptive placement of, or the termination of parental rights to, an Indian child that was made under MCL 712B.13(1); an Indian tribe may not withdraw the consent made by a parent under MCL 712B.13(1).

3. ADOPTION — MICHIGAN INDIAN FAMILY PRESERVATION ACT — PLACEMENT PREFERENCES — NO CONSIDERATION AFTER PLACEMENT FOR ADOPTION.

A court must consider the placement preferences set forth in the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., when considering the adoptive placement of an Indian child, but those preferences are no longer relevant after the Indian child is placed for adoption (MCL 712B.23(2), (4), and (6)).

Docket No. 334095:

Angela Sherigan for petitioners.

Hertz Schram PC (by *Lisa D. Stern* and *Matthew J. Turchyn*) for Hands Across the Water, Inc.

Elizabeth A. Eggert for the Sault Ste. Marie Tribe of Chippewa Indians.

Karen Gullberg Cook for the minor children.

Docket No. 335932:

Eric J. Smith, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *John Paul Hunt*, Assistant Prosecuting Attorney, for the Department of Health and Human Services.

Michigan Indian Legal Services (by *Cameron Ann Fraser* and *James A. Keedy*) for respondent.

Before: SAWYER, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM. In Docket No. 334095, petitioners, foster mothers (collectively, petitioners), appeal as of right an Oakland Circuit Court order denying their petition to adopt JJW and ELW (collectively, the children). The children's biological father, intervenor, is a member of the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe), which was also an intervening party in the lower court proceedings. The children are eligible for membership in the Tribe. In addition to challenging the order denying the petition to adopt, petitioners also challenge an earlier order rescinding the order that had placed the children with them for purposes of adoption on the basis of the withdrawal of consent by the child-placing agency and the Tribe.

In Docket No. 335932, respondent, the children's biological father (respondent father), appeals by leave granted[1] a subsequent order from the Macomb Circuit

[1] *In re Williams, Minors*, unpublished order of the Court of Appeals, entered December 19, 2016 (Docket No. 335932).

Court denying his motion to withdraw his consent to terminate his parental rights and for return of the children.

Because the children are eligible for membership in the Tribe, the parties' claims on appeal implicate the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. ICWA establishes minimum federal standards for the placement of Indian children in foster or adoptive homes that "reflect the unique values of Indian culture." 25 USC 1902. Likewise, the Michigan Legislature enacted MIFPA, with the purpose of protecting "the best interests of Indian children and promot[ing] the stability and security of Indian tribes and families." MCL 712B.5(a). There is no dispute that the children in this case are Indian children under both ICWA and MIFPA. See 25 USC 1903(4) and MCL 712B.3(k).

In Docket No. 335392, we affirm the Macomb Circuit Court's order denying respondent father's motion to withdraw consent to terminate his parental rights and for return of the children because he does not have a right to withdraw his consent under MIFPA, specifically MCL 712B.13, ICWA, or the Michigan Adoption Code, MCL 710.21 *et seq*. In Docket No. 334095, we vacate the Oakland Circuit Court's order rescinding the order that had placed the children with petitioners because we conclude that neither ICWA nor MIFPA permits rescission of a placement order due to a change in consent by a child-placing agency or tribe after entry of the placement order. Because the Oakland Circuit Court did not rule on the factual issue whether adoption was in the children's best interests, or whether circumstances had arisen that made adoption undesirable, we vacate the order denying petitioners' petition for adoption and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In August 2012, the Department of Health and Human Services (DHHS) filed a petition in the Macomb Circuit Court, requesting that the court take jurisdiction over the two-year-old JJW and newborn ELW, whose meconium screen tested positive for THC, opiates, and cocaine. Both biological parents, respondent father and the mother, admitted that they had relapsed into substance abuse. The children were removed from their biological parents' care and placed with petitioners on August 13, 2012.

Nearly three years later, in May 2015, respondent father signed a form titled, "RELEASE OF CHILD BY PARENT." It provided, in relevant part:

> 2. . . . I voluntarily give up permanently all of my parental rights to my child.
>
> 3. I understand my right to request a rehearing or to appeal within 21 days after an order is entered terminating my parental rights.
>
> 4. I have not received or been promised any money or anything of value for the release of my child except for charges and fees approved by the court.
>
> 5. Of my own free will, I give up completely and permanently my parental rights to my child, and I release my child to Michigan Department of Human Services for the purpose of adoption.

The statutes and court rule listed at the bottom of the release form are: "MCL 710.28, MCL 710.29, MCL 710.54, 25 USC 1913(a), [and] MCR 3.801." The children's mother executed the same document on the same day. At the hearing regarding the release, the biological parents waived any right to a judge. The biological parents explained that they could not provide for their children and that the current placement

with petitioners was "working out good." The referee advised them that there was no guarantee who the children would be placed with, and respondent father replied, "Right." Following the release of parental rights, the Macomb Circuit Court entered an order terminating the biological parents' rights to the children and also continuing the children's placement with petitioners. The Macomb Circuit Court committed the children to the Michigan Children's Institute (MCI) for further case planning.[2]

Petitioners have four other biological and adopted children in their family. Throughout the period of time shortly after the children's placement with petitioners in 2012 until petitioners filed a petition for adoption in December 2015, respondent Hands Across the Water (HAW) investigated a number of reports involving the foster family, and various safety plans and corrective action plans were implemented. Mary E. Rossman, the Superintendent of MCI, nevertheless voluntarily consented to the adoption of the children by petitioners. In addition, the Tribe approved of the adoption "with reservations."

On February 2, 2016, the Oakland Circuit Court terminated the rights of MCI after finding that the consent to adoption was genuine, that it was given with legal authority, and that the best interests of the children would be served by the adoption. After consent, the court entered an order placing both children with petitioners.

On February 22, 2016, HAW wrote a letter to the Oakland Circuit Court, asking it to rescind the order placing the children with petitioners and not to finalize

[2] The record shows continued monitoring of the children's placement by the Macomb Circuit Court, but adoption proceedings involving petitioners later proceeded in the Oakland Circuit Court.

the adoption. In the letter, HAW detailed previous allegations and action plans and noted new allegations[3] that suggested that the foster family would be unable to meet the needs of all the children in the home. On March 7, 2016, the Tribe wrote to the Oakland Circuit Court supporting HAW's recommendation to oppose the adoption of the children by petitioners.

At a hearing on April 29, 2016, the Oakland Circuit Court judge suggested that she had little discretion in this matter because, under ICWA, any parent or Indian tribe could withdraw consent to placement at any time, and upon withdrawal, the child would be returned to the parent or tribe. The judge stated that she was "irritated and frustrated" that HAW had not done its job to recognize the problems with the placement earlier, before the children were "going to be ripped out of this home." The judge then requested additional briefing.

On June 14, 2016, the Oakland Circuit Court entered an opinion and order providing, in relevant part:

> Consents to adoption may be executed by "the authorized representative of the department or his or her designee or of a child placing agency to whom the child has been permanently committed by an order of the court and/or by the court . . . having permanent custody of the child." MCL 710.43. Under ICWA Section 1913(c), parents may withdraw consent to adoptive placement for any reason at any time prior to the entry of a final decree of adoption. See *In re Kiogima*, 189 Mich App 6[; 472 NW2d 13] (1991). Similarly, under MIFPA, "a parent *or Indian custodian* who executes a consent" for placement for purposes of adoption "may withdraw his or her consent at

[3] A new corrective action plan was created for one new allegation, but HAW concluded that the foster family was following safety plans already instituted regarding the second new allegation.

any time before entry of a final order of adoption by filing a written demand requesting the return of the child." MCL 712B.13(3) (emphasis added). "Once a demand is filed with the court, the court shall order the return of the child." *Id*. Importantly, withdrawal of consent by a parent or Indian custodian "constitutes a withdrawal of . . . a consent to adopt executed under" MCL 710.43, cited above. MCL 712B.13(3).

In *Oglaga Sioux Tribe* [sic], the court at issue held that "Tribes have *parens patriae* standing to bring [an] action" on par with that of a biological parent. [*Oglala Sioux Tribe v Van Hunnick*, 993 F Supp 2d 1017, 1027-1028 (D SD, 2014).] The Court reasoned that ICWA was enacted to " 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " *Id*. (quoting ICWA sec 1902).

The Court's Findings

Based on the legal authority cited above, the Court has no choice but to grant the Agency's and the Tribe's request to set aside the Order. The Court notes that Petitioners' citation of MCL 710.51 is inapplicable here, as Minors are of Indian heritage such that ICWA and MIFPA supersede any and all conflicting provisions of the Michigan Adoption Code. The Court notes that the Agency and the Tribe both have standing to rescind the Order and that their authority to do so still exists because the finalization of Minors' adoption has not yet occurred. While ICWA only specifically addresses a *parent's* right to revoke consent to adoption, the Court notes that MIFPA expressly expands the authority to a Minor's *Indian custodian* and then provides that an agency's consent to adopt is akin to a parent's and/or an Indian custodian's consent. Finally, the Court notes that the Court's finding is corroborated by ICWA's stated intent, as the Act was created to protect a tribe's stability and security by giving deferential preference to a minor's tribe.

The Court notes that it does not make this finding without apprehension, as Minors have resided with Peti-

> tioners for most of Minors' young lives. As a result, the Court deems it necessary to schedule a hearing as soon as possible to determine the details of removing Minors from Petitioners' residence and ensuring that said removal is performed to reduce any potential trauma on Minors, as well as Petitioners.

On June 21, 2016, the Oakland Circuit Court recommitted the children to MCI and denied petitioners' petition for adoption. By that time, the children (ages almost four and six) had lived with petitioners approximately four years.

Following the order rescinding the order that had placed the children with petitioners, respondent father filed a notice in the Macomb Circuit Court to withdraw consent to the termination of his parental rights and a demand requesting the return of the children pursuant to MCL 712B.13(3). Respondent father stated that he had voluntarily relinquished his parental rights to the children to allow petitioners to adopt them, but the Oakland Circuit Court had recently denied their petition for adoption.

The Macomb Circuit Court refused to withdraw respondent father's consent and ruled that MCL 712B.13(3) did not apply because respondent father released his rights to DHHS, he did not voluntarily consent to placement for purposes of adoption under MCL 712B.13(3). In other words, the court disagreed with respondent father's claim that he had consented to the adoptive placement with petitioners. The court concluded that instead MCL 712B.13(5) applied to the release in this case. The court reasoned that although MCL 712B.13(5) refers to MCL 712B.15 (which governs the removal of an Indian child), the latter statute does not cover withdrawal of a parent's consent to adoption. Accordingly, the court referred to ICWA and *In re Kiogima*, 189 Mich App 6; 472 NW2d 13 (1991),

which only allow rescission of a release before termination of parental rights. Citing *In re Dependency of MD*, 110 Wash App 524; 42 P3d 424 (2002), the court further reasoned that allowing the release to be rescinded at any time would make court orders terminating parental rights conditional and meaningless.

II. DOCKET NO. 334095 — PETITIONERS' APPEAL

The primary questions presented in petitioners' appeal concern who has authority to give consent to the adoptive placement, and whether ICWA or MIFPA permit HAW or the Tribe to withdraw consent after the order placing the children is entered.

In *In re KMN*, 309 Mich App 274, 286; 870 NW2d 75 (2015), this Court observed:

> "The primary goal when interpreting a statute is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217-218; 801 NW2d 35 (2011). 'The words contained in a statute provide us with the most reliable evidence of the Legislature's intent.' *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). '[S]tatutory provisions are not to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole.' *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (emphasis omitted). If statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). An unambiguous statute must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007)." [Quoting *Hoffenblum v Hoffenblum*, 308 Mich App 102, 109-110; 863 NW2d 352 (2014) (alteration in original).]

"Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law . . . to effectuate the legislative purpose as found in harmonious statutes." *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009). "If two statutes lend themselves to a construction that avoids conflict, that construction should control." *Id*. "When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007).

A. MCI'S AUTHORITY TO WITHDRAW CONSENT

After the children's biological parents released their parental rights to DHHS, the children were committed to MCI. According to MCL 400.203(1), the superintendent of MCI "shall represent the state as guardian of each child . . . ." The MCI superintendent "has the power to make decisions on behalf of a child committed to the institute" and is authorized to consent to that child's adoption. MCL 400.203(2) and MCL 400.209(1); see also MCL 710.43(1)(e) (stating that consent to adoption shall be executed by the guardian of a child). MCL 710.51 addresses the procedure that follows a consent to adoption and provides, in relevant part:

> (1) Not later than 14 days after receipt of the report of investigation, except as provided in subsections (2) and (5), the judge shall examine the report and shall enter an order terminating the rights of the child's parent or parents, if there was a parental consent, or the rights of any person in loco parentis, if there was a consent by other than parents, and approve placement of the child with the petitioner if the judge is satisfied as to both of the following:

> (a) The genuineness of consent to the adoption and the legal authority of the person or persons signing the consent.
>
> (b) The best interests of the adoptee will be served by the adoption.
>
> * * *
>
> (3) Upon entry of an order terminating rights of parents or persons in loco parentis, a child is a ward of the court and a consent to adoption executed under [MCL 710.43] shall not be withdrawn after the order is entered.

The DHHS Adoption Services Manual[4] similarly explains:

> After consent to adopt has been issued to an adoptive family, the family may file a petition to adopt with the court. If circumstances develop that cause the adoption worker to determine that adoption by the family who has received consent would not be in the best interests of the child, the adoption worker must document in writing the reasons and immediately provide this documentation to the Michigan Children's Institute (MCI) superintendent or his or her designee that the request for consent is withdrawn.
>
> Consent may be withdrawn at any time up until the court has issued an order terminating the rights of the Department of Human Services (DHS). If the court has issued an order terminating the rights of DHS and an order placing the child for adoption, the child is no longer under the supervision of MCI and the MCI superintendent or his or her designee does not have authority to withdraw consent.

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[4] DHHS, Adoption Services Manual, ADM 0840, *Withdrawal of Consent for Michigan Children's Institute Wards* (October 1, 2013), available at <https://dhhs.michigan.gov/OLMWEB/EX/AD/Public/ADM/0804.pdf#pagemode=bookmarks> (accessed June 7, 2017) [https://perma.cc/6ETB-UKG9].

Pursuant to the plain language of MCL 400.203(2) and MCL 400.209, MCI had authority to consent to petitioners' adoption of the children. After the Oakland Circuit Court terminated MCI's rights and entered an order placing the children with petitioners on February 2, 2016, MCI lost any authority to withdraw consent.

B. WITHDRAWING CONSENT UNDER ICWA AND MIFPA

Even though MCI lost authority to withdraw consent after the February 2, 2016 order, we must still determine whether either HAW or the Tribe retained such authority given that the children are Indian children for purposes of ICWA and MIFPA. Again, MCL 710.51(3) provides that consent to adoption "shall not be withdrawn" after an order is entered terminating the rights of parents or persons *in loco parentis*. Quoting from and combining portions of MCL 712B.13(1) and (3), the Oakland Circuit Court nevertheless concluded:

> The Court notes that the Agency and the Tribe both have standing to rescind the Order and that their authority to do so still exists because the finalization of Minors' adoption has not yet occurred. While ICWA only specifically addresses a *parent's* right to revoke consent to adoption, the Court notes that MIFPA expressly expands the authority to a Minor's *Indian custodian* and then provides that an agency's consent to adopt is akin to a parent's and/or an Indian custodian's consent.

The Oakland Circuit Court correctly concluded that neither HAW nor the Tribe established any authority to withdraw consent under ICWA. Rather, ICWA gives the parent of an Indian child the power to withdraw consent in a voluntary proceeding. 25 USC 1913(c) provides:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

The Oakland Circuit Court erred by concluding that both HAW and the Tribe had authority to withdraw consent under MIFPA. MIFPA addresses withdrawal of consent to both guardianship and adoptive placement in MCL 712B.13, which provides in relevant part:

> (1) If both parents or Indian custodian voluntarily consent to a petition for guardianship under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, or if a parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28 and MCL 710.29] or consent under [MCL 710.43 and MCL 710.44], the following requirements must be met:
>
> (a) To be valid, consent under this section must be executed on a form approved by the state court administrative office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, birth of the Indian child is not valid.
>
> (b) Notice of the pending proceeding must be given as prescribed by Michigan supreme court rule, the Indian child welfare act, and [MCL 712B.9].
>
> (c) The voluntary custody proceeding shall be conducted in accordance with Michigan supreme court rules and the following statutes:

(*i*) In a guardianship proceeding under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, [MCL 712B.25] also applies.

(*ii*) In an adoption proceeding, [MCL 712B.27] also applies.

* * *

(3) If the placement is for purposes of adoption, a consent under subsection (1) of the Indian child's parent must be executed in conjunction with either a consent to adopt, as required by [MCL 710.43 and MCL 710.44], or a release, as required by [MCL 710.28 and MCL 710.29]. A parent who executes a consent under this section may withdraw his or her consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the Indian child. Once a demand is filed with the court, the court shall order the return of the Indian child. Withdrawal of consent under this section constitutes a withdrawal of a release executed under [MCL 710.28 and MCL 710.29] or a consent to adopt executed under [MCL 710.43 and MCL 710.44].

(4) A parent or Indian custodian who executes a consent under this section for the purpose of guardianship may withdraw his or her consent at any time by sending written notice to the court substantially in compliance on a form approved by the state court administrative office that the parent or Indian custodian revokes consent and wants his or her Indian child returned.

(5) A release executed under [MCL 710.28 and MCL 710.29] during a pendency of a proceeding under [MCL 712A.2(b)] is subject to [MCL 712B.15]. If the release follows the initiation of a proceeding under [MCL 712A.2(b)], the court shall make a finding that culturally appropriate services were offered.

(6) A parent who executes a consent to adoption under [MCL 710.43 and MCL 710.44] may withdraw that con-

> sent at any time before entry of a final order for adoption by filing notification of the withdrawal of consent with the court.

None of the parties on appeal argue that the Oakland Circuit Court was correct in concluding that HAW and the Tribe could withdraw their consent as Indian custodians under MCL 712B.13. Indeed, the Tribe concedes that "[t]he trial court was not bound to follow the Tribe's objection . . . ." We agree that the circuit court's interpretation is contrary to the plain language of the statute for several reasons. First, as discussed further in Part III of this opinion, the power to withdraw consent to an adoptive placement made under MCL 712B.13(3) is only expressly provided to parents. The plain language of the statute does not permit an Indian custodian to withdraw such consent to an adoptive placement. Rather, references to an Indian custodian in MCL 712B.13 relate only to consent for purposes of guardianship, not adoption, which is relevant to this case. See MCL 712B.13(1) and (4).

Second, even if an Indian custodian could withdraw consent to an adoptive placement made under MCL 712B.13(1), neither HAW nor the Tribe constitutes an Indian custodian under MIFPA. Pursuant to MCL 712B.3(n), " 'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the Indian child's parent." The children were wards of the court after it terminated MCI's rights and placed the children with petitioners for purposes of adoption. MCL 710.51(3). Therefore, neither HAW nor the Tribe had custody of the children. Moreover, HAW is not an "Indian person" for purposes of MIFPA. Rather, a " '[c]hild placing agency' means a private

organization licensed under 1973 PA 116, MCL 722.111 to 722.128, to place children for adoption." MCL 710.22(k). Similarly, the Tribe is not a single "Indian person." " 'Indian tribe' or 'tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians . . . ." MCL 712B.3(o). The Legislature's distinct use of the terms "Indian custodian," "agency," and "tribe" throughout MIFPA demonstrates its intent that the terms are not interchangeable. See, e.g., MCL 712B.7(3), MCL 712B.9, and MCL 712B.15(5).

Because neither ICWA nor MIFPA granted authority to HAW or the Tribe to withdraw consent after entry of the order terminating MCI's rights and placing the children, MCL 710.51(3)—which precludes the withdrawal of consent after the order terminating MCI's rights—controls. The Oakland Circuit Court erred by concluding that the withdrawal of HAW's or the Tribe's consent could have any effect on the order placing the children with petitioners.

C. STANDING

To support its conclusion that the Tribe's withdrawal of consent could affect the order placing the children, the Oakland Circuit Court also cited *Oglala Sioux Tribe*, 993 F Supp 2d 1017.[5] In that case, the federal district court for the district of South Dakota ruled that when tribes assert claims on behalf of all of the sovereign's citizens, they have *parens patriae* standing to bring an action to litigate due process and ICWA

[5] "Decisions from lower federal courts are not binding but may be considered persuasive." *Truel v Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010).

violations. *Id*. at 1027-1028. "*Parens patriae* 'is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc.' " *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 29; 755 NW2d 553 (2008), quoting *Black's Law Dictionary* (6th ed). There is no question that the Tribe has standing in this case. ICWA and MIFPA both allow a tribe to intervene. See 25 USC 1911(c) and MCL 712B.7(6). But "[s]tanding in no way depends on the merits of the case." *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 136; 863 NW2d 344 (2014) (quotation marks and citation omitted). The mere fact that the Tribe has an interest in the placement of Indian children under ICWA and MIFPA does not confer a statutory right to withdraw consent. The Oakland Circuit Court erred by relying on standing to support its decision to rescind the order that placed the children with petitioners for adoption.

D. PLACEMENT PREFERENCES

The Oakland Circuit Court also determined that allowing the Tribe's withdrawal of consent to affect the order placing the children was consistent with "ICWA's stated intent, as the Act was created to protect a tribe's stability and security by giving deferential preference to a minor's tribe." We conclude that ICWA placement preferences have no bearing on this case.[6] 25 USC 1915(a) provides that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a

[6] We note that neither HAW nor the Tribe argues that any placement-preference provisions in ICWA or MIFPA apply.

placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."

In *Adoptive Couple v Baby Girl*, 570 US 637, 654; 133 S Ct 2552; 186 L Ed 2d 729 (2013), the United States Supreme Court held that ICWA's adoptive-placement "preferences are inapplicable in cases where no alternative party has formally sought to adopt the child." In *Baby Girl*, the biological father (a member of an Indian tribe), who contested the child's placement with an adoptive couple and argued his parental rights should not have been terminated, did not seek to adopt the child in the lower court proceeding. *Id*. at 643-645. Although there was testimony in the record that the tribe had certified approximately 100 couples to be adoptive parents, none of those couples had formally sought to adopt the child in the state court. *Id*. at 655 n 12. Because there was no preference to apply if no alternative party that was eligible to be preferred under § 1915(a) had come forward, the placement was affirmed. *Id*. at 654. Similarly, here, there was no pending adoption petition of an alternative party who was eligible to be preferred under 25 USC 1915(a). Thus, there was no ICWA preference to apply, and this placement-preference scheme under ICWA did not support the court's decision to rescind the order placing the children.

The list of potential placements set forth in MCL 712B.23 of MIFPA also had no bearing after the children were placed with petitioners. As this Court explained in *In re KMN*, 309 Mich App at 290:

> MIFPA differs from ICWA in that it does not give a preference to eligible parties over ineligible parties. Rather, MIFPA requires that, absent good cause, the adoptive placement *must* be either with a member of the

> child's extended family, a member of the Indian child's tribe, or an Indian family, in that "order of preference." [Quoting MCL 712B.23(2).]

Or, under MCL 712B.23(6), "if the Indian child's tribe establishes a different order of preference, the department or court ordering the placement shall follow the tribe's order of preference." MCL 712B.23(4) addresses deviation from the list of potential placements and the court's responsibility to investigate and eliminate possible placements until the placement meets MIFPA requirements. The statute provides:

> The court shall not find good cause to deviate from the placement preferences stated in this section without first ensuring that all possible placements required under this section have been thoroughly investigated and eliminated. All efforts made under this section must be provided to the court in writing or stated on the record. The court shall address efforts to place an Indian child in accordance with this section at each hearing until the placement meets the requirements of this section.

The Tribe created its own order of preference as allowed under MCL 712B.23(6), which included a placement for the best interests of the children as approved by the Tribe's Child Welfare Committee. The Child Welfare Committee concluded that placement with petitioners was in the children's best interests. Therefore, when the Oakland Circuit Court placed the children with petitioners on February 2, 2016, the court complied with MCL 712B.23. The court was only required to address efforts to place the children "in accordance with [MCL 712B.23] at each hearing *until* the placement meets the requirements of this section." MCL 712B.23(4) (emphasis added). The word "until" means "up to the time that: up to such time as." *Merriam-Webster's Collegiate Dictionary* (11th ed). The plain language of the statute requires compliance with

the Tribe's preference up to the time of the placement. The Legislature did not impose any duty on the court to ensure that the placement continued to satisfy the Tribe's preferences after the time of the placement.[7] Therefore, the list of potential placements in MCL 712B.23 was inapposite at the time the Tribe moved to withdraw consent because a proper placement had already been made according to that statute.

E. BEST INTERESTS

HAW, the Tribe, and the guardian ad litem all argue on appeal that, even if the withdrawal of consent by HAW and the Tribe should have had no effect on the order placing the children, the Oakland Circuit Court nevertheless properly denied the petition to adopt because the placement was not in the children's best interests, see MCL 710.21a(b) and MCL 710.22(g), and because circumstances arose that made the adoption undesirable, see MCL 710.56. We agree that the court had the authority to deny the petition for adoption on the basis that the adoption was undesirable. But no such finding was made in this case. Therefore, remand is required for the court to make the necessary factual determinations regarding the desirability of the adoption.

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[7] The Tribe argues that changing its preference was its prerogative under *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30; 109 S Ct 1597; 104 L Ed 2d 29 (1989). Although the *Holyfield* Court noted, when interpreting the ICWA domicile provisions, that the purpose of ICWA was to protect a tribe's ability to assert its interest in its children, *id*. at 51, *Holyfield* was decided before MIFPA was enacted. Moreover, our interpretation of MIFPA allows the Tribe to assert its interest in the children, but encourages stability and consistency in the decision regarding placement once it is made. Regardless, as discussed further in Part II(E), in this case, when the Tribe changed its mind, it was not precluded from arguing that circumstances arose that made the adoption undesirable.

A general purpose of the Michigan Adoption Code is "[t]o provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned." MCL 710.21a(b). MCL 710.51(1) provides:

> Not later than 14 days after receipt of the report of investigation, except as provided in subsections (2) and (5), the judge shall examine the report and shall enter an order terminating the rights of the child's parent or parents, if there was a parental consent, or the rights of any person in loco parentis, if there was a consent by other than parents, and approve placement of the child with the petitioner if the judge is satisfied as to both of the following:
>
> (a) The genuineness of consent to the adoption and the legal authority of the person or persons signing the consent.
>
> (b) The best interests of the adoptee will be served by the adoption.

MCL 710.56(1) provides in relevant part:

> Except as otherwise provided in this subsection, 6 months after formal placement under [MCL 710.51], unless the court determines that circumstances have arisen that make adoption undesirable, the court may enter an order of adoption.

As petitioners argue on appeal, the Oakland Circuit Court never made any findings that the adoption was not in the children's best interests or that circumstances arose that made the adoption undesirable. Rather, at the hearing on April 29, 2016, the court stated that it was bound by ICWA and had little discretion. In its June 14, 2016 opinion and order, the court rescinded the order placing the children with petitioners on the basis of the withdrawal of consent,

and then in its July 8, 2016 order, it denied petitioners' petition for adoption. Although the parties claimed below, as well as on appeal, that new allegations affected the ability of the foster family to care for the children, the court made no findings regarding the allegations. Moreover, the court never weighed the allegations against its finding that the children "have resided with Petitioners for most of Minors' young lives." This Court may only review issues not preserved below if "a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case." *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007) (quotation marks and citation omitted). Because the Oakland Circuit Court did not rule on the factual issue whether the adoption was in the children's best interests or whether circumstances had arisen that made adoption undesirable, we decline to address this issue on appeal and remand for further proceedings.

HAW argues that the court was excused from making a best-interest determination because the motion to rescind the order placing the children could be treated as a motion for rehearing under MCR 3.806 and MCL 710.64(1), and this Court has ruled that trial courts have discretion whether to address the children's best interests on rehearings of adoption proceedings. Rehearing provisions in the court rules and the Michigan Adoption Code require notice to all interested parties that a petition for rehearing has been filed. MCR 3.806(A); MCL 710.64(1). Moreover, a trial court must rule that good cause exists to grant a rehearing. MCR 3.806(B). Contrary to HAW's claim, nothing in the record suggests that HAW requested a rehearing when it sent the February 22, 2016 letter

requesting that the court rescind the order placing the children with petitioners, or even that the court treat the letter as a petition for rehearing. In addition, the court never found the requisite good cause for a rehearing.[8]

III. DOCKET NO. 335932 — RESPONDENT FATHER'S APPEAL

The question presented in respondent father's appeal is whether MIFPA permits him to withdraw his release of parental rights at any time before the final order of adoption is entered. To resolve this question, it is necessary to review MCL 712B.13 in its entirety. That statute provides:

> (1) If both parents or Indian custodian voluntarily consent to a petition for guardianship under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, or if a parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28 and MCL 710.29], or consent under [MCL 710.43 and MCL 710.44], the following requirements must be met:
>
> (a) To be valid, consent under this section must be executed on a form approved by the state court administrative office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custo-

[8] On appeal, HAW cites *In re KJS*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2016 (Docket No. 330722), for the proposition that a party's e-mail to the court can be treated as a petition for a rehearing and argues that its February 22, 2016 letter was treated similarly. First, *In re KJS* is not precedentially binding under MCR 7.215(C)(1). Second, in *In re KJS*, unpub op at 1, the party actually requested rehearing. A similar request was not made in this case.

dian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, birth of the Indian child is not valid.

(b) Notice of the pending proceeding must be given as prescribed by Michigan supreme court rule, [ICWA], and [MCL 712B.9].

(c) The voluntary custody proceeding shall be conducted in accordance with Michigan supreme court rules and the following statutes:

(*i*) In a guardianship proceeding under section 5204 or 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204 and 700.5205, [MCL 712B.25] also applies.

(*ii*) In an adoption proceeding, [MCL 712B.27] also applies.

(2) Consent described under subsection (1) must contain the following information:

(a) The Indian child's name and date of birth.

(b) The name of the Indian child's tribe and any identifying number or other indication of the child's membership in the tribe, if any.

(c) The name and address of the consenting parent or Indian custodian.

(d) A sworn statement from the translator, if any, attesting to the accuracy of the translation.

(e) The signature of the consenting parent, parents, or Indian custodian recorded before the judge, verifying an oath of understanding of the significance of the voluntary placement and the parent's right to file a written demand to terminate the voluntary placement or consent at any time.

(f) For consent for voluntary placement of the Indian child in foster care, the name and address of the person or entity who will arrange the foster care placement as well as the name and address of the prospective foster care parents if known at the time.

(g) For consent to termination of parental rights or adoption of an Indian child, in addition to the information in subdivisions (a) to (f), the name and address of the person or entity that will arrange the preadoptive or adoptive placement.

(3) If the placement is for purposes of adoption, a consent under subsection (1) of the Indian child's parent must be executed in conjunction with either a consent to adopt, as required by [MCL 710.43 and MCL 710.44], or a release, as required by [MCL 710.28 and MCL 710.29]. A parent who executes a consent under this section may withdraw his or her consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the Indian child. Once a demand is filed with the court, the court shall order the return of the Indian child. Withdrawal of consent under this section constitutes a withdrawal of a release executed under [MCL 710.28 and MCL 710.29] or a consent to adopt executed under [MCL 710.43 and MCL 710.44].

(4) A parent or Indian custodian who executes a consent under this section for the purpose of guardianship may withdraw his or her consent at any time by sending written notice to the court substantially in compliance on a form approved by the state court administrative office that the parent or Indian custodian revokes consent and wants his or her Indian child returned.

(5) A release executed under [MCL 710.28 and MCL 710.29] during a pendency of a proceeding under [MCL 712A.2(b)] is subject to [MCL 712B.15]. If the release follows the initiation of a proceeding under [MCL 712A.2(b)], the court shall make a finding that culturally appropriate services were offered.

(6) A parent who executes a consent to adoption under [MCL 710.43 and MCL 710.44] may withdraw that consent at any time before entry of a final order for adoption by filing notification of the withdrawal of consent with the court. In a direct placement, as defined in [MCL 710.22(o)], a consent by a parent or guardian shall be

accompanied by a verified statement signed by the parent or guardian that contains all of the following:

(a) That the parent or guardian has received a list of community and federal resource supports and a copy of the written document described in section 6(1)(c) of the foster care and adoption services act, 1994 PA 204, MCL 722.956.

(b) As required by [MCL 710.29 and MCL 710.44], that the parent or guardian has received counseling related to the adoption of his or her Indian child or waives the counseling with the signing of the verified statement.

(c) That the parent or guardian has not received or been promised any money or anything of value for the consent to adoption of the Indian child, except for lawful payments that are itemized on a schedule filed with the consent.

(d) That the validity and finality of the consent are not affected by any collateral or separate agreement between the parent or guardian and the adoptive parent.

(e) That the parent or guardian understands that it serves the welfare of the Indian child for the parent to keep the child placing agency, court, or department informed of any health problems that the parent develops that could affect the Indian child.

(f) That the parent or guardian understands that it serves the welfare of the Indian child for the parent or guardian to keep his or her address current with the child placing agency, court, or department in order to permit a response to any inquiry concerning medical or social history from an adoptive parent of a minor adoptee or from an adoptee who is 18 years or older.

On appeal, respondent father relies on the withdrawal provision in MCL 712B.13(3), which allows for a parent who executes a consent under Subsection (1) to withdraw his or her consent at any time before entry of a final order of adoption. Under the plain language of MCL 712B.13(3), to withdraw consent made under MCL 712B.13, a parent must have first executed a

consent under MCL 712B.13(1) in conjunction with either a consent to adopt, under MCL 710.43 and MCL 710.44, or a release, under MCL 710.28 and MCL 710.29. The Legislature's use of the phrase "in conjunction with" establishes its intent that executing a consent under Subsection (1) is a separate obligation from executing a consent to adopt or a release. Here, respondent father only executed a release of his parental rights under MCL 710.28 and MCL 710.29. Nothing in the record establishes that respondent father executed a consent under Subsection (1). Because the requirements of MCL 712B.13(3) were not satisfied, any withdrawal provision in that subsection does not apply to this particular case. Therefore, the Macomb Circuit Court reached the right result in declining respondent father's request for relief under MCL 712B.13(3).

We note, however, that the Macomb Circuit Court's reasoning for excluding the application of MCL 712B.13(3)—that this was not an adoptive placement under MCL 712B.13(1)—is not consistent with the plain language of that subsection. See *Demski v Petlick*, 309 Mich App 404, 441; 873 NW2d 596 (2015) ("[T]his Court will affirm when the trial court reaches the right result for the wrong reason."). In this case, the court ruled that respondent father did not consent to adoptive placement because, for purposes of the Michigan Adoption Code, " '[p]lacement' or 'to place' means selection of an adoptive parent for a child and transfer of physical custody of the child to a prospective adoptive parent according to this chapter." MCL 710.22(s). As the record establishes, respondent father did not consent to a particular adoptive placement. Rather, the referee advised him that there were no guarantees about with whom the children would be placed. Regardless, MCL 712B.13(1) applies if a parent

either "consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28 and MCL 710.29], or consent under [MCL 710.43 and MCL 710.44]." Contrary to the circuit court's reasoning in this case, respondent father could have consented for purposes of Subsection (1) without consenting to a particular adoptive placement and by instead consenting to the termination of his parental rights for the express purpose of adoption. As respondent father argues, MCL 710.28(5) also provides that a release under MCL 710.28 shall be given only to a child-placing agency or to the department. Therefore, contrary to the circuit court's interpretation, a specific adoptive placement was not required under MCL 712B.13(1).

Even though withdrawal of consent under MCL 712B.13(3) does not apply to this particular case, we note that MCL 712B.13 nevertheless addresses two situations involving a parent who did not consent under Subsection (1). First, MCL 712B.13(6) pertains to a parent who merely executed a consent to adoption under MCL 710.43 and MCL 710.44. Like MCL 712B.13(3), Subsection (6) allows a parent to withdraw consent at any time before entry of a final order for adoption. Subsection (6) does not apply here because respondent father did not consent to adoption under MCL 710.43 and MCL 710.44.

Second, MCL 712B.13(5) applies to a parent who executed a release under MCL 710.28 and MCL 710.29 during a child protective proceeding brought under MCL 712A.2(b). As the Macomb Circuit Court found, respondent father executed this type of release. MCL 712B.13(5) does not address or provide for withdrawal of the release. Rather, it requires the court to "make a

finding that culturally appropriate services were offered." In addition, it provides that this type of release is subject to MCL 712B.15, which in turn addresses, *inter alia*, requirements for a proceeding involving a parent who executed a release under MCL 710.28 but did not execute a consent under MCL 712B.13. Again, MCL 712B.15 does not address or provide for withdrawal of the release.

Because MIFPA does not specifically provide whether a parent who executed a release under MCL 710.28 and MCL 710.29 during a child protective proceeding brought under MCL 712A.2(b) can withdraw the release, we consult ICWA and the Michigan Adoption Code together because they relate to the same subject matter and share a common purpose. See *In re Project Cost*, 282 Mich App at 148.

ICWA, 25 USC 1913(c), provides:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

This Court interpreted this provision in *In re Kiogima*, 189 Mich App at 7-8, a case in which the mother had released her parental rights for purposes of adoption and the court terminated her parental rights on the same day. This Court explained:

> "[W]e do not believe that § 1913(c) allows a parent to withdraw a voluntary relinquishment of parental rights after a final order terminating those rights has been entered. Section 1913(c) applies to two kinds of proceedings: to voluntary proceedings for termination of parental rights and to voluntary proceedings for the adoptive placement of Indian children. The consent it refers to may

> be one of two kinds: a consent to termination of parental rights or a consent to adoptive placement. A consent to termination may be withdrawn at any time before a final decree of termination is entered; a consent to adoption at any time before a final decree of adoption. If Congress had intended consents to termination to be revocable at any time before entry of a final decree of adoption, the words 'as the case may be' would not appear in the statute. Therefore, if the Superior Court's order was a final order, [the] purported revocation was without legal significance." [*Id*. at 12, quoting *In re JRS*, 690 P2d 10, 13-14 (Alas, 1984).]

Following the reasoning in *In re Kiogima*, respondent father could not rely on ICWA, 25 USC 1913(c), to withdraw his release after his parental rights were terminated.

Respondent father lacked authority to withdraw his release under the Michigan Adoption Code as well. MCL 710.29 provides, in relevant part:

> (10) Entry of an order terminating the rights of both parents under subsection (8) terminates the jurisdiction of the circuit court over the child in any divorce or separate maintenance action.
>
> (11) Except as otherwise provided in subsection (12), upon petition of the same person or persons who executed the release and of the department or child placing agency to which the child was released, the court with which the release was filed may grant a hearing to consider whether the release should be revoked. A release may not be revoked if the child has been placed for adoption unless the child is placed as provided in [MCL 710.41(2)] and a petition for rehearing or claim of appeal is filed within the time required. A verbatim record of testimony related to a petition to revoke a release shall be made.
>
> (12) Except as otherwise provided in this subsection, a parent or guardian who has signed an out-of-court release but wishes to request revocation of the out-of-court release shall submit a request for revocation to the adoption

> attorney representing the parent or guardian or the child placing agency that accepted the out-of-court release not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed. The request for revocation from the parent or guardian must be submitted in writing by the parent or guardian who signed the out-of-court release to the adoption attorney representing the parent or guardian or a caseworker from the child placing agency that accepted the out-of-court release. The request for revocation is timely if delivered to the adoption attorney or the child placing agency not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed. Upon receipt of a timely request for revocation, the adoption attorney or the child placing agency receiving the request for revocation shall assist the parent or guardian in filing the petition to revoke the out-of-court release with the court as soon as practicable. A parent or guardian may file this petition with the court on his or her own. If the parent or guardian files the petition on his or her own, the petition must be filed with the court not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed.

Respondent father did not file a petition with the department or child-placing agency, nor was his motion filed within the limited time for a rehearing. See MCL 710.64(1). Therefore, he could not revoke the release under MCL 710.29(11). Similarly, he did not timely request revocation under MCL 710.29(12). Because neither MIFPA, the ICWA, nor the Michigan Adoption Code allowed respondent father to withdraw his release of parental rights, the Macomb Circuit Court properly denied his motion.[9]

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[9] Respondent father argues that the release of his parental rights was void or voidable because a consent to adopt was not executed procedurally pursuant to MCL 712B.13(1). But respondent father did not raise this issue in a request for rehearing. Moreover, he did not argue this error in his application for leave to appeal in this case. This Court limited the appeal "to the issue raised in the application and supporting

IV. CONCLUSION

In summary, we affirm the Macomb Circuit Court's order denying respondent father's motion to withdraw consent to terminate his parental rights and for return of the children because he does not have a right to withdraw his consent under MIFPA, ICWA, or the Michigan Adoption Code. We vacate the Oakland Circuit Court's order rescinding the order that placed the children with petitioners because we conclude that neither ICWA nor MIFPA permits rescission of a placement order based on a change in consent by HAW or the Tribe after entry of the placement order. Because the Oakland Circuit Court did not rule on the factual issue whether adoption was in the children's best interests, or whether circumstances had arisen that made adoption undesirable, we vacate the order denying petitioners' petition for adoption and remand for further proceedings.

Affirmed in part, rescission order vacated, order denying the adoption petition vacated, and case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SAWYER, P.J., and SAAD and RIORDAN, JJ., concurred.

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brief." *In re Williams, Minors*, unpublished order of the Court of Appeals, entered December 19, 2016 (Docket No. 335932). Therefore, respondent father's argument is not properly before this Court.

WALRATH v WITZENMANN USA LLC

Docket No. 331953. Submitted June 6, 2017, at Detroit. Decided June 8, 2017, at 9:20 a.m.

Lawrence W. Walrath brought a negligence action in the Oakland Circuit Court against Witzenmann USA LLC, alleging that defendant was liable for all economic and noneconomic losses stemming from work-related injuries plaintiff sustained on June 14, 2014, because defendant did not have workers' compensation insurance coverage as required by MCL 418.611 of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., on the date of the accident. Defendant obtained its workers' compensation insurance policy through Star Insurance (Star), and defendant's policy period began on January 1, 2014, providing coverage for a term of one year pending timely premium payments. Defendant missed the premium payment due on May 1, 2014. On May 6, 2014, Star mailed defendant a notice of pending cancellation, and on May 29, 2014, Star canceled defendant's policy because Star had not received payment. Defendant had not been aware of the cancellation until defendant attempted to file a claim on plaintiff's behalf. Defendant wired a premium payment to Star on June 18, 2014, and Star reinstated defendant's policy "without a lapse in coverage." Star then opened a claim for plaintiff's injury, and plaintiff began receiving medical and wage-loss benefits pursuant to defendant's policy. Plaintiff filed the negligence complaint, and defendant moved for summary disposition, arguing that defendant was in compliance with MCL 418.611 because defendant had obtained reinstatement of the policy and that the WDCA provided the exclusive remedy for plaintiff's work-related loss. The court, Rae Lee Chabot, J., agreed with defendant and granted defendant's motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 418.611(1) provides, in pertinent part, that under the WDCA, each employer shall secure the payment of compensation by either (a) receiving authorization to be a self-insurer or (b) by insuring against liability with an insurer authorized to transact the business of workers' compensation insurance within the state of Michigan. MCL 418.611(1), by its plain language, does not

specifically require an employer to maintain an active workers' compensation policy and does not contain a temporal requirement limiting qualifying coverage to that obtained before an employee's injury; the ultimate goal of the statute is to ensure payment of compensation to an injured employee. Accordingly, when an employer secures compensation from an insurer pursuant to a reinstated policy, the employer has secured compensation as required by MCL 418.611(1)(b). In this case, plaintiff argued that defendant was noncompliant with MCL 418.611 on the day of plaintiff's injury because defendant was technically, if only momentarily, uninsured; however, this interpretation was contrary to the plain language of the WDCA. The cancellation of defendant's policy did not render defendant's ultimate compliance with MCL 418.611(1)(b) impossible: the pertinent question was whether the employer secured compensation, not whether the employer was insured when the employee sustained the injury. Following Star's reinstatement of the policy, defendant's policy documents indicated that defendant was covered for the entirety of the policy term, including the date on which plaintiff was injured, and Star began making payments for benefits in accordance with the WDCA. When Star reinstated defendant's policy "without a lapse in coverage," defendant was brought back into compliance with the plain terms of MCL 418.611(1)(b); therefore, defendant secured compensation as required by MCL 418.611(1)(b).

2. MCL 418.131(1) provides, in pertinent part, that the right to recovery of benefits as provided under the WDCA shall be the employee's exclusive remedy against the employer for a personal injury, except in cases of intentional tort. However, MCL 418.131(1) only protects employers from civil suit when they are properly in compliance with the WDCA's requirements. When an employer has failed to comply with the requirements of MCL 418.611, the WDCA provides for penalties, including liability in tort for additional damages. MCL 418.641(2) provides that the employee of an employer who violates MCL 418.611 shall be entitled to recover damages from the employer in a civil action when that injury arose out of and in the course of employment notwithstanding the provisions of MCL 418.131. In this case, the issue was whether defendant violated MCL 418.611 for purposes of MCL 418.641. When an employer corrects an accidental lapse and secures coverage for an injured employee, the employer has not violated MCL 418.611 for purposes of MCL 418.641. Because defendant secured compensation as required by MCL 418.611(1)(b) pursuant to a reinstated policy, defendant did not violate MCL 418.611, and plaintiff was thereafter precluded from pursuing a tort claim against defendant under MCL 418.641(2).

This interpretation of MCL 418.611 and MCL 418.641 was consistent with a decision of the Workers' Compensation Appellate Commission and with the WDCA's legislative purpose of balancing the potential costs to the employee and the employer.

3. Summary disposition is premature if discovery on a disputed issue has not been completed. However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position. In this case, plaintiff did not specifically identify any facts still in dispute, did not provide support for his claim that Star did not actually reinstate coverage, and did not attempt to dispute the authenticity of the notice of reinstatement indicating that defendant's policy with Star had been reinstated without a lapse in coverage. Because plaintiff could not show that additional discovery stood a fair chance of uncovering support for his position, the trial court properly granted defendant's motion for summary disposition before the end of the discovery period.

Affirmed.

1. WORKERS' COMPENSATION — WORKER'S DISABILITY COMPENSATION ACT — INSURING AGAINST LIABILITY — AN EMPLOYER'S REINSTATED INSURANCE POLICY SECURES COMPENSATION.

MCL 418.611(1) provides, in pertinent part, that under the Worker's Disability Compensation Act, each employer shall secure the payment of compensation by either (a) receiving authorization to be a self-insurer or (b) by insuring against liability with an insurer authorized to transact the business of workers' compensation insurance within the state of Michigan; the pertinent question under MCL 418.611(1)(b) is whether the employer secured compensation, not whether the employer was insured when the employee sustained the injury; when an employer secures compensation from an insurer pursuant to a reinstated policy, the employer has secured compensation as required by MCL 418.611(1)(b).

2. WORKERS' COMPENSATION — WORKER'S DISABILITY COMPENSATION ACT — EXCLUSIVE REMEDY FOR PERSONAL INJURY — AN INJURED EMPLOYEE MAY NOT RECOVER DAMAGES FROM THE EMPLOYER IN A CIVIL ACTION WHEN THE EMPLOYER CORRECTS AN ACCIDENTAL LAPSE IN INSURANCE COVERAGE.

MCL 418.131(1) provides, in pertinent part, that the right to recovery of benefits as provided under the Worker's Disability Compensation Act shall be the employee's exclusive remedy

against the employer for a personal injury, except in cases of intentional tort; MCL 418.641(2) provides that the employee of an employer who violates MCL 418.611, which requires each employer to secure the payment of compensation, shall be entitled to recover damages from the employer in a civil action when that injury arose out of and in the course of employment notwithstanding the provisions of MCL 418.131; when an employer corrects an accidental lapse in insurance coverage and secures coverage for an injured employee, the employer has not violated MCL 418.611 for purposes of MCL 418.641.

Charles W. Palmer for plaintiff.

Clark Hill PLC (by *Kaveh Kashef* and *Paul E. Scheidemantel*) for defendant.

Before: JANSEN, P.J., and MURPHY and BORRELLO, JJ.

PER CURIAM. Plaintiff appeals by right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Defendant is a Michigan limited liability company and has maintained a workers' compensation insurance policy since it began operations in 2000. In 2013 and 2014, defendant obtained its policy through Star Insurance (Star). Defendant's 2014 policy period began on January 1, 2014, providing coverage for a term of one year pending timely premium payments. Defendant missed the premium payment due on May 1, 2014. On May 6, 2014, Star mailed defendant a notice of pending cancellation. Star did not receive a payment and canceled defendant's policy three weeks later, on May 29, 2014. On June 14, 2014, plaintiff was operating a "10-ton hydraulic burst tester" at one of defendant's facilities when the material being tested flew out of the tester and struck plaintiff in the face. Plaintiff suffered multiple fractures, sinus damage, brain injury, and post-traumatic stress disorder related

to the incident. Defendant was made aware of Star's cancellation of the workers' compensation policy when defendant attempted to file a claim on plaintiff's behalf. On June 18, 2014, defendant wired a premium payment to Star, and Star reinstated defendant's policy "without a lapse in coverage." Star then opened a claim for plaintiff's injury and plaintiff began receiving medical and wage-loss benefits pursuant to defendant's policy.

Plaintiff brought a one-count complaint in the circuit court against defendant for negligence. Plaintiff sought to hold defendant liable for all economic and noneconomic losses stemming from the injury because, on the date of the accident, "defendant did not have any workers' compensation insurance coverage, as required by MCL 418.611."

Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that because defendant had obtained reinstatement of the workers' compensation insurance policy, it had "secured" coverage for plaintiff and complied with § 611, MCL 418.611, of the Michigan Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Therefore, defendant argued, under MCL 418.131, the WDCA provided the exclusive remedy for plaintiff's work-related loss. The circuit court agreed with defendant and granted defendant's motion pursuant to MCR 2.116(C)(10).

On appeal, plaintiff argues that the trial court erred by concluding that defendant complied with the WDCA's coverage requirements and by concluding that plaintiff's negligence claims were barred by the WDCA's exclusive remedy provision. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Bernardoni v City of Saginaw*, 499 Mich 470, 472; 886 NW2d 109 (2016).

Defendant sought summary disposition under MCR 2.116(C)(8) and (C)(10). However, the circuit court explicitly stated that its decision to grant summary disposition was made pursuant only to MCR 2.116(C)(10). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to 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). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). A party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006) (citation and quotation marks omitted).

This case requires this Court to interpret the provisions of the WDCA. Questions of law in a workers' compensation case are reviewed de novo, as are questions requiring statutory interpretation. *Smitter v Thornapple Twp*, 494 Mich 121, 129; 833 NW2d 875 (2013). "[T]he WDCA is in derogation of the common law, and its terms should be literally construed without judicial enhancement." *Paschke v Retool Indus*, 445 Mich 502, 510-511; 519 NW2d 441 (1994). " 'Rights, remedies, and procedure thereunder are such and such only as the statute provides,' " and " '[i]f the statute is short of what it should contain in order to prevent injustice, the defects must be cured by future legislation and not by judicial pronouncement.' " *Id*. at 511, quoting *Luyk v Hertel*, 242 Mich 445, 447; 219 NW 721 (1928) (emphasis omitted).

The material facts of this case are not in dispute. The propriety of the trial court's order for summary disposition in favor of defendant under MCR 2.116(C)(10) therefore turns on whether defendant was entitled to judgment as a matter of law. Defendant argued, and the trial court agreed, that Star's reinstatement of defendant's workers' compensation policy, backdated to provide coverage from the date of cancellation "without a lapse," brought defendant into compliance with the coverage mandates for employers under the WDCA. Thus, plaintiff was limited to the remedies provided under the act. Plaintiff argues to the contrary, insisting that the trial court erred when it determined that his negligence claims were barred. Plaintiff submits that the plain language of the WDCA permits an injured employee to sue an employer whose insurance coverage has been canceled before the date of the injury, regardless of whether the policy is subsequently reinstated and the injured employee receives benefits under the policy.

Stated succinctly, the question this Court must answer is whether an employer whose workers' compensation policy has been canceled maintains compliance with the coverage mandate of MCL 418.611—and therefore avoids civil suit for injuries sustained by an employee during the cancellation period—by securing reinstatement of the policy to cure the lapse. Resolution of this issue is a matter of first impression in Michigan.

When this Court interprets a statute, its goal is "to give effect to the Legislature's intent, focusing first on the statute's plain language." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016). Statutes must be examined as a whole, and individual words and phrases are read in

the context of the entire legislative scheme. *Id*. Unless otherwise defined in the statute or accepted as terms of art, words of a statute are assigned their plain and ordinary meaning. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 40; 761 NW2d 269 (2008). Further, an individual statute "must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained." *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009). "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ronnisch*, 499 Mich at 552.

"The WDCA substitutes statutory compensation for common-law tort liability founded upon an employer's negligence in failing to maintain a safe working environment." *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000) (quotation marks and citation omitted). "Under the WDCA, employers provide compensation to employees for injuries suffered in the course of employment, regardless of fault." *Id*. Under MCL 418.301, an employer is required to compensate an employee who "receives a personal injury arising out of and in the course of employment," as provided in the act. Section 611 of the WDCA governs workers' compensation coverage requirements for employers. *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 621; 640 NW2d 589 (2001). In pertinent part, MCL 418.611 provides:

> (1) Each employer under this act, subject to the approval of the director, *shall secure the payment of compensation under this act* by either of the following methods:
>
> (a) By receiving authorization from the director to be a self-insurer. In the case of an individual employer, the director may grant that authorization upon a reasonable showing by the employer of the employer's solvency and

> financial ability to pay the compensation and benefits provided for in this act and to make payments directly to the employer's employees as the employees become entitled to receive the payment under the terms and conditions of this act . . . .
>
> (b) *By insuring against liability with an insurer* authorized to transact the business of worker's compensation insurance within this state. [Emphasis added.]

"In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer." *Clark v United Technologies Auto, Inc*, 459 Mich 681, 687; 594 NW2d 447 (1999). This arrangement balances the benefits to the employer and the employee. See *Herbolsheimer*, 239 Mich App at 255. The exclusive remedy provision, MCL 418.131, ensures that this balance of mutual benefits is maintained. *Reed v Yackell*, 473 Mich 520, 529; 703 NW2d 1 (2005) (opinion by TAYLOR, C.J.). In pertinent part, MCL 418.131(1) provides that "[t]he right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease," except in cases of intentional tort.

> "Th[is] language expresses a fundamental tenet of workers' compensation statutes that if an injury falls within the coverage of the compensation law, such compensation shall be the employee's only remedy against the employer or the employer's insurance carrier. The underlying rationale is that the employer, by agreeing to assume automatic responsibility for all such injuries, protects itself from potentially excessive damage awards rendered against it and that the employee is assured of receiving payment for his injuries." [*Reed*, 473 Mich at 530 (opinion by TAYLOR, C.J.), quoting *Farrell v Dearborn Mfg Co*, 416 Mich 267, 274; 330 NW2d 397 (1982).]

"By enacting the exclusive remedy provision of the WDCA, the Legislature clearly and unambiguously limited an employee's right to recover against his employer for injury arising out of the course of his employment to the benefits available under the WDCA." *Harris v Vernier*, 242 Mich App 306, 320; 617 NW2d 764 (2000).

However, the exclusive remedy provision only protects employers from civil suit when they are properly in compliance with the act's requirements. When an employer under the act has failed to comply with the coverage requirements of MCL 418.611, the WDCA provides for penalties, including criminal sanctions and liability in tort for additional damages. Under MCL 418.641:

> (1) An employer who fails to comply with the provisions of section 611 is guilty of a misdemeanor and may be fined not more than $1,000.00, or imprisoned for not more than 6 months, or both. . . .
>
> (2) The employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131. [MCL 418.641 (citations omitted).]

The application of MCL 418.641 is clear when an employer's noncompliance is undisputed. "[Section] 641(2) imposes common-law liability in addition to, but not as a substitute for, benefits recoverable under the WDCA." *Smeester v Pub-N-Grub, Inc (On Remand)*, 208 Mich App 308, 312; 527 NW2d 5 (1995). In other words, when an employer fails to procure workers' compensation coverage as required by MCL 418.611, MCL 418.641(2) allows an injured employee to pursue a tort claim against the noncompliant employer *in*

addition to receiving compensation for available benefits from the employer under the WDCA.[1] The issue here, however, is whether defendant violated MCL 418.611 for purposes of MCL 418.641.

Plaintiff asks this Court to hold that MCL 418.641(2) permits plaintiff to pursue a civil action against defendant because defendant's workers' compensation coverage was canceled two weeks before plaintiff's work-related accident and defendant was therefore uninsured on the date of defendant's injury, despite the fact that defendant's policy was immediately reinstated with no lapse in coverage and plaintiff received compensation pursuant to the policy. Plaintiff argues that on the day of his injury, defendant was noncompliant with MCL 418.611 because defendant was technically, if only momentarily, uninsured.

We find that plaintiff's proposed interpretation of MCL 418.611(1) and MCL 418.641(2) is contrary to the plain language of the WDCA. MCL 418.611(1) requires only that an employer "secure the payment of compensation" under the act for an injured employee. MCL 418.611(1) provides two alternative methods of securing compensation, one of which is to operate as an approved self-insurer, MCL 418.611(1)(a), and is inapplicable here. The other is "insuring against liability with an insurer . . . ." MCL 418.611(1)(b). The language of the statute is important. It indicates, especially considering the available alternative methods for securing compensation, that the ultimate goal of the

[1] Such damages are not limited to the benefits available under the WDCA, but double recovery is not permitted. *Smeester*, 208 Mich App at 314. "Accordingly, if . . . an employee successfully has pursued and recovered benefits in a worker's disability compensation proceeding, or been voluntarily awarded benefits, any such benefits must be subtracted from the recovery awarded by the trier of fact in a common-law action under [Section] 641(2)." *Id*.

statute is to ensure payment of compensation to an injured employee. The statute, by its plain language, does not specifically require an employer to maintain an active workers' compensation policy. It requires an employer to "secure the payment of compensation . . . [b]y insuring against liability . . . ." MCL 418.611(1)(b). Further, the statute does not contain a temporal requirement limiting qualifying coverage to that obtained before an employee's injury. Plaintiff asks this Court to read a temporal requirement into the language of MCL 418.611(1)(b), arguing that temporal language in MCL 418.171(1), another section of the WDCA imposing liability on an employer who hires a contractor that "does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death," indicates that MCL 418.611 also requires compliance "prior to the date of the injury." This Court may not judicially enhance the literal meaning of MCL 418.611(1)(b) by reading a requirement into the statute's plain language. Regardless, plaintiff's comparison does not support his suggested interpretation of MCL 418.611(1)(b). To the contrary, the Legislature's inclusion of a temporal requirement in MCL 418.171(1) indicates that the omission of such language in MCL 418.611(1)(b) was intentional. *In re AJR*, 300 Mich App 597, 600; 834 NW2d 904 (2013) ("[T]his Court may not ignore the omission of a term from one section of a statute when that term is used in another section of the statute."). Based on the plain language of MCL 418.611, we hold that when an employer secures compensation from an insurer pursuant to a reinstated policy, the employer has secured compensation as required by MCL 418.611(1)(b). Accordingly, the employer cannot be found in noncompliance with MCL 418.611 for purposes of MCL 418.641. This perhaps overly technical

reading of the plain language of MCL 418.611 is necessitated by the overly technical interpretation of MCL 418.611 plaintiff asks this Court to adopt on appeal; therefore, this plain-language reading of MCL 418.611 will apply only in such limited contexts as the one currently before this Court.

Plaintiff argues that defendant cannot be found in compliance with MCL 418.611(1)(b) because the reinstatement of defendant's policy did not render defendant "insured" on the date of defendant's injury. However, the cancellation of defendant's workers' compensation policy only placed defendant in a precarious position, potentially unable to obtain reinstatement of coverage and secure compensation. It did not render defendant's ultimate compliance with MCL 418.611(1)(b) impossible. Furthermore, plaintiff's suggestion that the reinstatement of defendant's policy with no lapse in coverage did not qualify defendant as "insured" on the date of plaintiff's injury is contrary to the terms of the insurance policy, well-accepted insurance industry practices, and common sense.

Defendant's workers' compensation coverage policy with Star became effective on January 1, 2014. Defendant made policy payments for several months out of the year-long policy period before missing a payment in May. Although the policy was canceled for nonpayment, defendant promptly discovered the oversight and Star agreed to reinstate the policy with no lapse in coverage. Defendant's policy documents indicate that defendant was covered for the entirety of the policy term, including on the date when plaintiff was injured. Indeed, Star opened a claim for plaintiff immediately upon reinstatement of defendant's policy and began making payments for benefits in accordance with the WDCA. Plaintiff argues that "one cannot insure

against an event that has already occurred." Plaintiff may be correct, but even if one cannot "insure" against an event that has already happened, one can certainly provide coverage for such an event. An insurer's reinstatement of a canceled insurance policy to provide coverage during a lapse is not unheard of, and we are unable to find any law prohibiting an insurer from taking such action. "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 519; 847 NW2d 657 (2014), quoting *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995) (quotation marks omitted).

Plaintiff has not argued that Star's decision to reinstate defendant's coverage was contrary to public policy. Plaintiff argues only that the reinstatement cannot be called "insurance." However, we are not persuaded that an insurer's payment of benefits pursuant to a reinstated policy is not the same as providing insurance coverage. In a related context, we have explained:

> When a lapsed policy is subsequently reinstated, the reinstatement "is not a new contract of insurance, nor is it the issuance of a policy of insurance; but rather it is a contract by virtue of which the policy already issued, under the conditions prescribed therein, is revived or restored after its lapse." Therefore, renewal of an existing policy or reinstatement of a lapsed policy is not in actuality a request for an insurance policy because such a policy already exists. [*Beckett-Buffum Agency, Inc v Allied Prop & Cas Ins Co*, 311 Mich App 41, 46; 873 NW2d 117 (2015) (citation omitted).]

Additionally, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the term "insurance" as "the business

of insuring persons or property," or "coverage by contract whereby one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril." Nothing in the definition of "insurance" limits the insurer's option to contract against losses that have already occurred. Reinstatement of a lapsed policy revives the contract of insurance already in existence, and the insurance coverage simply runs from the date of reinstatement the parties contract for.

Had defendant failed to reinstate the policy or managed to obtain a reinstatement guaranteeing only prospective coverage, defendant would have failed to comply with the requirement in MCL 418.611(1)(b) that it "secure the payment of compensation . . . [b]y insuring against liability with an insurer." However, when Star reinstated defendant's workers' compensation policy with no lapse in coverage, defendant was brought back into compliance with the plain terms of MCL 418.611(1)(b). Plaintiff was thereafter precluded from pursuing a tort claim against defendant. MCL 418.641(2) permits a civil suit against an employer who "violates the provisions" of MCL 418.611. And while, as plaintiff notes, MCL 418.641(2) does not contain an exception for cases of accidental lapse, such an exception would be unnecessary in light of the plain language of MCL 418.611. Again, the question is whether the employer secured compensation of benefits, not whether the employer was insured when the employee sustained the injury. When an employer corrects an accidental lapse and secures coverage for an injured employee, the employer simply has not violated MCL 418.611 for purposes of MCL 418.641. In this case, it is undisputed that defendant secured the payment of compensation to plaintiff by obtaining reinstatement of the workers' compensation policy with Star, an insurer authorized to do business in

Michigan, without a lapse in coverage. Defendant is therefore not liable for a violation under MCL 418.641(2).

We are careful to note that this proposed reading of the statute does not create a legal loophole through which employers may avoid the obligation to consistently carry workers' compensation insurance coverage. As previously mentioned, an employer who has not qualified as a self-insurer under MCL 418.611(1)(a) must still "insur[e] against liability with an insurer" under MCL 418.611(1)(b) to avoid tort liability under MCL 418.641(2). An employer will find itself hard-pressed to obtain workers' compensation coverage from an approved insurer backdated to cover an injury that has already occurred. Therefore, in practice, this Court's interpretation of MCL 418.611(1)(b) does not alter an employer's obligation to obtain and proactively maintain workers' compensation insurance coverage; it simply precludes liability under MCL 418.641(2) for a momentary—and promptly corrected—lapse in an employer's existing workers' compensation policy.

Our interpretation of MCL 418.611 and MCL 418.641 is consistent with an opinion by the Workers' Compensation Appellate Commission (WCAC) addressing somewhat analogous facts. In *Sweeney v Nehme Enterprises Inc*, 2007 Mich ACO 110, p 13, the defendant employer applied for and purchased workers' compensation insurance through an insurance agency, Meadowbrook Insurance Group (MIG). However, MIG failed to obtain the employer's policy from an insurance carrier, Everest National Insurance Company (Everest). *Id*. Subsequently, the plaintiff was injured in a work-related accident. *Id*. Upon learning of the plaintiff's injury, Everest declined to issue a retroactive policy. *Id*. However, MIG issued a retroactive

policy through another provider, Star Insurance (Star), which covered the entire period that the defendant had been uninsured, including the date of the plaintiff's injury. *Id*. The issue before the magistrate was whether Star was the carrier of the defendant's insurance on the date of the plaintiff's injury for purposes of MCL 418.611(1)(b). *Id*. at 14.

The magistrate found that Star was not the defendant's carrier on the date of the plaintiff's injury, and the defendant was therefore "uninsured" on the date of the plaintiff's injury. *Id*. at 4, 14. The magistrate concluded that the employee therefore had a right to sue the defendant and could not be "deprive[d]" of that right by a retroactive policy covering his injury date. *Id*. at 5. On appeal, the WCAC disagreed and reversed the magistrate's decision. *Id*. at 16. The WCAC found that the magistrate had incorrectly framed the issue:

> The issue is not what [the employee] loses or gains by having [the defendant] deemed to be insured, but whether or not Star is legally the workers' compensation carrier for [the defendant] on the date of [the employee's] injury. [*Id*. at 14.]

The WCAC held that Star was the defendant's insurer on the date of the plaintiff's injury despite the fact that the policy was retroactive. *Id*. at 15-16.

While not binding on this Court, "an administrative agency's interpretation is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1, 7; 884 NW2d 848 (2015) (quotation marks and citation omitted). "[T]he WCAC's interpretation and application of a provision of the WDCA is entitled to 'considerable deference' from this Court where that interpretation is not 'clearly incorrect.' " *McCaul*, 248 Mich App at 619 (citation omitted).

While *Sweeney* is otherwise factually distinguishable, there can be no doubt that the WCAC considered the employer "insured" on the injury date under a retroactive policy issued by Star. As defendant aptly posits, the *Sweeney* opinion undercuts plaintiff's argument that lack of coverage at the precise moment of injury perfects a negligence action that irrevocably triggers MCL 418.641(2) as well as plaintiff's suggestion that retroactive coverage is not insurance for purposes of MCL 418.611(1)(b). We find nothing in the WCAC's interpretation or application of MCL 418.611 "clearly incorrect." We therefore decline plaintiff's request to interpret MCL 418.611(1)(b) such that the WCAC's *Sweeney* opinion would be overruled.

Our interpretation of the WDCA is also consistent with the act's legislative purpose. "[A] fundamental premise of the act is that if the employee's injury falls within its provisions, then worker's compensation will be the only remedy against the employer and the employer's insurance carrier." *Kidder v Miller-Davis Co*, 455 Mich 25, 38; 564 NW2d 872 (1997). This balances the potential costs to the employee and the employer. "The notion of fault is eliminated, and the idea is compensation tied to earnings, the costs of which are ultimately passed on to the consumers." *Id*. at 38 n 6, quoting 1 Larson, Workmen's Compensation Law, §§ 3.00-3.30, pp 1-17 to 1-19.

To allow an employee who has received benefits pursuant to a workers' compensation policy to sue its employer in tort for additional damages would be inconsistent with the balance of interests protected by the WDCA. An employer that cures a lapse in its insurance policy to secure workers' compensation coverage for an employee's work-related injury has upheld its part of the bargain struck between employees and

employers under the WDCA and has provided for compensation in the form of insurance payments for benefits available under the WDCA without regard to fault. An employee who receives compensation from a workers' compensation insurance policy under such circumstances has received his or her full benefits under the WDCA. No additional penalties on the employer or benefits for the employee are called for. Even under the penalties provision, MCL 418.641, an injured employee is only allowed to sue an employer who *has failed to provide compensation* via self-insurance or a workers' compensation policy. In such a situation, the employer has failed to meet its obligation to the employee and is no longer entitled to the protections of the WDCA. Additionally, the employee has lost the ability to recover *any* benefits without accepting the costs and risks of litigation. It therefore makes sense that the employee would be entitled to the additional benefit of pursuing an action in negligence.

In this case, plaintiff asks this Court to interpret the WDCA in such a way that he receives twice the benefits without any concession. He has received benefits available under the WDCA pursuant to his employer's workers' compensation insurance policy without regard to fault. We cannot agree that plaintiff's request is consistent with the purposes of the WDCA. Defendant, while perhaps negligent, has protected its employee and upheld its part of the bargain. It cannot be said that defendant has forfeited the protections of the WDCA.

The circuit court properly determined that plaintiff's civil action was barred by the exclusive remedy provision of the WDCA. Defendant was therefore entitled to judgment as a matter of law, and the trial court's entry of summary disposition pursuant to MCR 2.116(C)(10) was proper.

Plaintiff also argues that summary disposition was premature because discovery was not yet complete. In general, summary disposition is premature if discovery on a disputed issue has not been completed. *Oliver*, 269 Mich App at 567. However,

> the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position. [*Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).]

Although in his response to defendant's motion for summary disposition plaintiff broadly claimed that material questions of fact remained, plaintiff did not specifically identify the facts still in dispute. To the contrary, plaintiff repeatedly acknowledged that the relevant facts were undisputed, arguing only that the facts precluded summary dismissal of his claim. On appeal, plaintiff suggests that documentary evidence or witness testimony may exist and prove that during negotiations with Star, Star did not actually reinstate coverage and defendant merely agreed to reimburse Star for any payments to plaintiff. Plaintiff has offered no support for this bizarre claim. Nor has he attempted to dispute the authenticity of the notice of reinstatement indicating that defendant's policy with Star was "reinstated without a lapse in coverage," the existence of which directly refutes plaintiff's claim. Plaintiff has not shown that additional discovery stood a "fair chance" of uncovering support for his position. The trial court therefore did not err when it granted defendant's motion for summary disposition before the end of the discovery period. Because we affirm the circuit

court's order, we need not address plaintiff's request for an order permitting plaintiff to file an amended complaint on remand.

Affirmed.

JANSEN, P.J., and MURPHY and BORRELLO, JJ., concurred.

PEOPLE v OROS

Docket No. 329046. Submitted March 7, 2017, at Grand Rapids. Decided June 8, 2017, at 9:25 a.m. Part II reversed and first-degree premeditated murder conviction and sentence reinstated 502 Mich 229.

Christopher A. Oros was convicted after a jury trial in the Kalamazoo Circuit Court of first-degree premeditated murder, MCL 750.316(1)(a); felony murder, MCL 750.316(1)(b); first-degree arson, MCL 750.72; second-degree home invasion, MCL 750.110a(3); and escape while awaiting trial, MCL 750.197(2). He was sentenced by Paul J. Bridenstine, J. A woman's body was found on a bed in a burning apartment. It was later determined that the woman had been murdered before the fire started. During the day of the fire, Oros had been knocking on apartment doors in the victim's apartment complex, asking residents who answered the door to use their phones, and then, after pretending to make a phone call, soliciting money from the residents. According to Oros, he knocked on the victim's door, she let him inside, and the victim attacked him without provocation and then sat on him with a large knife in her hand. Oros and the victim allegedly struggled for control of the knife, and when Oros gained control of it, he stabbed the victim 29 times, killing her. Oros claimed that he killed the victim in self-defense or, in the alternative, that other mitigating factors reduced his culpability for the victim's death. The jury rejected Oros's defenses, and Oros appealed his convictions.

The Court of Appeals *held*:

1. A criminal defendant has a due-process right to have his or her convictions supported by sufficient evidence. Conviction of first-degree premeditated murder, MCL 750.316(1)(a), requires evidence sufficient to show that the murder was perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated process. Because the Legislature used the conjunctive word "and" in the phrase "other willful, deliberate and premeditated killing," there must be evidence of all three components to sustain a conviction of first-degree premeditated murder. To premeditate means to think about beforehand. Premeditation and deliberation may be proved through evidence of (1) the parties' prior relationship, (2) the defendant's actions

before the killing, (3) the circumstances surrounding the killing itself, and (4) the defendant's conduct after the killing. No evidence of the first two factors was presented at Oros's trial. There was no evidence that Oros and the victim had a prior relationship, and there was no evidence that Oros's actions before the murder indicated that he planned to kill the victim when he knocked at her door. Evidence of Oros's actions after the murder—the fourth factor—did not suggest that Oros's attempt to cover up the crime was part of a pre-offense plan. The critical factor in Oros's case was the third factor—the circumstances surrounding the killing itself. Although premeditation can be proved through circumstantial evidence, inferences drawn from circumstantial evidence cannot be the result of mere speculation. The circumstances surrounding Oros's conduct did not support a finding of premeditation. The brutality of a murder and the infliction of successive blows are not indicative of premeditation. Many brutal murders are committed in a consuming frenzy or the heat of passion and by law qualify only as second-degree murders. Oros's offense was savage and senseless, but there was not sufficient evidence to establish that it was premeditated, and the first-degree premeditated murder conviction had to be reduced to a second-degree murder conviction.

2. A felony-murder conviction requires that the killing take place during the commission or attempted commission of a crime specified in MCL 750.316(1)(b), one of which is larceny of any kind. The crime of using false pretenses to defraud, MCL 750.218, does not constitute larceny of any kind because with false pretenses the victim intends to part with title and possession of the property, whereas a victim of larceny does not intend to part with title to his or her property. Because false pretenses is not listed in MCL 750.316(1)(b) and does not constitute larceny of any kind, it cannot serve as the predicate offense for felony murder. In this case, the trial court erred by instructing the jury that it could find Oros guilty of felony murder if it found that he intentionally caused the victim's death during the commission or attempted commission of either larceny or the use of false pretenses to defraud. The verdict form did not require the jury to specify on which of the two crimes it relied for Oros's felony-murder conviction. Without specification by the jury, it was impossible to know whether the jury had improperly based its decision on the use of false pretenses to defraud. A defendant is entitled to reversal of his or her conviction when one of two alternatives given to the jury for conviction of an offense was legally insufficient and it is impossible to tell upon which theory the jury relied. Accordingly,

Oros's conviction had to be reversed, and the case had to be remanded for a new trial on the charge of felony murder.

3. Waiver is the intentional relinquishment or abandonment of a known right or privilege. Typically, when defense counsel affirmatively agrees to an erroneous jury instruction, the defendant is deemed to have waived the error. In this case, the felony-murder instructional error rose to the level of a due-process violation; it was not merely the imprecise definition of a relevant issue or the omission of an element of an offense for which there was overwhelming evidence. The erroneous instruction directed the jury to convict Oros on the basis of findings that could not support a conviction of felony murder. Defense counsel cannot unilaterally waive an error of constitutional magnitude unless the defendant is fully informed of the issue, understands the consequences of the waiver, and expressly consents to the waiver. Defense counsel on at least two occasions expressed his erroneous belief that false pretenses could serve as an underlying offense for a felony-murder conviction and affirmatively stated that he had no objection to the felony-murder instruction the prosecution requested. A defendant cannot consciously waive a right as a result of his or her attorney's mistaken view of the law. Therefore, defense counsel's repeated approval of the jury instructions did not waive Oros's due-process right to a properly instructed jury.

4. Evidence of a victim's mental illness and paranoia may not be admitted unless it is relevant to an issue in a case. Such evidence may be relevant when a defendant claims that he was attacked by the victim and the defendant can establish a link between the victim's mental illness and aggression. In this case, the trial court did not abuse its discretion by refusing to admit evidence of the victim's mental illness because Oros failed to establish a link between the victim's history of mental illness and her alleged aggression.

5. Under MCR 6.120(C), the trial court must sever for separate trials offenses that are not related. According to MCR 6.120(B)(1), offenses are related if they are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. Oros attempted to escape from jail 12 days after the murder. The trial court refused to sever the escape attempt from Oros's other charges even though the escape attempt appeared to be a crime of opportunity rather than part of a previous plan connected with the other crimes. The trial court did not abuse its discretion when it denied Oros's motion to sever because Oros's attempts to cover

up the murder, to evade arrest, and to escape from jail could be considered a series of connected acts taken to avoid incarceration.

6. According to MCL 771.14(2)(e), the sentencing guidelines require that the crime with the highest crime class be scored when there are multiple convictions in a single case. Before entry of the conviction for second-degree murder in place of Oros's original conviction of first-degree premeditated murder, the crime with the highest crime class was arson because under MCL 769.34(5) the guidelines are not scored for offenses penalized by mandatory life imprisonment. Oros claimed that the trial court erred when it assessed points against him under the offense variables corresponding to arson using facts involving the circumstances of the murder. Because Oros's first-degree murder conviction will be reduced to second-degree murder, second-degree murder will be the crime with the highest crime class and the sentencing guidelines must be scored for that crime. Because arson will no longer be the crime scored, Oros's claim was moot.

First-degree premeditated murder conviction reduced to second-degree murder, felony-murder conviction vacated, and case remanded for retrial of the felony-murder charge and for resentencing.

1. CRIMINAL LAW — FIRST-DEGREE PREMEDITATED MURDER — PROOF OF PREMEDITATION — CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence may be used to support a conviction of first-degree premeditated murder, but inferences drawn from the circumstantial evidence cannot be based on mere speculation.

2. CRIMINAL LAW — FIRST-DEGREE PREMEDITATED MURDER — REQUIREMENTS FOR CONVICTION — WILLFUL, DELIBERATE, AND PREMEDITATED.

The Legislature's use of the conjunctive word "and" in the phrase "other willful, deliberate and premeditated killing" means that evidence of all three components must be present to convict a defendant of first-degree premeditated murder on this basis (MCL 750.316(1)(a)).

3. CRIMINAL LAW — FELONY MURDER — JURY INSTRUCTIONS — ALTERNATIVE PREDICATE OFFENSES.

A defendant's felony-murder conviction must be reversed when one of two possible predicate offenses submitted to the jury is legally insufficient and the verdict form does not indicate on which predicate offense the jury based its guilty verdict (MCL 750.316(1)(b)).

4. CRIMINAL LAW — FELONY MURDER — PREDICATE OFFENSES — FALSE PRETENSES.

Under MCL 750.316, a person is guilty of first-degree felony murder if he or she commits murder in the perpetration or attempted perpetration of certain enumerated crimes, including larceny of any kind; false pretenses with the intent to defraud is not a crime on which a felony-murder conviction can be based because it is not specifically enumerated in MCL 750.316(1)(b) and it does not qualify as a larceny of any kind (MCL 750.218).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Heather S. Bergmann*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

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

PER CURIAM. Defendant appeals from his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a); felony murder, MCL 750.316(1)(b); first-degree arson, MCL 750.72; second-degree home invasion, MCL 750.110a(3); and escape while awaiting trial, MCL 750.197(2). Defendant asserts that there was insufficient evidence to support the convictions of premeditated murder and felony murder and that those convictions should be reduced to second-degree murder. He also seeks reversal on grounds of evidentiary and procedural error and to be resentenced.

For the reasons set forth in this opinion, we reduce defendant's conviction of first-degree premeditated murder to second-degree murder and remand for sentencing for that offense. We also vacate his conviction of felony murder and remand for a new trial on that charge. We reject his other claims of error and do not address the sentencing issue because it is moot.

I. FACTS

On November 22, 2014, emergency personnel responded to a fire at the apartment complex of the victim, Marie McMillan, in Kalamazoo, Michigan. The responders extinguished the fire and discovered the victim's body on a bed in her bedroom. Testimony from first responders indicated that someone had piled items over her body and set them on fire. An autopsy determined that the victim had died before the fire was set as a result of multiple stab wounds.

Police officers learned that a man had been knocking on the apartment doors of the victim's neighbors throughout the day of the fire and using a fake story to solicit money. He told the residents that his girlfriend had left with his car, debit card, and cell phone. He then asked to use the person's phone, and, if allowed to do so, he made a call that went unanswered. After the "unsuccessful" call, he directly or indirectly solicited money from the resident.

Officers determined that the number this man called from the residents' phones was associated with defendant. They also learned that a call had been made to that number from the victim's phone. The officers tracked defendant down at the apartment he shared with his girlfriend, Robin Wiley, in Battle Creek, Michigan.[1] When officers arrived, defendant unsuccessfully attempted to flee. After defendant was arrested, he was interrogated.[2] During the interrogation, defendant admitted that he had gotten the victim to let him into her apartment and that he used her phone.

[1] Wiley testified against defendant at trial. She stated that she had pleaded guilty to being an accessory after the fact for her role in helping defendant return to the victim's apartment and dispose of evidence.

[2] Defendant did not testify at trial, but his statements were recounted in the interrogating police officer's testimony.

He claimed that she then attacked him without provocation by hitting him on the head with a coffee mug and that she sat on top of him with a "huge knife in her hand." He said that he and the victim struggled for control of the knife and he gained control of it. Defendant then began stabbing the victim, first in the stomach, and then, after getting on the victim's back, in the neck and other parts of her body. There were 29 stab wounds in all.

Defendant was charged with both first-degree premeditated murder and felony murder. At trial, defendant argued that he was not guilty of murder because he killed the victim in self-defense. In the alternative, he argued that there were mitigating circumstances that reduced his culpability for her death. The jury rejected his defenses and found him guilty as earlier described.

II. SUFFICIENCY OF THE EVIDENCE OF FIRST-DEGREE PREMEDITATED MURDER

Defendant first challenges the sufficiency of the evidence supporting his first-degree premeditated murder conviction.[3] "The sufficient evidence requirement is a part of every criminal defendant's due process rights." *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational

[3] This Court reviews a challenge to the sufficiency of the evidence by reviewing "the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id*. at 515-516. "The fact that some evidence is introduced does not necessarily mean that the evidence is sufficient to raise a jury issue." *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (opinion by COLEMAN, C.J.). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Defendant does not argue that there was insufficient evidence from which a reasonable jury could have found that he killed McMillan and did so with malice. Therefore, he concedes that there was sufficient evidence to support a verdict of second-degree murder. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (stating that the elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse") (quotation marks and citation omitted). Instead, he argues that the prosecution failed to present any evidence from which the jury could reasonably find that he deliberated or premeditated the killing thereby elevating the crime to first-degree murder.

First-degree murder is a statutory offense. Therefore, we must "interpret the statute by examining its plain language and by employing *applicable* rules of statutory construction." *People v Anstey*, 476 Mich 436, 445 n 7; 719 NW2d 579 (2006). The Legislature defined first-degree murder as, in relevant part, "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, *and* premeditated killing." MCL 750.316(1)(a) (emphasis added). "Murder committed in the perpetration of, or attempt to perpetrate," certain enumerated offenses also constitutes first-

degree murder. MCL 750.316(1)(b). Significantly, the Legislature used the conjunctive word "and" in the phrase "other willful, deliberate, and premeditated killing." We must, therefore, presume that the Legislature intended different meanings for the words and that there must be evidence of all three to sustain a conviction on this basis. See *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 57; 746 NW2d 282 (2008) (stating that when the conjunctive "and" is used, the Legislature presumes different meanings), and *People v Sanford*, 402 Mich 460, 473-474; 265 NW2d 1 (1978) (noting that because "[t]he assault with intent to rob unarmed statute is conjunctive," there must be an assault with force and violence).

To "premeditate" means "to think about beforehand." *People v Morrin*, 31 Mich App 301, 329; 187 NW2d 434 (1971). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "premeditate" as "to think about and revolve in the mind beforehand[.]" *Black's Law Dictionary* (10th ed) defines "premeditation" as "[c]onscious consideration and planning that precedes an act (such as committing a crime); the pondering of an action before carrying it out."[4] Premeditation can be proved through circumstantial evidence; however, in-

[4] This definition is consistent with the examples provided in the statute. Both poisoning and lying in wait involve conscious planning for an action to be taken later. When a statute contains general terms that follow immediately after specific terms, the general words are presumed to be "of the same kind, class, character or nature as those specifically enumerated." *People v Jacques*, 456 Mich 352, 355; 572 NW2d 195 (1998) (describing and applying the canon of *ejusdem generis* in statutory construction) (quotation marks and citation omitted). This is particularly so when, as in MCL 750.316(1)(a), the general words are preceded by the word "other." *Id*. at 361-362 (TAYLOR, J., dissenting). See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 199-213, for a discussion of *ejusdem generis*.

ferences may "not be arrived at by mere speculation." *People v O'Brien*, 89 Mich App 704, 710; 282 NW2d 190 (1979). The prosecution may establish premeditation and deliberation through evidence of (1) the parties' prior relationship, (2) the defendant's actions before the killing, (3) the circumstances surrounding the killing itself, and (4) the defendant's conduct after the killing. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

Regarding the first factor, no evidence was presented that defendant and the victim had a prior relationship. Nor was there any evidence that defendant had previously threatened the victim or that she ever expressed fear of defendant. Thus, consideration of the parties' prior relationship yielded no evidence to support a finding of premeditation.

The second factor, defendant's actions before the murder, similarly yielded no support for a finding of premeditation. Defendant had a well-established pattern of trying to trick people into giving him money by telling them a false story about being locked out of his apartment and needing to get to his place of work. Residents of four other apartments in the same complex in which the victim lived testified that defendant attempted the same scam with them that afternoon, and, though some described defendant as intimidating, none testified that he acted violently. There was no evidence to suggest that defendant acted with a different plan when he knocked on the victim's door.

The fourth factor concerns the defendant's actions after the murder. In this case, defendant attempted to cover up the murder, but his actions do not suggest that the attempt was part of a pre-offense plan. Defendant washed the knife, which was an ordinary steak knife, in the victim's kitchen sink and left it there.

Nearly two hours later,[5] ample time after the crime to think about the extensive evidence at the victim's apartment, he returned to the apartment, removed bloodied items, and set the fire. While evidence that an assailant attempted to cover up a murder in its immediate aftermath can support a reasonable inference that the series of events was part of a preconceived plan, see *People v Gonzalez*, 468 Mich 636, 641-642; 664 NW2d 159 (2003), defendant's actions after the murder in this case do not indicate a preconceived plan. To the contrary, the fact that defendant initially left the victim's apartment after doing very little, if any, cleanup suggests that even after the murder defendant's thought process was unsettled and that he had not preplanned any means of covering up his crime. The prosecution has not suggested any premeditated plan that would involve leaving the scene of the crime and returning two hours later to attempt to cover it up. Therefore, evidence of defendant's actions after the murder cannot be used to support a finding of premeditation.

The most significant factor here is the third one—the circumstances surrounding the killing. The prosecution argues that given the number of stab wounds, defendant had adequate time to consciously reconsider his actions in a "second look" and decide whether to continue, i.e., to have premeditated some of the later knife wounds he inflicted. However, the prosecution's argument that premeditative intent can be formed between successive stab wounds has already been rejected by our Supreme Court. In *People*

[5] Defendant's cell phone records established that the murder took place between 4:30 p.m. and 4:38 p.m. Wiley testified that defendant had returned home by "6:15ish" and that after defendant had changed his clothes, the two of them went back to the victim's apartment. The fire at the apartment complex was first reported at 8:27 p.m.

v Hoffmeister, 394 Mich 155, 157-158; 229 NW2d 305 (1975), the victim and the defendant were seen by witnesses driving into a parking area shortly before the victim drove with " 'multiple lacerations and stab wounds' " to a friend's house where she ultimately died. The prosecution in that case argued, as the prosecution in this case does, that the number of stab wounds and the brief time that the victim and defendant were together before the killing were sufficient for a jury to infer premeditation and deliberation. *Id*. at 159. The *Hoffmeister* Court concluded that "[t]here is no basis on this record for an inference that between the successive, potentially lethal blows the killer calmly, in a cool state of mind . . . subjected the nature of his response to a second look." *Id*. (quotation marks and citation omitted). The Court explicitly stated that "[t]he brutality of a killing does not itself justify an inference of premeditation and deliberation." *Id*. " '[M]any murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and . . . these are in law only murder in the second degree.' " *Id*. at 160, quoting *Austin v United States*, 127 US App DC 180, 190; 382 F2d 129 (1967) (alteration in original).

The prosecution refers us to two Supreme Court cases issued after *Hoffmeister*, but it does not suggest that the cases have overruled *Hoffmeister*, and we conclude that they can be harmonized with that case.[6] *People v Johnson*, 460 Mich 720, 721-722; 597 NW2d 73 (1999), involved the murder of a social worker at a juvenile detention center by one of the detainees. In that case, which involved manual strangulation, the

[6] We recognize that this issue is challenging and that bench and bar may benefit from additional clarification from the Supreme Court. See *People v Martin*, 472 Mich 930 (2005) (MARKMAN, J., dissenting).

Court stated that "evidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.' " *Id*. at 733. However, the Court was careful to note that "neither the brutal nature of a killing nor manual strangulation *alone* is sufficient to show premeditation . . . ." *Id*. (emphasis added). Other evidence of premeditation cited in *Johnson* included the following: (1) the defendant moved the victim to a more secluded place before committing the murder, (2) about an hour before the murder the defendant asked another detainee if he had seen the victim, (3) the defendant had asked the victim when she was leaving for the day, and (4) the defendant directed another detainee away from the area where the murder occurred shortly thereafter. *Id*. at 732-733. In *Gonzalez*, 468 Mich at 638-639, 642, the defendant raped the victim, battered her to death, strangled her, and then set her corpse on fire before leaving the premises. The *Gonzalez* opinion cited *Johnson* for the principle that "[m]anual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look,' " *id*. at 641, but it did not conclude that such evidence was sufficient on its own.

That this murder was particularly savage and senseless may be considered by the trial court when imposing sentence for second-degree murder, but it does not provide sufficient evidence to prove premeditated first-degree murder.[7]

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[7] Defendant's culpability does not turn on "[t]he apparent savagery of the attack or any number of other factors [that] may appear to some persons to evince the highest degree of moral culpability." *People v Gill*, 43 Mich App 598, 604; 204 NW2d 699 (1972). "The Legislature . . . has chosen to distinguish degrees of culpability based on the presence or absence of premeditation and deliberation[.]" *Id*.

III. THE FELONY-MURDER INSTRUCTION

Defendant was convicted of a second count of first-degree murder on a felony-murder theory. The prosecution presented evidence that the murder occurred during either of two crimes: larceny from a person, MCL 750.357, or use of false pretenses to defraud, MCL 750.218. On the prosecution's request, and with defense counsel's acquiescence, the trial court instructed the jury that it could convict defendant of first-degree felony murder if it found that he caused the victim's death, did so intentionally, and did so while "committing or attempting to commit the crime of attempted false pretenses under 200 dollars and/or larceny under 200 dollars." Consistent with this instruction, the jury verdict form did not require the jury to specify which of the two underlying crimes was the basis for its conviction; the form simply required the jury to indicate whether it found defendant guilty of felony murder.

On appeal, defendant correctly points out that using false pretenses cannot serve as the basis for a felony-murder conviction. The prosecution does not disagree. It appears from the record that the prosecutor, defense counsel, and the trial court were all under the mistaken belief that using false pretenses was a larceny for purposes of felony murder. However, it is long settled that the crime of using false pretenses to obtain a victim's property does not constitute a larceny because the victim of false pretenses intends to part with title and possession of the property, whereas the victim of a larceny does not intend to part with title. *People v Malach*, 202 Mich App 266, 271; 507 NW2d 834 (1993), citing *People v Long*, 409 Mich 346, 350-351; 294 NW2d 197 (1980).

On appeal, the prosecution does not argue that defendant could have been properly convicted of felony murder using false pretenses as the predicate offense. Nor does it argue that the conviction should stand because the jury might have concluded that defendant had committed larceny from a person rather than using false pretenses. It is clear that "[w]here one of two alternative theories of guilt is legally insufficient to support a conviction, and where it is impossible to tell upon which theory the jury relied, the defendant is entitled to a reversal of his conviction and a new trial." *People v Grainger*, 117 Mich App 740, 755; 324 NW2d 762 (1982).

The prosecution does, however, maintain that defendant waived his right to raise this error on appeal. The record shows that both in pretrial proceedings and at trial, defendant's trial counsel expressed his belief that false pretenses could serve as an underlying felony to support a first-degree felony-murder conviction, and he affirmatively stated that he had no issue with the jury being instructed as the prosecution requested. Typically, when defense counsel affirmatively agrees to an erroneous instruction, the defendant is deemed to have waived the error. See *People v Carter*, 462 Mich 206, 213-214; 612 NW2d 144 (2000). However, we decline to find a waiver in this case.

The nature of the instructional error in this case rises to the level of a due process violation, and we conclude that allowing it to stand would undermine the authority of the judiciary. The error was not merely one in which the jury received an imprecise definition or in which the trial court omitted an element of the offense for which the evidence was overwhelming. In this case, the instruction directed the jury to convict defendant on the basis of affirmative findings that, by statute, are

not grounds on which to convict. We, therefore, conclude that defendant's trial counsel could not unilaterally waive this issue without defendant's full knowledge and understanding about exactly what he was waiving. It is well recognized that "there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client . . . ." *Taylor v Illinois*, 484 US 400, 417-418; 108 S Ct 646; 98 L Ed 2d 798 (1988). Among the basic constitutional rights that cannot be waived absent a defendant's express consent are the rights to plead not guilty, to have a jury trial, and to be present at that trial. *Id*. at 418 n 24.

If a defendant's trial counsel cannot waive the defendant's rights to plead not guilty and to demand a trial on all the elements of the charged offense without the fully informed and express consent of his or her client, we see no reason why counsel should be able to agree that the defendant may be found guilty of the charged offense when the jury finds that the defendant committed acts that are not grounds on which to convict. The United States Supreme Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins Co v Kennedy*, 301 US 389, 393; 57 S Ct 809; 81 L Ed 1177 (1937), and they should "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel Co v Pub Utilities Comm of Ohio*, 301 US 292, 307; 57 S Ct 724; 81 L Ed 1093 (1937).

Additionally, in this case, the only reason defense counsel agreed to submission of the felony-murder charge was his mistaken view of the law that false

pretenses could serve as an underlying felony for a felony-murder conviction. Our Supreme Court has previously held that a defendant could not consciously waive a right as a result of his or her attorney's mistaken view of the law. *People v Grimmett*, 388 Mich 590, 601; 202 NW2d 278 (1972), overruled on other grounds by *People v White*, 390 Mich 245, 257-258; 212 NW2d 222 (1973).

The prosecution refers us to *People v Kowalski*, 489 Mich 488, 502-504; 803 NW2d 200 (2011), and asserts that in that case, the Supreme Court held that waiver can occur even when it involves a constitutional error in instructions.[8] The instructional error in *Kowalski* occurred when the trial court omitted an element of the charged offense. *Id*. at 502-503. The *Kowalski* Court determined that defense counsel's "explicit[] and repeated[]" approval of the instruction operated as a waiver. *Id*. at 503. Despite that determination, however, the Court conducted a thorough analysis of the substance of the claimed error and ultimately declined to reverse because it concluded that "even if the trial court had properly instructed [the jury,] . . . the jury would still have convicted defendant" due to the nature

[8] The prosecution has not referred us to any other cases in support of its argument that we should dispose of this case on the basis of waiver. It cites *Carter*, 462 Mich 206, and *People v Unger*, 278 Mich App 210; 749 NW2d 272 (2008), but neither involved an instructional error of constitutional magnitude; rather, the claimed errors were very minor. *Carter* concerned the jury's request for the transcripts of testimony of certain witnesses; in fact no such transcripts yet existed, but the defendant argued that the court's instruction that the transcripts were not available violated MCR 6.414(H). *Carter*, 462 Mich at 210, 213-215. In *Unger*, the defendant challenged the trial court's decision to give a single limiting instruction to the jury that applied to the testimony of several enumerated witnesses. *Unger*, 278 Mich App at 233-234. The defendant claimed on appeal that the court should have repeated the instructions for each witness separately. *Id*. at 233.

of the evidence.[9] *Id*. at 506. The *Kowalski* Court went on to state that "defendant cannot establish that the trial court's charge to the jury affected the outcome of the lower court proceedings." *Id*. at 509-510. According to the Court,

> jury instructions that [are] somewhat deficient may nonetheless, when viewed as a whole, have sufficed to protect a defendant's rights when the jury would have convicted the defendant on the basis of the evidence regardless of the instructional error. If the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings. [*Id*. at 506.]

Given this standard, we have reviewed the record in this case to determine whether the evidence related to larceny from a person was "overwhelming and uncontested" and whether the erroneous instruction adequately served to protect defendant's rights. We conclude that the instant circumstances fall well short of that demanding standard. The evidence to support the charge of larceny from a person was far weaker than the overwhelming evidence that supported the false-pretenses charge. There was no direct or forensic evidence of a larceny; the only evidence supporting it was indirect and inferential. The prosecution suggests that the evidence supports an inference that defendant handled the victim's purse during the crime because defendant took the victim's purse when he returned to the crime scene to set the fire. The prosecution also points out that following the crime, defendant sent a

[9] For the same reason, the Court rejected the defendant's claim of ineffective assistance of counsel related to his counsel's failure to object to the jury instructions because, given the evidence, the defendant could not demonstrate that in its absence, the result of the proceeding would have been different. *Kowalski*, 489 Mich at 510 n 38.

text to an associate that could be read as indicating that defendant had obtained enough money to buy drugs. Evidence of a prior incident during which defendant had taken valuables from an apartment when its resident refused to give defendant money was also introduced. While that evidence allowed for reasonable inferences consistent with guilt, the inferences were vigorously contested[10] and far from overwhelming.

In a related issue, defendant argues not only that the instruction was infirm, but that there was insufficient evidence to convict him of larceny from a person. As just noted, the record evidence of larceny from a person was limited but, taking the evidence in the light most favorable to the prosecution, it was sufficient to present to the jury for decision. Accordingly, we reject defendant's argument that a retrial would be improper.

IV. EVIDENCE OF THE VICTIM'S MENTAL HEALTH

Defendant next argues that the trial court abused its discretion when it precluded him from introducing evidence of the victim's history of mental illness and her paranoia about people trying to kill her.[11] The trial court precluded defendant from introducing this evidence absent a "nexus between the mental illness . . . and violence."

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[10] Defendant rebutted these inferences by pointing out that he had been given $30 by other residents of the apartment building and that on the day in question he did not take any property from those residents who refused to give him money.

[11] We review for an abuse of discretion a trial court's decision whether to permit the admission of evidence. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

We do not find the trial court's ruling to be outside the range of reasonable and principled outcomes. The evidence of the victim's mental health that defendant wished to introduce came from statements of the victim's family members recorded in police reports. Defendant failed to proffer any proof of prior aggressive behavior linked to the victim's mental illness. Furthermore, statements of the victim's family members would have been lay opinion testimony and could not establish a medical diagnosis. Evidence of a link between the victim's mental illness and aggressive behavior showing that the mental illness caused irrational aggression would have been relevant to the jury's determination of whether the victim acted aggressively. However, that was not the case here.

V. MOTION TO SEVER

While in jail awaiting trial, defendant attempted to escape by pushing an officer who was escorting him to a different part of the jail and grabbing the officer's key fob. Defendant's attempt to escape failed when the key fob did not operate the door he attempted to open. Defendant was charged with escape while awaiting trial, MCL 750.197(2). Defendant moved to sever this charge, but the trial court denied the motion. Defendant argues that the denial of his motion was erroneous.[12] MCR 6.120(C) provides that the trial court "must sever for separate trials offenses that are not related as defined in subrule (B)(1)." Subrule (B)(1) states that offenses are related if they are based on "(a) the same

[12] We review for an abuse of discretion a trial court's decision on a motion to join or sever charges. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1)(a) through (c). The prosecution argued that the escape offense was connected to the other offenses. Each of defendant's acts—attempting to cover up the murder, evade arrest, and escape—were, in the prosecution's view, related by motive and connected as a series of events taken to avoid incarceration for the offenses defendant committed. The trial court found that there was a sufficient connection between the acts to warrant joinder and denied defendant's motion on that basis.

Given that the attempted escape from jail happened 12 days after the murder and appeared to be a crime of opportunity rather than part of a previous scheme or plan connected with the other crimes, there is some merit to defendant's argument that this event was not related to the murder, arson, and home invasion. However, because defendant's attempts to cover up the murder, evade arrest, and escape from jail can be seen as a series of connected acts, we do not find that the trial court's decision was outside the range of reasonable and principled outcomes. Additionally, defendant cannot show, even if it was erroneous for the trial court to deny his motion, that this decision prejudiced him. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Defendant's self-defense claim was extremely weak, and while the evidence was insufficient to support a conviction of first-degree premeditated murder, the evidence supporting defendant's convictions of second-degree murder, first-degree arson, second-degree home invasion, and escape while awaiting trial was overwhelming. Defendant was not prejudiced by the denial of his motion to sever the attempted-escape charge from the other charges, and he is not entitled to any relief on this basis.

VI. SENTENCING ERROR

Defendant's final claim of error is that the trial court erred when it assessed points under the offense variables for his sentencing offense, arson, on the basis of facts involving the circumstances of the murder. See *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009) (stating that "offense variables are scored by reference only to the sentencing offense, except where specifically provided otherwise"). Because the sentencing guidelines do not apply to offenses with a mandatory penalty of life imprisonment, the trial court did not score the guidelines for defendant's first-degree murder convictions. See MCL 769.34(5). Instead, it had to score the variables for the remaining offense with the highest crime class. MCL 771.14(2)(e); see also *People v Lopez*, 305 Mich App 686, 690; 854 NW2d 205 (2014). Following his jury trial, arson was the remaining offense with the highest crime class. See MCL 777.16c and MCL 777.16f.

However, in light of our decision to reduce defendant's first-degree premeditated murder conviction to second-degree murder, the second-degree murder conviction becomes the offense with the highest crime class. See MCL 777.16p and MCL 777.16c. Therefore, defendant's claim of error is moot. See *Swinehart v Secretary of State*, 27 Mich App 318, 320; 183 NW2d 397 (1970) (explaining that the Court will not consider moot questions). Defendant must be resentenced on the basis of the second-degree murder conviction.

VII. CONCLUSION

We reduce defendant's first-degree premeditated murder conviction to second-degree murder. Defendant must be resentenced on this basis. We vacate defen-

dant's conviction of first-degree felony murder and remand for retrial on that charge. We do not retain jurisdiction.

STEPHENS, P.J., and SHAPIRO and GADOLA, JJ., concurred.

ELLISON v DEPARTMENT OF STATE

Docket No. 336759. Submitted June 7, 2017, at Lansing. Decided June 13, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 953.

Terry L. Ellison brought an action in the Court of Claims against the Department of State, seeking to compel the department to comply with Ellison's requests under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., for certain public documents. In March 2016, the department notified Ellison that it was unable to verify his insurance, and the department later canceled Ellison's license plate on that basis; Ellison appealed, and the department reversed its decision and reinstated his license plate. Ellison subsequently filed a FOIA request with the department, seeking various types of information related to other vehicle registrants whom the department had similarly notified about insurance-verification problems. Ellison alternatively requested paper copies of the letters the department had sent to all similarly situated vehicle registrants. The department denied Ellison's first request, stating that it did not possess a record that compiled the requested information and that FOIA did not require the department to create one. The department denied Ellison's second request, stating that Ellison's request should have been filed under the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., not FOIA, and that Ellison had failed to complete an MVC record-lookup-request form and had not paid the required fee for each record. The parties filed competing motions for summary disposition. The Court of Claims, CYNTHIA DIANE STEPHENS, J., granted summary disposition in favor of the department on Ellison's first claim, reasoning that the information sought was not a public record for purposes of FOIA because the record requested by Ellison did not exist in the form sought and the department was not required to create a new record. The court also granted summary disposition of Ellison's second request on the basis that Ellison had failed to pay the record fee required by the MVC. Ellison appealed.

The Court of Appeals *held*:

1. FOIA, in general, requires the full disclosure of public records that are in the possession of a public body. A FOIA request

must only be descriptive enough that a public body can find the records containing the requested information. For purposes of FOIA, MCL 15.232(e) defines the term "public record" as a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function from the time it is created. The term "writing," as defined in MCL 15.232(h), includes electronic copies and computer tapes, and if a writing exists in an electronic format, the plaintiff is entitled to an electronic copy. With certain exceptions, FOIA does not require a public body to make a compilation, summary, or report of information, MCL 15.233(4), and the act does not require a body to create a new public record to fulfill a plaintiff's request for a public record. A computer database constitutes a "writing" for purposes of FOIA when it stores information that a public body uses to perform an official function. In this case, the database maintained by the department contained part of the information sought by Ellison, and it was not necessary for the department to generate a report from the database for it to be a public record. Instead, the database was a writing for purposes of FOIA because it contained information stored in a computer that the department used to perform an official function. Accordingly, the court erred when it concluded that the department's database was not a public record. Summary disposition in favor of Ellison would have been premature, however, because a question of fact existed as to whether the department could have provided Ellison the requested information without creating a new compilation of the data.

2. MCL 257.208a of the MVC provides that with certain exceptions records maintained under the MVC must be available to the public in accordance with procedures prescribed in the MVC, FOIA, or other applicable laws; accordingly, because the disjunctive term "or" allows a choice between alternatives, Ellison could have proceeded under FOIA or the MVC with his record-lookup requests. However, although Ellison had a choice whether to procced under the MVC or FOIA, the MVC fee provisions applied. MCL 15.234(1) of FOIA allows a public body to charge a fee to respond to a public record search. However, pursuant to MCL 15.234(10), FOIA fee provisions do not apply to public records that are prepared under an act or statute that specifically authorizes the sale of those public records to the public or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute. MCL 257.208b(1) of the MVC specifically authorizes the secretary of state to provide a commercial lookup service of records maintained under the MVC and to charge a fee for each record-lookup

request; the database is a public record maintained under the MVC. FOIA's fee provisions did not apply in this case because the requested records were prepared under the MVC, which specifically authorizes the MVC to sell its records to the public and provides the amount of the fee. MCL 257.208b(9) provides that the secretary of state shall not provide an entire computerized central file or other file of records maintained under the MVC to a nongovernmental person or entity unless the person or entity pays the prescribed fee for each individual record within the computerized file. Ellison was not entitled to the records he requested under FOIA because he had failed to pay the required MVC fees for each individual record that the file contained, an amount calculated to be $1.6 million. Accordingly, while the Court of Claims' analysis was flawed, the error did not require reversal, and the Court of Claims correctly granted summary disposition in favor of the department.

Affirmed.

1. RECORDS — FEES FOR RECORDS — MICHIGAN VEHICLE CODE RECORDS — ACTION BROUGHT UNDER FREEDOM OF INFORMATION ACT.

MCL 15.234(10) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., provides that FOIA fee provisions do not apply to public records that are prepared under an act or statute that specifically authorizes the sale of those public records to the public or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute; because MCL 257.208b(1) of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., specifically authorizes the Secretary of State to provide a commercial lookup service of records maintained under the MVC and to charge a fee for each record-lookup request, a plaintiff seeking MVC records must pay the fees set forth in the MVC, even when the plaintiff requested the records under FOIA.

2. RECORDS — FREEDOM OF INFORMATION ACT — INFORMATION CONTAINED IN COMPUTER DATABASE.

A computer database constitutes a "writing" for purposes of the Freedom of Information Act, MCL 15.231 *et seq*., when it stores information that a public body uses to perform an official function; the public body does not have to generate a report from the information contained in the database for it to be a public record subject to disclosure under FOIA (MCL 15.232(e) and (h)).

Outside Legal Counsel PLC (by *Philip L. Ellison*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Joshua O. Booth* and *Thomas Quasarano*, Assistant Attorneys General, for defendant.

Before: SWARTZLE, P.J., and SAAD and O'CONNELL, JJ.

O'CONNELL, J. Plaintiff, Terry Lee Ellison, appeals by right the January 26, 2017 order of the Court of Claims granting summary disposition under MCR 2.116(I)(2) (opposing party entitled to judgment) to defendant, the Michigan Department of State, on plaintiff's claims under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The Court of Claims erred by concluding that a computerized database was not a public record, but because plaintiff did not pay the appropriate fee for the records he sought, we affirm.

I. FACTUAL BACKGROUND

Plaintiff's allegations included that on March 31, 2016, defendant notified plaintiff that it was canceling his license plate and registration because it was unable to verify his insurance. Plaintiff submitted appeal paperwork, but his license plate was forfeited. After plaintiff called defendant's insurance-fraud unit and spoke with numerous workers, defendant reversed its forfeiture decision and reinstated plaintiff's license plate.

On July 6, 2016, plaintiff sent defendant a FOIA request that included two distinct requests. First, plaintiff requested for all vehicle registrants whom defendant had notified about an inability to verify proof of insurance at renewal "any and all" information related to their full name, their address, their vehicle plate or registration number, their vehicle identification number, the insurance-audit date, the date of their

most recent vehicle renewal, and the fee category of the cancelled or forfeited plate. Second, in the alternative, plaintiff requested that defendant provide paper copies of the letters it had sent resulting from the same circumstances.

Defendant denied plaintiff's first request under MCL 15.233 and MCL 15.235(4)(b) on the basis that it did not possess a responsive record and that it was "not required to make a compilation, summary, report of information, or create a new public record." Defendant denied plaintiff's second request because he had not completed a record-lookup-request form and paid the fee for each record. At her deposition, defendant's FOIA coordinator Michelle Halm testified that she denied plaintiff's FOIA request because the computerized system did not provide an electronic output, there was no way to create an output, and defendant was not required to create one.

Joe Rodriguez testified at his deposition that he is the assistant administrator of defendant's Office of Customer Services. He was familiar with the insurance database that included some of the information—such as registration, vehicle identification numbers, and customer information—that plaintiff sought. Rodriguez testified that it was not possible to simply copy the database because it had a front end and a back end, and the front end was shared between all the users on the staff. However, it would be possible to copy the database's back-end tables onto a jump drive.

On August 2, 2016, plaintiff filed his complaint in this action, seeking an order compelling FOIA disclosure, a fine, punitive damages, and costs. Plaintiff alleged that defendant improperly denied his first FOIA request because it maintained an electronic database with the information he sought and improp-

erly denied his second FOIA request because he was entitled to the records through FOIA rather than through the Michigan Vehicle Code (MVC)[1] commercial lookup service. Plaintiff moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), asserting that defendant violated FOIA by requiring him to use the MVC service and by not providing a copy of its electronic database in response to his FOIA request.

Defendant responded by moving for summary disposition under MCR 2.116(I)(2), arguing that plaintiff had requested personal information that was exempt from disclosure and that the records plaintiff sought did not exist. Defendant also argued that it was not required to create a new record that would be responsive to plaintiff's request. Additionally, the MVC required defendant to charge a person a fee for each record contained in a computerized file, and plaintiff did not submit his request in the proper format because he failed to submit the proper fees.

The Court of Claims granted summary disposition to defendant regarding plaintiff's first FOIA request on the basis that the record did not exist in the form sought by plaintiff. It reasoned that the database contained "some or most of the information," but it was not a public record because "there was no routinely generated report containing this information." It additionally reasoned that defendant was not required to compile or summarize the database or create a new record.

Regarding plaintiff's second request, the Court of Claims refused to consider defendant's personal information exemption request because defendant did not

[1] MCL 257.1 *et seq*.

cite the exemption when denying plaintiff's request, nor did defendant make any argument before the court on the balancing test employed in evaluating the exemption. However, the Court of Claims determined that defendant properly denied plaintiff's request because plaintiff had not met the statutory requirement to pay the statutory fee under the MVC.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013).

We also review de novo issues of statutory interpretation. *Herald*, 463 Mich at 117. The goal of statutory interpretation is to discern the Legislature's intent from the words expressed in the statute. *Id*. "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id*. at 117-118.

III. ANALYSIS

First, plaintiff argues that an insurance database itself is a public record and that defendant improperly

denied plaintiff's request because the database was responsive to his request. We conclude that there is a question of fact whether defendant could simply copy the relevant database file or whether instead defendant would have to create or alter a record to provide the requested information.

FOIA broadly provides that "all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.231(2). Accordingly, "FOIA's specific provisions generally require the full disclosure of public records in the possession of a public body." *Herald*, 463 Mich at 118.

FOIA defines the term "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e). FOIA defines the term "writing" as

> handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content. [MCL 15.232(h).]

For the purposes of FOIA, writings include "electronic copies and computer tapes." *City of Warren v Detroit*, 261 Mich App 165, 172; 680 NW2d 57 (2004) (citations omitted).

If a writing exists in an electronic format, the plaintiff is entitled to an electronic copy. *Farrell v Detroit*, 209 Mich App 7, 14-15; 530 NW2d 105 (1995). See MCL 15.234(1)(c). However, subject to exceptions

that do not apply in this case, FOIA "does not require a public body to make a compilation, summary, or report of information," MCL 15.233(4), and it "does not require a public body to create a new public record," MCL 15.233(5).

In *Warren*, 261 Mich App at 173, this Court determined that a computer formula used to calculate water and sewer rates was a public record. In that case, the defendant argued that the formula did not exist in the form of a public record because it was not itself a document or computer disk. *Id*. at 172. This Court rejected the argument because the formula was information stored in a computer and was used during a computing process in the same way that entered data would be. *Id*. at 171. The Court further reasoned:

> We can discern no reason why the formula contained on the computer disk would be different than those types of electronic recordings already recognized as "writings" by this Court. To hold otherwise would allow public bodies to hide behind the exception by creating and maintaining public records within software and on computer disks only. [*Id*. at 173.]

In this case, the database contained some of the information plaintiff sought, including the names, addresses, vehicle identification numbers, registration, and insurance-audit information. It was not necessary for defendant to generate a report from the database for it to be a public record. The database itself was a writing because it was information stored in a computer, *id*. at 172-173, that defendant used to perform an official function, MCL 15.232(e). The Court of Claims erred when it held that the database was not a public record.

Defendant responds that disclosing the information stored on the database would have required it to create

a new record because the database did not contain *only* the information plaintiff sought. Summary disposition on these grounds would be improper because there is a question of fact regarding whether defendant could have copied the database without creating a new, more specifically responsive record.

A FOIA request need only be descriptive enough that a defendant can find the records containing the information that the plaintiff seeks. *Herald*, 463 Mich at 121. When a plaintiff does not ask the defendant to create a new record, "the fact that the [defendant] had no obligation to create a record says nothing about its obligation to satisfy plaintiff's request in some other manner . . . ." *Id*. at 122. In this case, simply because defendant could have created a strictly responsive record does not mean that it could not have satisfied plaintiff's request by copying the back-end tables. Plaintiff requested "any" information that was included in its list. The database's tables contained much of the information plaintiff sought.

Rodriguez's testimony about whether he could copy the tables containing the information plaintiff sought without needing to create a new record was self-contradictory. Rodriguez testified that he could not simply copy the entire database onto a jump drive. He testified that to put the entire database on a thumb drive, he "would have to change the programming . . . ." Rodriguez testified that he would have to program the database to give him *specific* output, like names and addresses.[2] But he also testified that he could copy the back-end tables onto a jump drive. The types of information plaintiff sought were stored as

[2] Such a query would necessarily compile and create a report of the information, which the FOIA does not require defendant to do. See MCL 15.233(4). See also *Herald*, 463 Mich at 121.

fields in the database tables. Rodriguez's self-contradictory testimony created a question of fact regarding whether defendant could have provided plaintiff the information he sought by simply copying the database's back-end tables or whether defendant could not do so without creating a new compilation of the data.

However, this Court need not reverse or vacate a trial court's order unless doing so appears to this Court to be inconsistent with substantial justice. MCR 2.613(A). The trial court's error is harmless if it is not decisive to the case's outcome. See *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 529; 730 NW2d 481, vacated and remanded in part on other grounds 480 Mich 910 (2007). We conclude that the Court of Claims' error does not require reversal because plaintiff did not submit the appropriate fees for the records he sought.

The MVC provides that a person seeking records may proceed through either the MVC or FOIA:

> Records maintained under this act, other than those declared to be confidential by law or which are restricted by law from disclosure to the public, shall be available to the public in accordance with procedures prescribed in this act, the freedom of information act, . . . or other applicable laws. [MCL 257.208a.]

The word "or" is a disjunctive term that allows a choice between alternatives. *Michigan v McQueen*, 293 Mich App 644, 671; 811 NW2d 513 (2011). But while plaintiff is correct that he may proceed under FOIA or the MVC, this does not mean that FOIA's fee provision applies.

FOIA allows a public body to charge a fee to respond to a public record search. MCL 15.234(1). For records on "nonpaper physical media," this fee is "the actual and most reasonably economical cost of the computer

discs, computer tapes, or other digital or similar media." MCL 15.234(1)(c). However, FOIA's fee provisions "do[] not apply to public records prepared under an act or statute specifically authorizing sale of those public records to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute." MCL 15.234(10).

In this case, defendant maintains the database pursuant to the requirements of the MVC. The MVC provides that records maintained under the act "shall be available to the public." MCL 257.208a. The database is therefore a public record maintained under the MVC. The MVC specifically provides that the Secretary of State may provide a commercial lookup service of records maintained under the MVC. MCL 257.208b(1). A fee shall be charged for each record looked up. *Id*. The fee is established annually by the Legislature or the Secretary of State. *Id*. Therefore, FOIA's fee does not apply because the records are prepared under an act that specifically authorizes sale of its records to the public, and the act specifically provides the amount of the fee.

The fact that plaintiff is seeking a database rather than individual paper records is not determinative. The MVC expressly addresses this scenario:

> The secretary of state shall not provide an entire computerized central file or other file of records maintained under this act to a nongovernmental person or entity, unless the person or entity pays the prescribed fee for each individual record contained within the computerized file. [MCL 257.208b(9).]

The term "shall" is mandatory. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008).

The database in this case is a computerized central file that contains records for numerous individual persons. Accordingly, MCL 257.208b(9) prohibits defendant from providing plaintiff with the database unless defendant charges plaintiff a fee for each individual record that the file contains. Halm estimated that this fee would be approximately $1.6 million in this case, and it is undisputed that plaintiff has not paid this amount. Accordingly, the Court of Claims correctly concluded that defendant had grounds to deny plaintiff's FOIA request because plaintiff had not paid the statutorily required fee.

We affirm.

SWARTZLE, P.J., and SAAD, J., concurred with O'CONNELL, J.

GEERING v KING

Docket No. 335794. Submitted June 8, 2017, at Lansing. Decided June 13, 2017, at 9:05 a.m.

Martin Robinson filed a petition in the Kalamazoo Circuit Court under MCL 722.27b of the Child Custody Act, MCL 722.21 *et seq*., seeking an order for grandparenting time with the children of his daughter, Elizabeth M. King, and her ex-husband, Jarret T. Geering. Although Geering and King's divorce was finalized in 2013, their contentious custody disputes continued after the divorce order was entered. According to Robinson, complications related to the parents' disputes resulted in a reduction in the amount of time that Robinson and his wife, the children's step-grandmother, were allowed to spend with the children; Robinson additionally alleged that their limited grandparenting time occurred only during King's parenting time. Geering and King filed a joint affidavit opposing an order of grandparenting time, stating that they were both fit parents and that a grandparenting-time order would not be in the children's best interests. The court, Julie K. Phillips, J., granted Robinson's motion, concluding that Geering and King were unfit parents because their inconsistent discipline of the children, inconsistent communication, inconsistent coparenting, and failure to foster the relationship with the other parent had created a substantial risk of harm to the children's mental, physical, and emotional health. On that basis, the court concluded that grandparenting time with Robinson was in the children's best interests. Geering and King appealed.

The Court of Appeals *held*:

1. MCL 722.27b provides that in certain circumstances a grandparent may seek an order for grandparenting time. MCL 722.27b(4) and (6) set forth the parameters under which a circuit court reviews a grandparenting-time motion when *one* of the child's parents objects to the motion. A court must apply MCL 722.27b(5), however, when *both* parents object to a grandparent's motion for grandparenting time. With certain exceptions, MCL 722.27b(5) provides that a court must dismiss a grandparent's motion for grandparenting time if the child's two fit parents sign

an affidavit opposing an order for grandparenting time. For purposes of MCL 722.27b, the undefined term "fit parent" means a parent who adequately cares for his or her children.

2. In this case, Geering and King averred that as fit parents, they opposed Robinson's grandparenting-time motion. The record established that although Geering and King had numerous custody disputes before and after their divorce that had adversely affected the children, those disputes and concerns were in the past. In addition, Child Protective Services conducted several investigations during the custody proceedings, and the primary allegations in each investigation were not substantiated. Accordingly, the record did not support the conclusion that either parent had failed to adequately care for the children, and the circuit court's finding that Geering and King were unfit parents was against the great weight of the evidence. For that reason, the circuit court abused its discretion when it granted Robinson grandparenting time under MCL 722.27b(5).

Reversed and remanded.

PARENT AND CHILD — GRANDPARENT VISITATION — OPPOSITION BY FIT PARENTS — WORDS AND PHRASES — DEFINITION OF FIT PARENT.

MCL 722.27b(5) of the Child Custody Act, MCL 722.21 *et seq*., provides that a court must dismiss a grandparent's motion for grandparenting time if both of the child's parents are fit and both parents sign an affidavit opposing an order for grandparenting time; a "fit parent" is a parent who adequately cares for his or her children.

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

Law Offices of Richard S. Victor, PLLC (by *Richard S. Victor*), and *Hertz Schram PC* (by *Gerald P. Cavellier* and *Matthew J. Turchyn*) for appellee.

Before: O'BRIEN, P.J., and HOEKSTRA and BOONSTRA, JJ.

O'BRIEN, P.J. Jarret T. Geering and Elizabeth May King (formerly known as Elizabeth May Geering and Elizabeth May Robinson) appeal as of right the circuit court's order granting Martin Robinson's motion for

grandparenting time. We reverse and remand this matter for the entry of an order denying the motion for grandparenting time.

Jarret T. Geering and Elizabeth May King began dating in approximately 2002, married on September 26, 2009, and have four children together. In 2011, however, the parties separated; Geering remained in Kalamazoo, and King moved with the children to Bay City. On December 15, 2011, Geering filed a complaint for divorce. In his complaint, Geering sought, in relevant part, joint legal and joint physical custody of the four children. From the filing of the complaint until June 2016, approximately 4½ years later, contentious custody proceedings between the parents ensued. In an order dated February 8, 2012, primary parenting time was awarded to King, but Geering was awarded two overnight visits during the first weekend of each month, five weeks of parenting time during the summer, and relatively equal holiday parenting time. Approximately four months later, on June 25, 2012, the trial court entered a parenting-time order modifying its February 8, 2012 order, this time awarding Geering primary parenting time and King supervised parenting time in light of allegations against King that she had failed to adequately attend to one child's fractured ankle and bacterial infection. It appears that Geering also reported his concerns to Child Protective Services (CPS), but the resulting neglect case was ultimately dismissed by stipulation.

On May 28, 2013, the trial court entered a "Final Decision as to Issues of Custody and Parenting Time." According to that decision, the parties were awarded joint legal and joint physical custody of their children. With respect to parenting time during the school year, the trial court concluded that King would "be allowed

to have the children once a month in Bay City on the first full weekend of every month, and [would] be allowed to visit them on any two other weekends in Kalamazoo for one overnight during the month as long as there is one week's notice to the father . . . ." With respect to parenting time during the summer and on holidays, the decision provided that "[t]he parents shall share alternating weeks in the summer" and relatively equal parenting time for holidays. Additionally, the order also provided that, in the event King "move[d] back to the Kalamazoo area permanently," "the mother and father shall share parenting time with the minor children on a 50/50 basis." The parties' divorce was finalized on June 23, 2013. The judgment of divorce provided for joint legal custody, and it provided that physical custody and parenting time would be addressed in "a separate order." Nevertheless, the parties' contentious custody disputes did not end upon the entry of the judgment of divorce.

Instead, the disputes grew more complicated, and it is the complications that arose after the judgment of divorce was entered that resulted in the instant appeal. Specifically, the issues before this Court focus on claims made by Martin Robinson, King's father and the children's grandfather, and his wife, Shaney Robinson, King's stepmother and the children's stepgrandmother, that they were being excluded from the children's lives. These claims resulted in Robinson and his wife filing a successful motion to intervene on November 25, 2013. Then, on the following day, Robinson and his wife filed a motion for grandparenting time, claiming that Geering had "abruptly terminated" their relationships with the children and requesting grandparenting time "[e]very Monday from the end of the school day until the end of their Religious Education Class," "[t]he first full weekend of every month," "[f]our

weeks during the summer, to include July 4," and "contact . . . via telephone, Skype and mail, especially on Holidays and Birthdays," as well as "such other and such further relief as may be equitable and in good conscience." However, an order permitting Robinson and his wife to withdraw that motion was entered approximately four months later, on March 3, 2014. According to King, she had asked Robinson to withdraw the motion because it added yet another dispute to the already-contentious custody proceedings.

Apparently, Robinson and his wife remained unhappy with their level of involvement in the children's lives over the next year or so. Consequently, on February 17, 2015, Robinson, alone this time, filed a second motion for grandparenting time. In his motion, Robinson asserted that Geering and King were only allowing him and his wife to spend time with the children "on a sporadic basis" and only "during their mother's parenting time." Explaining that he had only been able to see all or some of the children 13 times between February 2014 and November 2014, Robinson asserted that the parents' decision to "cut him off cold" would have a "devastatingly negative impact on [the children] mentally and emotionally." As he and his wife had requested before, Robinson again requested grandparenting time "[e]very Monday from the end of the school day until the end of their Religious Education Class," "[t]he first full weekend of every month," "[f]our weeks during the summer, to include July 4," and "contact . . . via telephone, Skype and mail, especially on Holidays and Birthdays," as well as "such other and such further relief as may be equitable and in good conscience." In response to Robinson's motion, Geering and King, who had largely disagreed on all custody-related issues to that point during the proceedings, filed a *joint* affidavit

opposing Robinson's motion. In the affidavit, they indicated, in relevant part, "[t]hat both of the affiants are fit parents and both parents of the . . . minor children herewith oppose the Motion for Grandparenting Time as not being within the best interest of the minor children."

After holding three day-long hearings over the course of the next 21 months, the trial court granted Robinson's motion, concluding, in relevant part, that Geering and King were unfit parents and that grandparenting time with Robinson was in the children's best interests. In finding that Geering and King were unfit parents, the trial court explained that due to their "inconsistency [in] discipline, the inconsistency in communication, the inconsistency in co-parenting, [and] not fostering the relationship with the other parent," the parents "created a substantial risk of harm to all four of [their] children's mental, physical, emotional health." Consequently, the circuit court entered an order allowing Robinson regular grandparenting time that could include his wife at his discretion. Specifically, the trial court ordered that the children spend one weekend each month during the school year and one week during the summer with Robinson and/or his wife. A written order reflecting the circuit court's decision was entered on November 14, 2016. Geering and King appeal as of right that order, arguing, in part, that the circuit court's order granting Robinson's motion for grandparenting time should be reversed because the order was based on the court's erroneous conclusion that they were unfit parents. We agree.

This Court recently summarized the law that applies when a parent challenges a circuit court's decision to grant a grandparent's motion for grandparent-

ing time. In *Zawilanski v Marshall*, 317 Mich App 43, 48-50; 894 NW2d 141 (2016), this Court stated, in relevant part, as follows:

> "Orders concerning [grand]parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Keenan v Dawson*, 275 Mich App 671, 679; 739 NW2d 681 (2007) (quotation marks and citation omitted). The Court should affirm a trial court's findings of fact unless the evidence "clearly preponderate[s] in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (quotation marks and citation omitted; alteration in original). A trial court abuses its discretion on a custody matter when its "decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We conclude that this standard should also apply to decisions about parenting and grandparenting time. A court commits clear legal error "when it incorrectly chooses, interprets, or applies the law." *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009).
>
> Parents have a constitutionally protected right to make decisions about the care, custody, and management of their children. *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014). This right "is not absolute, as the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor . . . ." *Id.* at 409-410, quoting *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (quotation marks and citation omitted). "The United States Constitution, however, recognizes 'a presumption that fit parents act in the best interest of their children' and that 'there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of [fit parents] to make the best decisions concerning the rearing of [their] children.' " *In re Sanders*, 495 Mich at

410, quoting *Troxel v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.) (alterations in *Sanders*).

MCL 722.27b provides grandparents in certain situations the means to seek an order for grandparenting time. To protect parents' fundamental liberty to make decisions about the care, custody, and management of their children, MCL 722.27b(4)(b) incorporates a rebuttable presumption "that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health." To rebut this presumption, a grandparent "must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health." *Id*. If the grandparent does not rebut the presumption, the court must dismiss the grandparenting-time action. *Id*. However, if the grandparent meets the standard for rebutting the presumption,

> the court shall consider whether it is in the best interests of the child to enter an order for grandparenting time. If the court finds by a preponderance of the evidence that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. [MCL 722.27b(6).]

In sum, MCL 722.27b(4) and (6) generally control when a parent objects to a grandparent's motion for grandparenting time. This case, however, does not involve a situation in which *a* parent objects to a grandparent's motion for grandparenting time. Rather, it involves a situation in which *both* parents object to a grandparent's motion for grandparenting time. In this situation, MCL 722.27b(5) controls. That statutory provision provides as follows:

> If 2 fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3). This subsection does not apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated.

Consequently, "if two fit parents (with the exception of certain circumstances that are not present in this case) both oppose visitation, their joint opposition effectively creates an irrebuttable presumption that denial of grandparenting time will not create a substantial risk of harm to the child, and the grandparents' petition must be dismissed." *Brinkley v Brinkley*, 277 Mich App 23, 29; 742 NW2d 629 (2007).

In this case, Geering and King each signed affidavits stating, in relevant part, that, as fit parents, they opposed an order regarding grandparenting time. Therefore, it was and remains their position that the circuit court was required to dismiss Robinson's motion for grandparenting time pursuant to MCL 722.27b(5). Robinson, on the other hand, contends that the circuit court was not required to dismiss his motion because one or both parents were unfit. Consequently, the issue before this Court focuses on the interpretation and application of the term "fit" as used in MCL 722.27b. The Child Custody Act, MCL 722.21 *et seq*., including the definitions provision of that act, MCL 722.22, does not define the terms "fit" or "unfit" in this context. It also appears that neither this Court nor our Supreme Court has defined the term in this context. However, the United States Supreme Court, in *Troxel*, 530 US at 68 (opinion by O'Connor, J.), defined a "fit" parent as a

parent who "adequately cares for his or her children . . . ." It did so in the context of determining whether statutes allowing for third-party parenting time must afford deference to the children's parents. It held that they must. *Id*. at 68-69. That decision led this Court to declare a previous version of our state's grandparenting-time statute unconstitutional, *DeRose v DeRose*, 469 Mich 320, 333-334; 666 NW2d 636 (2003), and it was the *Troxel* and *DeRose* decisions that ultimately led the Legislature to amend MCL 722.27b to its current form, *Brinkley*, 277 Mich App at 28-29. It is well established that the Legislature is presumed to act with knowledge of current judicial interpretations, *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991), and "[w]hen statutory provisions are construed by the court and the Legislature reenacts the statute, it is assumed that the Legislature acquiesced to the judicial interpretation," *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 373; 781 NW2d 310 (2009). For these reasons, we choose to incorporate the definition of the term "fit" as set forth in *Troxel*—as a parent who "adequately cares for his or her children"—to MCL 722.27b.

Consequently, the issue before this Court is whether the circuit court's finding that Geering and King were unfit parents was against the great weight of the evidence. *Zawilanski*, 317 Mich App at 48. We conclude that it was. While we acknowledge that, like most, if not all, parents, Geering and King are not perfect, it is our view that the record before us simply does not support a conclusion that either parent failed to adequately care for his or her children. The circuit court's analysis largely focused on the parents' failure to resolve various parenting issues during the contentious proceedings that took place both before and after the parents' divorce. Specifically, the circuit court

pointed to the parents' "inconsistency [in] discipline, the inconsistency in communication, the inconsistency in co-parenting, [and] not fostering the relationship with the other parent . . . ." However, as the circuit court expressly acknowledged, the parents' relationship has significantly improved since they resolved the remaining custody and parenting-time issues while this motion was pending. Indeed, as the trial court recognized, the record reflects that there was "improvement between mom and dad," that "they [were] both starting to mature and get established," and "that the children are doing well academically and emotionally and . . . have witnessed their parents being respectful and pleasant for each other." It is this improvement that led to the entry of a stipulated order in either late May or early June 2016 determining the parties' custody and parenting-time arrangements. Although it is true that, during the custody proceedings, the children had struggled with changing households frequently, the children had difficulty in adjusting to the different expectations between Geering's and King's households, and the parents had failed to effectively communicate and resolve those disagreements, the record also reflects that, generally speaking, those concerns are largely concerns of the past. Relatedly, it cannot be overlooked that CPS conducted several investigations during the custody proceedings, most of which Geering believes were a result of Robinson's wife's reports, and none of the primary allegations was substantiated. In sum, we do not believe that the record before us supports a conclusion that Geering or King failed to adequately care for their children, and the circuit court's conclusion to the contrary clearly preponderated in the opposite direction. *Id*.

Our conclusion does not necessarily mean that we agree with Geering's and King's purported decision to

largely exclude Robinson and his wife from the children's lives. Indeed, it is very apparent from the record that the trial court did not agree with that decision. However, parents have a constitutionally protected right to raise their children as they see fit, *Zawilanski*, 317 Mich App at 49-50, and we cannot deprive them of this constitutionally protected right simply because we, as bystanders who are not intimately involved in the parents' or the children's lives, do not agree with a decision made by the parents. It may well be that the parents' decision to alter the relationship that the children, Robinson, and his wife shared negatively impacted the children, but that is not the inquiry, and it is simply not the judiciary's role to make such a decision for two otherwise fit parents. Indeed, it appears that King may be willing to allow Robinson to spend time with the children, and it is certainly possible that, eventually, both parents might even be willing to allow Robinson and his wife to spend time with the children as well. However, our review of the record reflects that such a decision should be made by Geering and King, two fit parents, not this Court or the circuit court. Accordingly, because the trial court's finding that Geering and King were unfit parents was against the great weight of the evidence, we reverse the circuit court's order granting Robinson's motion for grandparenting time and remand this matter for the entry of an order denying his motion. In light of this conclusion, we need not address the remainder of Geering and King's arguments raised on appeal.

Reversed and remanded. We do not retain jurisdiction. Appellants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

HOEKSTRA and BOONSTRA, JJ., concurred with O'BRIEN, P.J.

PEOPLE v LAWHORN

Docket No. 330878. Submitted April 12, 2017, at Grand Rapids. Decided June 15, 2017, at 9:00 a.m.

Anita D. Lawhorn was convicted following a jury trial in the Kent Circuit Court of third-degree child abuse, MCL 750.136b(5), in connection with the excessive physical discipline she had used on the victim, who is her son. The guidelines minimum sentence range was 0 to 11 months in jail. The court, Paul J. Sullivan, J., sentenced defendant outside the recommended range to one year in jail and five years' probation. Defendant appealed.

The Court of Appeals *held*:

1. MCL 750.136b(5) provides that a person is guilty of third-degree child abuse if the person knowingly or intentionally causes physical harm to a child or the person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child and the act results in physical harm to the child. The term "physical harm" is defined in MCL 750.136b(1)(e) as any injury to a child's physical condition.

2. A statute may be challenged as unconstitutionally vague on the basis that it does not provide fair notice of the conduct proscribed or that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. A statute must not allow arbitrary enforcement or give unstructured and unlimited discretion to the trier of fact to determine whether an offense was committed; a scienter requirement in a statute alleviates concerns that a statute is unconstitutionally vague. A statute is sufficiently definite when its meaning can be fairly ascertained by referring to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.

3. In light of the dictionary definitions related to the defined term "physical harm," a person of ordinary intelligence would understand that the third-degree child abuse statute prohibits a person from knowingly or intentionally causing harm or damage to the state of a child's body or knowingly or intentionally

committing an act that poses an unreasonable risk of harm or injury to a child and results in harm or damage to the state of a child's body. Given the prior judicial interpretation of the term "reasonable" in MCL 750.136b(9)—which clarifies that the child abuse statute does not prohibit a parent or guardian from reasonably disciplining a child, including the use of reasonable force—a person of ordinary intelligence would understand that he or she must also act reasonably, not excessively, when physically disciplining a child. Accordingly, MCL 750.136b(5) provides fair notice of the conduct that is prohibited, and the statute is not unconstitutionally vague on that basis. The statutory definition of third-degree child abuse contains a scienter element—that the physical harm was caused knowingly or intentionally or the harm was the result of a knowing or intentional act that posed an unreasonable risk of harm or injury—and the definition is sufficiently definite that ordinary people are able to understand what conduct is prohibited; the MCL 750.136b(9) provision that allows parents or guardians to use reasonable force when physically disciplining a child provides a sufficient standard to prevent arbitrary and discriminatory enforcement by law enforcement, judges, or juries. Accordingly, the statute is not unconstitutionally vague on the basis of indefiniteness. Furthermore, the jury reasonably concluded from testimony and exhibits that defendant knowingly or intentionally caused an injury to the victim's physical condition by beating him with a belt and causing scars, and it correctly concluded that the force used was not reasonable. Accordingly, the statute was also not unconstitutionally vague as applied to defendant.

4. The trial court's factual findings related to defendant's sentence were not clearly erroneous. The factors considered by the trial court were related to the nature of the offense and defendant's background, and, when imposing a sentence outside the guidelines minimum sentence range, the court correctly determined that certain factors were not adequately considered by the sentencing guidelines. Defendant's sentence was reasonable because it was proportionate to the seriousness of the circumstances surrounding the offense and the offender.

Affirmed.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — THIRD-DEGREE CHILD ABUSE — VAGUENESS — FAIR NOTICE.

For purposes of the third-degree child abuse statute, MCL 750.136b(5), the MCL 750.136b(1)(e) definition of "physical harm"

provides fair notice of the conduct MCL 750.136b(5) proscribes, and the statute is not unconstitutionally vague because of a lack of fair notice.

2. CONSTITUTIONAL LAW — CRIMINAL LAW — THIRD-DEGREE CHILD ABUSE — VAGUENESS — INDEFINITE.

The third-degree child abuse statute, MCL 750.136b(5), is sufficiently definite that ordinary people can understand the conduct that it proscribes, and the statute is therefore not unconstitutionally vague; the statute does not allow for arbitrary enforcement or give unstructured and unlimited discretion to the trier of fact to determine whether an offense was committed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Kimberly M. Manns*, Assistant Prosecuting Attorney, for the people.

Gower Reddick, PLC (by *Jesse A. Nash*), for defendant.

Before: BECKERING, P.J., and MARKEY and SHAPIRO, JJ.

PER CURIAM. Defendant, Anita Diane Lawhorn, was convicted by a jury of third-degree child abuse, MCL 750.136b(5). Defendant was sentenced to 365 days in jail with credit for 36 days served and to 60 months' probation. The trial court ordered defendant to immediately serve 150 days of her jail sentence with the remainder to be served at the end of probation or upon court order, whichever occurs first. Defendant now appeals by right.

Defendant argues that her conviction should be vacated because the third-degree child abuse statute, MCL 750.136b(5), is unconstitutionally vague as it does not provide fair notice of the prohibited conduct and because it is so indefinite that it gives unstructured and unlimited discretion to the trier of fact to

arbitrarily determine whether an offense was committed. We disagree and so affirm.[1]

MCL 750.136b defines the crime of third-degree child abuse as follows:

> (5) A person is guilty of child abuse in the third degree if any of the following apply:
>
> (a) The person knowingly or intentionally causes physical harm to a child.
>
> (b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.
>
> (6) Child abuse in the third degree is a felony punishable by imprisonment for not more than 2 years.

" 'Child' means a person who is less than 18 years of age and is not emancipated by operation of law . . . ." MCL 750.136b(1)(a). " 'Person' means a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person." MCL 750.136b(1)(d). For purposes of MCL 750.136b, the term "physical harm" is defined as "any injury to a

[1] Defendant did not challenge the constitutionality of MCL 750.136b in the trial court; consequently, defendant's claim is unpreserved. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014). Ordinarily, we review de novo challenges to the constitutionality of a statute under the void-for-vagueness doctrine. *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000). Unpreserved challenges to the constitutionality of a statute, however, are reviewed for plain error. *Vandenberg*, 307 Mich App at 61. On plain-error review, the defendant has the burden to show (1) "error"; (2) that the error was "plain," meaning "clear or obvious"; and (3) that the error affected substantial rights or caused prejudice, meaning "that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

child's physical condition." MCL 750.136b(1)(e). In addition, MCL 750.136b(9) provides that "[t]his section does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force."

"[A] statute is presumed to be constitutional and is so construed unless its unconstitutionality is clearly apparent." *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002). "To determine whether a statute is unconstitutionally vague, this Court examines the entire text of the statute and gives the words of the statute their ordinary meanings." *People v Lockett*, 295 Mich App 165, 174; 814 NW2d 295 (2012). A court must also consider any judicial constructions of the statute when determining if it is unconstitutionally vague. *Boomer*, 250 Mich App at 539.

"The void for vagueness doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law. US Const, Am XIV; Const 1963, art 1, § 17." *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011) (quotation marks and citation omitted). As explained by the United States Supreme Court in *Grayned v City of Rockford*, 408 US 104, 108-109; 92 S Ct 2294, 33 L Ed 2d 222 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide

> explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [Citations omitted; alterations and omission in original.]

Following from these principles, we have stated:

> A statute may be challenged for vagueness on three grounds: (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. [*Roberts*, 292 Mich App at 497 (quotation marks and citation omitted).]

Because defendant does not argue that the third-degree child abuse statute is overly broad or that it impinges on First Amendment rights, we need only address the issues of fair notice and indefiniteness.

We begin by noting that "[t]he party challenging the constitutionality of a statute has the burden of proving the law's invalidity." *People v Bosca*, 310 Mich App 1, 71; 871 NW2d 307 (2015). A vagueness challenge to a statute not based on First Amendment grounds must be reviewed on the basis of the particular facts of the case at issue. *People v Nichols*, 262 Mich App 408, 410; 686 NW2d 502 (2004). Therefore, a defendant may not assert that a statute is overbroad and reaches innocent conduct if the defendant's conduct clearly falls within the language of the statute. See *People v Lynch*, 410

Mich 343, 352; 301 NW2d 796 (1981). In other words, "[a] defendant has standing to raise a vagueness challenge only if the statute is vague as applied to his conduct." *People v Al-Saiegh*, 244 Mich App 391, 397 n 5; 625 NW2d 419 (2001). Further, even if "a statute may be susceptible to impermissible interpretations, reversal is not required where the statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and where the defendant's conduct falls within that prescribed by the properly construed statute." *Id*. "To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999) (citation omitted). "A statute cannot use terms that require persons of ordinary intelligence to speculate regarding its meaning and differ about its application." *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004). "For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id*. To survive constitutional scrutiny, the words used in a statute are not required to have a single meaning, *Dep't of State Compliance & Rules Div v Mich Ed Ass'n-NEA*, 251 Mich App 110, 120; 650 NW2d 120 (2002), and a statute need not define an offense with " 'mathematical certainty,' " *Grievance Administrator v Fieger*, 476 Mich 231, 255; 719 NW2d 123 (2006) (citation omitted).

In this case, defendant's vagueness challenge is directed solely at the statutory definition of "physical harm" as "any injury to a child's physical condition." MCL 750.136b(1)(e). We have previously rejected the argument that the definition of physical harm in MCL 750.136b is unconstitutionally vague for purposes of

fourth-degree child abuse. *People v Gregg*, 206 Mich App 208, 210-211; 520 NW2d 690 (1994). We held that "the statute clearly provides fair notice to persons of ordinary intelligence of the conduct proscribed, namely, an omission or reckless act that causes any injury to a child's physical condition." *Id*. at 211. Fourth-degree child abuse is also defined in MCL 750.136b. See MCL 750.136b(7). The same definition of "physical harm" applies to both third-degree and fourth-degree child abuse, although third-degree child abuse requires a knowing or intentional act that causes physical harm to the child rather than an omission or reckless act that causes physical harm. See MCL 750.136b(1)(e), (5), and (7). Furthermore, a person of ordinary intelligence need not speculate about the meaning of "any injury to a child's physical condition" to understand the nature of the physical harm that must not be inflicted on a child. Anyone may consult a dictionary, and courts themselves often do so. *Sands*, 261 Mich App at 161. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "injury" as "hurt, damage, or loss sustained." Relevant to the statute at issue, the term "physical" can mean "of or relating to the body," and "condition" may mean "a state of being." *Id*. Therefore, a person of ordinary intelligence would clearly understand that the third-degree child abuse statute prohibits a person from knowingly or intentionally causing harm or damage to the state of a child's body or knowingly or intentionally committing an act that poses an unreasonable risk of harm or injury to a child and results in harm or damage to the state of a child's body.

Additionally, we held in *Gregg* that the provision in MCL 750.136b providing that a parent or guardian shall not be prohibited "from taking steps to reasonably discipline a child, including the use of reasonable

force,"[2] was not overbroad and did not impinge on the defendant's right to discipline his child. *Gregg*, 206 Mich App at 213. We relied on dictionary definitions of "reasonable" that defined the term to mean

> [f]air, proper, just, moderate, [and] suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.
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> * * *
>
> 1. agreeable to or in accord with reason or sound judgment; logical. 2. not exceeding the limit prescribed by reason; not excessive . . . . [*Id*. (quotation marks and citations omitted).]

Accordingly, a person of ordinary intelligence would also understand that in using physical discipline on a child, he or she must act in a manner that is reasonable and not excessive. See *Sands*, 261 Mich App at 161; *Gregg*, 206 Mich App at 213. Therefore, MCL 750.136b(5) provides fair notice of the conduct that is prohibited. See *Noble*, 238 Mich App at 652.

We also conclude that MCL 750.136b(5) is not so vague that it allows for arbitrary enforcement or gives unstructured and unlimited discretion to the trier of fact to determine whether an offense was committed. A criminal statute "must provide standards for enforcing and administering the laws in order to ensure that enforcement is not arbitrary or discriminatory; basic

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[2] The language of the statutory provision in effect when *Gregg* was decided, MCL 750.136b(6), 1988 PA 251, remains unchanged and is now contained in MCL 750.136b(9).

policy decisions should not be delegated to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *In re Forfeiture of 719 N Main*, 175 Mich App 107, 112-113; 437 NW2d 332 (1989). This Court has held that applying a "reasonable person standard" to a statute is sufficient "to provide fair notice of the type of conduct prohibited," as well as preventing enforcement abuses by "prevent[ing] any ad hoc and subjective application by police officers, judges, juries, or others empowered to enforce" it. *Plymouth Charter Twp v Hancock*, 236 Mich App 197, 201-202; 600 NW2d 380 (1999). "[S]cienter requirements [also] alleviate vagueness concerns." *Gonzales v Carhart*, 550 US 124, 149; 127 S Ct 1610; 167 L Ed 2d 480 (2007).

In this case, MCL 750.136b(5) includes a scienter requirement, i.e., that the physical harm either be caused "knowingly or intentionally" or be the result of a knowing or intentional act that poses an unreasonable risk of harm or injury; the scienter requirement "alleviate[s] vagueness concerns." See *Carhart*, 550 US at 149. Furthermore, the provision that allows parents or guardians to use "reasonable force" when physically disciplining children—MCL 750.136b(9)—provides a sufficient standard to prevent the statute from being applied in a subjective manner by law enforcement, judges, or juries. See *Hancock*, 236 Mich App at 202.

Testimony at trial revealed that defendant admitted that she "whupped" the victim with a belt, hit him "too hard," and caused marks to be left on the victim. Additionally, Kirsten Harder testified that when she investigated the case in May 2013, as part of her work for Child Protective Services (CPS), she observed injuries on the back of the victim's thigh and calves that were scabbed over, and the victim reported that he also

had marks on his buttocks that had bled and scabbed over. When Harder asked the victim how he had received the marks, he indicated that he had gotten in trouble at home a few days earlier, that defendant had "whupped him with a belt on the butt and the back of his legs," and that the marks were made by the "whupping" defendant had given him. According to Harder, the victim also reported that defendant had instructed him after the "whupping" "not to tell anybody what happened at home." Dr. N. Debra Simms testified that she examined the victim in September 2014. At that time, she observed scars on the back of the victim's legs that could have been caused by a cord, thin belt, or wire coat hanger and that were most likely permanent. Simms took photographs of the marks on the victim's body that were admitted into evidence at trial, and Harder testified that the photographs Simms had taken showed marks that were in the same area on the victim as the area where Harder had observed marks on him in 2013.

A jury could reasonably conclude from this evidence that defendant knowingly or intentionally caused an injury to the victim's physical condition—i.e., "physical harm"—and that the force defendant exerted in disciplining the victim exceeded that which would be "reasonable," supporting the jury's determination that defendant was guilty of third-degree child abuse. Defendant's actions—beating her son with a belt and causing scars—clearly fall within the conduct prohibited by MCL 750.136b(5); consequently, the statute is not unconstitutionally vague as applied to defendant. *Lynch*, 410 Mich at 350; *Gregg*, 206 Mich App at 210-213. The statutory definition of third-degree child abuse is sufficiently definite that ordinary people can understand what conduct is prohibited, and it prevents

arbitrary and discriminatory enforcement. See *Boomer*, 250 Mich App at 538-539.

Defendant essentially argues that to avoid being considered unconstitutionally vague, the statute should specifically delineate all of the acceptable and unacceptable forms of corporal punishment and should define physical harm more narrowly. Physical harm is indeed defined broadly by the statute to include "any injury to a child's physical condition." MCL 750.136b(1)(e). But an offense need not be defined with " 'mathematical certainty.' " *Fieger*, 476 Mich at 255 (citation omitted). We conclude that the statute is not unconstitutionally vague; therefore, we affirm defendant's conviction.

Defendant also raises a challenge to her sentencing. She argues that her sentence of one year in jail with five years' probation was unreasonable given that her recommended minimum sentence range was 0 to 11 months in jail. We disagree.

"[T]he proper interpretation and application of the legislative sentencing guidelines . . . are legal questions that this Court reviews de novo." *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

MCL 769.34(4)(a) requires the trial court to impose "a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months,

whichever is less," when a defendant's guidelines minimum sentence range is less than 18 months. Because defendant's guidelines minimum sentence range was 0 to 11 months, defendant's sentence of one year in jail constitutes an upward departure of one month of additional jail time. MCL 769.31(a). But, given our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), "under Subsection (4)(a), a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *People v Schrauben*, 314 Mich App 181, 195; 886 NW2d 173 (2016).

Because defendant was sentenced after the opinion was issued in *Lockridge*, and the trial court was aware of the new sentencing standards set forth in that case, defendant's departure sentence must be reviewed for reasonableness under the "principle of proportionality" test adopted in *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). See *People v Steanhouse*, 313 Mich App 1, 42, 45, 46-47, 48; 880 NW2d 297 (2015). The *Steanhouse* Court held "that a sentence that fulfills the principle of proportionality under *Milbourn*, and its progeny, constitutes a reasonable sentence under *Lockridge*." *Steanhouse*, 313 Mich App at 47-48. In *People v Masroor*, 313 Mich App 358, 374; 880 NW2d 812 (2015), this Court summarized the reasonableness standard of review to be applied to departure sentences:

> In a nutshell, *Milbourn*'s "principle of proportionality" requires a sentence "to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. *Milbourn* instructs that departure sentences "are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing" so that the sen-

> tence range calculated under the guidelines "is disproportionate, in either direction, to the seriousness of the crime." *Id*. at 657. The *extent* of the departure must also satisfy the principle of proportionality. *Id*. at 660.

In *Steanhouse*, 313 Mich App at 46, this Court also noted several factors that courts have considered in applying the proportionality standard, including "(1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation." (Citations omitted.)

When justifying the sentence imposed in this case, the trial court noted several things about the circumstances surrounding the crime and defendant's background. First, the trial court noted that the victim murdered another child. There was testimony at trial that the victim had committed this murder, and the presentence investigation report (PSIR) included a description of the circumstances surrounding the victim's apprehension immediately after the murder. The PSIR stated that the victim called 9-1-1 after the stabbing and told the dispatcher that "he hated his life, had 'taken many pills,' and he felt like no one loved him." Thus, the trial court's factual finding was supported by a preponderance of the evidence and was not clearly erroneous. *Hardy*, 494 Mich at 438. Contrary to defendant's argument on appeal, the trial court did not find that defendant was responsible for the other child's death or punish defendant for that murder. Rather, the trial court noted the likely detrimental effect that defendant's treatment of the victim and the accompanying home environment had on the victim.

Second, the trial court found that defendant must have known that Bernard Harrold, defendant's stepfather, beat the victim. Moreover, Harrold himself testified at trial that he had used corporal punishment on the victim when he started fires or got into trouble at school. Harrold also testified that he lived with defendant in May 2013, took care of the children while defendant was at work, and inflicted visible physical marks on the victim after using corporal punishment on him in May 2013. Testimonial and photographic evidence of the marks on the victim's legs was introduced at trial. Therefore, the trial court's factual finding in this respect was supported by a preponderance of the evidence and was not clearly erroneous.

Third, the trial court found that regardless of whether defendant used cocaine, it was highly likely that defendant knew that there was cocaine in the home and that Harrold was using cocaine. Nonetheless, defendant still permitted Harrold to care for the victim and the other children. Harrold testified at trial that he was sometimes under the influence of alcohol and cocaine, and the PSIR indicated that the police had found drug paraphernalia that tested positive for cocaine when they executed a search warrant at defendant's and Harrold's residence in August 2014. Furthermore, CPS worker Paula Leonard testified at the preliminary examination that during the search, the police discovered "cocaine paraphernalia, beer cans scattered throughout the home, . . . flies, mouse feces," mold, and backed-up sinks. The PSIR also indicated that defendant had denied that she was under the influence of drugs when the incident at issue occurred and that she had denied ever having any problems with substance abuse or addiction. The trial court, while acknowledging a belief that defendant used cocaine, did not find that she actually used

cocaine. Instead, the court considered generally the fact that cocaine was being used in the home. This factual finding was supported by a preponderance of the evidence and was not clearly erroneous.

Fourth, the trial court found that there were deplorable conditions inside the home. According to the PSIR, when the search warrant was executed at the residence, "[t]he detective observed the home to be in an unsafe and deplorable condition," and "[d]rug paraphernalia was found in the upstairs bedroom, which later tested positive for cocaine." Thus, this factual finding was supported by a preponderance of the evidence and was not clearly erroneous.

Fifth, the trial court found that defendant was involved in some incidents in New York from "many years ago" that suggested "at least the possibility if not the likelihood of some type of prior abuse or neglect . . . ." The trial court did not make any specific finding about defendant's conduct in these incidents, but merely noted her involvement. A CPS report for defendant's case, which is included in the lower court record, describes cases from New York in 1995 and 2000 that involved allegations that defendant had abused and neglected her children. One of these cases resulted in defendant's parental rights being terminated by surrender. Contrary to defendant's appellate argument, we find no conflict between the trial court's findings at sentencing and at trial with respect to this matter. At trial, the trial court merely ruled that evidence of the victim's statement that he was afraid that defendant's other children would be taken away from her where his fear was apparently based on knowledge of matters that had transpired earlier in New York could only come in at trial to show the victim's state of mind and his concern for defendant.

The trial court ruled that it did not matter whether the allegations were true or not for purposes of the trial. When the statement was introduced, the trial court instructed the jury in accordance with its ruling about the purpose for which the statement could be considered. Thus, this factual finding by the trial court was supported by a preponderance of the evidence and was not clearly erroneous.

On appeal, defendant does not cite any authority to support an argument that the sentence itself was unreasonable. Her only contention is that the trial court made erroneous factual findings. As previously discussed, the trial court's findings of fact were not clearly erroneous. With respect to the sentence the trial court imposed, we conclude that all of the factors considered by the trial court related to the "nature of the offense and the background of the offender." *Milbourn*, 435 Mich at 651. Furthermore, the trial court could have reasonably found that the severity of the impact of defendant's conduct on the victim received inadequate weight under the guidelines' calculation. Defendant was assessed 10 points for Offense Variable (OV) 4, which applies when a defendant caused "[s]erious psychological injury requiring professional treatment" to the victim, MCL 777.34(1)(a), and 10 points for OV 10, which applies 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," MCL 777.40(1)(b). So, although the guidelines accounted for some degree of the harm the victim suffered, it was reasonable for the trial court to conclude that the factors it considered, especially the effects of defendant's behavior on the victim that culminated in his stabbing another child and saying that he hated his life and that nobody loved him, were not adequately considered in the

guidelines calculation. See *People v Houston*, 448 Mich 312, 321; 532 NW2d 508 (1995) (holding that the sentence imposed by the trial court satisfied the proportionality test because "the trial judge found that the recommended range was inadequate to reflect the seriousness of this offense" and further held that even if the guidelines range adequately reflected the seriousness of the offense, "the sentence did not constitute an abuse of discretion because the offense involved circumstances not accounted for, or accounted for inadequately, in formulating the guidelines"). A departure sentence does not need to be arithmetically measured. *Id*. at 320. Finally, the extent of this departure—one month—was minor in light of all of the factors the trial court found demonstrating the seriousness of the offense and surrounding circumstances. See *Masroor*, 313 Mich App at 374.

For the reasons discussed, defendant's sentence was "proportionate to the seriousness of the circumstances surrounding the offense and the offender" and fulfilled the "principle of proportionality." *Milbourn*, 435 Mich at 636. Defendant's sentence was therefore reasonable. *Lockridge*, 498 Mich at 392; *Steanhouse*, 313 Mich App at 47-48.

We affirm.

BECKERING, P.J., and MARKEY and SHAPIRO, JJ., concurred.

KERN v KERN-KOSKELA

Docket No. 330183. Submitted June 14, 2017, at Detroit. Decided June 20, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 1027.

Frank Kern III brought an action in the Oakland Circuit Court against his sister, Bonnie Kern-Koskela; his brother-in-law, Larry Koskela; Christopher Kelly; Maxitrol Company (Maxitrol); and Mertik Maxitrol (Mertik), alleging various claims of shareholder oppression and breach of fiduciary duty, particularly in connection with a lease agreement that Maxitrol had entered into (known as the M-Annex lease). Kern and Kern-Koskela own a 50 percent interest in Maxitrol and Mertik, and they, along with Koskela and Kelly, serve as corporate officers. Kern also alleged that Maxitrol's corporate counsel—David Kall, Michael Latiff, and McDonald Hopkins LLC—owed him a fiduciary duty as a shareholder in a closely held corporation, which they breached by performing legal work for Kern-Koskela while serving as corporate counsel for Maxitrol. After the trial court, James M. Alexander, J., granted corporate counsel summary disposition, Maxitrol successfully moved for the appointment of a disinterested person pursuant to MCL 450.1495 to investigate whether the continuation of Kern's derivative suit was in the best interests of the corporation. The disinterested person's report concluded that Kern should be allowed to proceed with a derivative claim related to the M-Annex lease and that Kern-Koskela, Koskela, and Maxitrol were necessary parties to the derivative claim. The report further concluded that all Kern's remaining claims, including those against Kelly, lacked merit. Maxitrol moved for dismissal, and Kern-Koskela, Koskela, and Kelly joined the motion. Kern responded, in part, by challenging the constitutionality of MCL 450.1495 as a violation of the separation-of-powers doctrine and also as an improper delegation of the trial court's functions to a nonjudicial court-appointed advisory expert. The trial court rejected Kern's constitutional claims and ultimately concluded that the disinterested person's determination was made in good faith after conducting a reasonable investigation and that, therefore, MCL 450.1495 required dismissal of those claims that the disinterested person determined should not proceed. Accordingly, the trial court dismissed with prejudice all Kern's claims except

the one relating to the M-Annex Lease. After a trial, a jury found that the lease was unfair to Maxitrol and that Maxitrol had incurred damages in the amount of $51,015. The trial court entered a judgment and order reflecting these findings. The trial court denied a number of postjudgment motions, including motions from both sides seeking attorney fees and taxable costs. Kern appealed, and Kern-Koskela, Koskela, Kelly, Maxitrol, and Mertik cross-appealed.

The Court of Appeals *held*:

1. Kern's constitutional challenges to MCL 450.1495 were without merit. First, Kern argued that, to the extent MCL 450.1495 provides a mechanism for summary disposition, it is an unconstitutional infringement of the Michigan Supreme Court's exclusive authority under Const 1963, art 6, § 5, to promulgate rules governing procedure—specifically, MCR 2.116(C)(10). However, the purpose of MCL 450.1495 is to give a corporate board an honest, informed, and objective opinion from a disinterested person on whether allowing litigation to proceed would be in the best interests of the corporation, whereas the purpose of MCR 2.116(C)(10) is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. Because the statute and court rule address different concerns at different stages of a civil proceeding, they do not inherently conflict, and it was therefore unnecessary to reach the separation-of-powers issue. Second, Kern argued that MCL 450.1495 was unconstitutional because it required a trial court to delegate its judicial powers to someone outside the judiciary in violation of Const 1963, art 6, § 27. However, MCL 450.1495 has no such requirement. Rather, under MCL 450.1495, the disinterested person stands in the stead of the corporation, on behalf of which the derivative suit is brought, and exercises the decision-making authority of the corporation in good faith and after reasonable investigation to determine whether the best interests of the corporation will be served if the suit or any portion of the suit continues. The disinterested person does not make recommendations to the trial judge regarding the merits of the claim or claims advanced in the derivative action, and the trial judge makes no ruling on the merits. The statute only requires the court to respect and implement the business judgment of the disinterested person or persons regarding whether any portion of the suit should continue if the process by which the decision was made was reasonable and undertaken in good faith. Finally, the trial court did not err by dismissing the action despite

the existence of factual questions because the trial court dismissed the action solely under MCL 450.1495, not MCR 2.116(C)(10).

2. The trial court did not err by granting summary disposition under MCR 2.116(C)(10) regarding Kern's claims that corporate counsel had breached their fiduciary duties to him. When an attorney is hired to represent a corporation, the client is the corporation rather than the shareholders of that corporation. While a fiduciary relationship may arise between corporate counsel and a shareholder if the nonclient shareholder reposed faith, confidence, and trust in the lawyer's advice or judgment, that reliance must be reasonable, and is not reasonable if the interests of the client and nonclient are adverse or potentially adverse. Kern presented no evidence to suggest that he reposed his faith, confidence, and trust in the advice or judgment of the corporate counsel. Kern communicated with the corporate attorneys through his own personal attorney and did so when demanding to review the corporate financial records. Even if Kern had relied on communications or advice from corporate counsel, that reliance would not have been reasonable under the circumstances given that the context of Kern's contacts with corporate counsel indicated a potentially adverse relationship. Nor was it improper for the trial court to grant summary disposition on this issue before discovery was completed, given that Kern's affidavit set forth no instances in which he had relied upon or trusted corporate counsel's advice or judgment.

3. Kern's argument that the trial court erred by denying his motion to disqualify corporate counsel based on a conflict of interest was not addressed because he failed to provide the relevant transcripts under MCR 7.210(B)(1)(a) and the issue was factual rather than legal.

4. Kern did not establish that statements by the trial court relating to Kern's claims and to his intention to proceed with a statutory claim for removing the individual defendants as corporate officers showed bias under MCR 2.003(C)(1)(a) and (b). Under MCR 2.003(C)(1)(a), a judge must be disqualified from hearing a case in which he or she cannot act impartially or is biased against a party. Judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality. Even remarks made during trial that are critical of or hostile to counsel, the parties, or their cases ordinarily do not establish

disqualifying bias. Under MCR 2.003(C)(1)(b), disqualification is warranted if the judge, based on objective and reasonable perceptions, has either a serious risk of actual bias impacting the due-process rights of a party as enunciated in *Caperton v Massey*, 556 US 868 (2009), or has failed to adhere to the appearance-of-impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. The test for determining whether there is an appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired. The trial judge's statement that he would not consider removing the individual defendants as officers was in keeping with the disinterested person's report that removal would not be in the corporation's best interests. Additionally, the trial judge's comment that Kern's entire case might be dismissed was also based on the report, which concluded that the vast majority of Kern's claims were unfounded. In fact, the judge warned all parties at various times that they should seek settlement because no one would be happy with the outcome. The judge nevertheless conducted the extensive jury trial in a temperate and fair manner.

5. The trial court's judgment was accurate and complete. MCR 2.602(B)(2) provides that a court shall sign a judgment or order when its form is approved by all the parties and if, in the court's determination, it comports with the court's decision. The trial court's judgment reflected the jury's findings that the M-Annex lease was unfair to Maxitrol and that Maxitrol had suffered $51,015 in damages as a result. While Kern argued that the judgment failed to reflect the fact that his claims for breach of fiduciary duty had survived summary disposition in a previous order, a review of the record makes it clear that the jury was asked to decide the very narrow issue of whether the lease was fair to Maxitrol under MCL 450.1545a, which contains no language regarding fiduciary duty. Accordingly, the trial court's judgment was a fair representation of the jury's verdict and comported with the trial court's previous rulings.

6. The trial court did not abuse its discretion by not awarding the parties attorney fees. MCL 450.1497(b) enables a court to order the corporation to pay the reasonable expenses of a plaintiff in a derivative action, including reasonable attorney fees, if it finds that the proceeding has resulted in a substantial benefit to the corporation. While the trial court had the discretion to award fees under this provision, it declined to do so, having concluded that the jury's verdict provided only minimal damages and,

therefore, was not a substantial benefit to Maxitrol, particularly when compared to Kern's expenditure of more than a million dollars. Kern was also not entitled to attorney fees under MCL 450.1562, which provides that a corporation has the power to indemnify a person who was or is a party to a threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation, against expenses, including attorneys' fees, and amounts paid in settlement actually and reasonably incurred by the person in connection with the action or suit, if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders. MCL 450.1562 further provides that indemnification shall not be made for a claim, issue, or matter in which the person has been found liable to the corporation except to the extent authorized in MCL 450.1564c. Along with the fact that MCL 450.1562 seems to relate to indemnification of corporate officers made defendants in actions, Kern had the obstacle of showing that he acted in good faith and in a manner that he reasonably believed to be in Maxitrol's best interests. Kern filed a multicount complaint alleging a variety of claims against the individual defendants, most of which were deemed without merit by the disinterested person. The trial court may have considered the fact that Kern, even if he acted in good faith, did not act reasonably, again as demonstrated by the relatively small award compared to the heavy expenditure. There was also no clear obligation to indemnify Kern pursuant to MCL 450.1564b(4) under Maxitrol's bylaws, which contained similar language to MCL 450.1562. Defendants also were not entitled to attorney fees under MCL 450.1497. MCL 450.1497(a) provides that on termination of a derivative proceeding, the court may order the plaintiff to pay any of the defendant's reasonable expenses, including reasonable attorney fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained in bad faith or without reasonable cause. While the trial court's comments clearly indicated that it questioned the reasonableness of Kern's action, the trial court was within its right to determine that he had not acted in bad faith or without reasonable cause, especially given the fact that he prevailed on the issue of the fairness of the M-Annex lease. In light of the jury's verdict in Maxitrol's favor, it made sense that the trial court would decline to award the individual defendants their attorney fees. In addition, the statute clearly provides that a trial court may order the payment of a defendant's reasonable expenses. Although Maxitrol was a nominal defendant in the technical sense, Kern was standing in

Maxitrol's shoes in this shareholder derivative action. The jury's $51,000 verdict flowed directly to Maxitrol. Therefore, at least under these circumstances, the statute did not seem to apply to Maxitrol.

7. The trial court did not abuse its discretion by failing to award taxable costs under MCR 2.625 or MCL 600.2591 given that no party truly prevailed in the action.

Affirmed.

Dettmer & Dezsi, PLLC (by *Michael R. Dezsi*), for Frank Kern III.

Bowen, Radabaugh & Milton, PC (by *Lisa T. Milton*), for Bonnie Kern-Koskela, Larry Koskela, and Christopher Kelly.

McDonald Hopkins PLC (by *Michael G. Latiff* and *Timothy J. Lowe*) for Maxitrol Company.

Maddin Hauser Roth & Heller, PC (by *Steven M. Wolock* and *Harvey R. Heller*), for Michael Latiff and McDonald Hopkins, LLC.

Before: STEPHENS, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM. Plaintiff appeals by right a final order reforming a lease contract. However, several issues on appeal relate to the trial court's prior orders dismissing a number of plaintiff's claims and granting summary disposition. Several defendants cross-appeal the final order, arguing that they were entitled to attorney fees and costs. Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff, Frank Kern III, and his sister, defendant Bonnie Kern-Koskela, both own a 50 percent interest

in Maxitrol and Mertik Maxitrol. Plaintiff, Kern-Koskela, and Kern-Koskela's husband,[1] Larry Koskela, compose Maxitrol's board of directors. Kern-Koskela serves as the Board's Chair and as the Executive Vice President and Chief Executive Officer of Maxitrol. Koskela serves as the Board's Vice Chair and as President and Chief Operating Officer of Maxitrol. Defendant Christopher Kelly is Maxitrol's Chief Financial Officer and Vice President of Finance. Defendants David Kall, Michael Latiff, and McDonald Hopkins, LLC, served as counsel for the corporate defendants.

In 2012, plaintiff sued the individual defendants and Kelly for shareholder oppression and breach of fiduciary duty, asserting that Kern-Koskela excluded plaintiff from any control or oversight over the corporations and was mismanaging the businesses so as to enrich herself at the expense of the corporations and plaintiff. Plaintiff alleged myriad types of wrongdoing. For purposes of this appeal, the focus is on a lease agreement between Bates Group, LLC, a company wholly owned by the individual defendants, and Maxitrol—the so-called M-Annex lease. Plaintiff also made claims against corporate counsel defendants, arguing that they owed a fiduciary duty to him as a shareholder in a closely held corporation and breached that duty by performing legal work for Kern-Koskela at the same time they were serving as corporate counsel for Maxitrol.

The trial court granted corporate counsel summary disposition, finding that there was no fiduciary relationship between plaintiff and corporate counsel. Thereafter, Maxitrol moved for the appointment of a

[1] We will refer to Kern as plaintiff and to Kern-Koskela and Koskela by name or as "the individual defendants."

"disinterested person" pursuant to MCL 450.1495 to investigate whether the continuation of plaintiff's derivative suit was in the best interests of the corporation. The trial court appointed attorney Joel H. Serlin to act as a disinterested person under the act and charged him with investigating whether the continuation of plaintiff's suit was in the best interests of the corporation. Serlin's July 7, 2014 report concluded:

> As the Disinterested Person, the undersigned has expended considerable time and effort in reviewing and analyzing all of the information, documentation and claims presented. Disputes involving family members of a closely held corporation, where each party is a 50% Shareholder, are among the most difficult to reconcile, and resolve. During the undersigned's lengthy investigation of the issues presented, it was clear that all witnesses, respective counsel, and the submissions presented to the undersigned were done so in a highly professional and forthright manner. After a comprehensive investigation, the undersigned makes the following recommendations:
>
> 1. Plaintiff Frank Kern III should be permitted to proceed with a derivative claim related to the M Annex, and the Annex Lease, entered into by and between Bates Group, LLC and Defendant Maxitrol Company, because those transactions may have constituted usurpation of a corporate opportunity and self-dealing.
>
> 2. As owners of Bates Group, LLC (the landlord), Defendants Bonnie Kern-Koskela and Larry Koskela, as well as Defendant Maxitrol Company (the tenant), are necessary parties to the derivative claim.
>
> 3. The Disinterested Person finds that all remaining claims asserted by Plaintiff Frank Kern III lack merit, and to proceed with those derivative claims would not be in the best interest of the Companies.
>
> 4. The Disinterested Person further finds that Defendant Christopher Kelly has not breached his fiduciary duties or acted improperly, and no derivative claims should proceed against him.

Maxitrol sought dismissal solely in reliance on Serlin's report. Kern-Koskela, Koskela, and Kelly joined the motion. Plaintiff responded, in part, by challenging the constitutionality of MCL 450.1495 as a violation of the separation-of-powers doctrine as well as an improper delegation of the trial court's constitutionally mandated function to a nonjudicial court-appointed advisory expert. The trial court indicated that the motion was more properly characterized as a motion to dismiss brought under MCL 450.1495 and rejected plaintiff's constitutional claims. In a written opinion read into the record, the trial court concluded that Serlin's determination was made in good faith after conducting a reasonable investigation. Consequently, MCL 450.1495 required dismissal of those claims that Serlin determined should not proceed. The trial court dismissed with prejudice plaintiff's third amended complaint against Mertik and Kelly. It also dismissed plaintiff's third amended complaint "as to Defendants Bonnie Kern-Koskela, Larry Koskela, and Maxitrol Company – with the exception of Plaintiff's claim 'related to the M Annex, and the Annex Lease, entered into by and between Bates Group, LLC and Defendant Maxitrol Company' – which may proceed to trial."

The jury found that the lease was unfair to Maxitrol and that Maxitrol was damaged in the amount of $51,015. The trial court denied a number of postjudgment motions.

II. DISMISSALS BASED ON THE DISINTERESTED PERSON'S REPORT

Plaintiff raises constitutional challenges to MCL 450.1495. First, he argues that to the extent the statute dictates a procedure for summary disposition, the statute should be declared unconstitutional as a violation of Michigan's separation-of-powers doctrine,

Const 1963, art 3, § 2; Const 1963, art 6, § 1; and Const 1963, art 6, § 5. Next, plaintiff argues that the statute is also unconstitutional because it commands the judiciary to delegate its constitutionally mandated function and adopt the findings of a nonjudicial court-appointed disinterested person. Finally, plaintiff maintains that, even assuming that the statute is constitutional, the trial court erred by granting summary disposition when there were numerous questions of fact regarding plaintiff's claims for removing Kern-Koskela and Koskela as corporate officers and for an accounting. We reject each of these challenges.

This Court reviews constitutional questions de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). "[A] statute is presumed to be constitutional unless its unconstitutionality is clearly apparent." *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

Plaintiff asserts that MCL 450.1495 violates the separation-of-powers doctrine because the statute impermissibly infringes our Supreme Court's exclusive authority under Const 1963, art 6, § 5, to promulgate rules governing procedure by providing a procedural mechanism for summary disposition. As observed in *McDougall*:

> It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court. Indeed, this Court's primacy in such matters is established in our 1963 Constitution:
>
> > The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.
>
> This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles. See Const 1963, art 3, § 2; *In re 1976 PA*

> *267*, 400 Mich 660; 255 NW2d 635 (1977). Thus, in *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964), we properly emphasized that "[t]he function of enacting and amending judicial rules or practice and procedure has been committed exclusively to this Court . . . ; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will."
>
> At the same time, it cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. *Shannon v Ottawa Circuit Judge*, 245 Mich 200, 223; 222 NW 168 (1928). Rather, as is evident from the plain language of art 6, § 5, this Court's constitutional rule-making authority extends *only* to matters of practice and procedure. *Shannon*, *supra* at 222-223. [*McDougall*, 461 Mich at 26-27.]

This Court need not address plaintiff's constitutional challenge, however, if MCL 450.1495 and MCR 2.116(C)(10) can be construed so as not to conflict. *McDougall*, 461 Mich at 24. "When there is no inherent conflict, '[w]e are not required to decide whether [the] statute is a legislative attempt to supplant the Court's authority.' " *Id*., quoting *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996) (alterations in *McDougall*). Moreover, this Court should " 'not lightly presume that the Legislature intended a conflict, calling into question this Court's authority to control practice and procedure in the courts.' " *McDougall*, 461 Mich at 24, quoting *People v Dobben*, 440 Mich 679, 697 n 22; 488 NW2d 726 (1992). Despite plaintiff's protestations to the contrary, MCL 450.1495 and MCR 2.116(C)(10) do not inherently conflict.

The purpose of MCL 450.1495 was cogently summarized in *Virginia M Damon Trust v North Country Fin Corp*, 406 F Supp 2d 796, 800-801 (WD Mich, 2005), as follows:

> The purpose of the section [MCL 450.1495] is to give a corporate board an honest, informed, and objective opinion on whether maintaining particular litigation is in the best interests of the corporation. Derivative claims are, after all, claims on behalf of the corporation, not an investor. The Michigan statute allows the court to put this determination in the hands of one or more disinterested persons appointed by the court. . . . This statutory scheme is designed to save the corporation money in defending or prosecuting a weak case originally bought as a derivative claim and to give the corporation the incentive to take the case if the derivative claims have merit.

The purpose of MCR 2.116(C)(10) is to "avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003); see also *American Community Mut Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992).

In light of these stated purposes, MCL 450.1495 and MCR 2.116(C)(10) do not conflict. The statute allows a disinterested party to stand in the stead of the corporation and determine, on behalf of the corporation, whether a continuation or dismissal of any portion of the derivative suit is in the best interests of the corporation. The court rule allows for an ongoing suit to be quickly resolved, in the absence of material factual issues, on the merits of the legal questions raised. Thus, MCL 450.1495 addresses whether a suit should be maintained in the first instance to vindicate the rights of the corporation, while MCR 2.116(C)(10) addresses which party prevails on the merits. Under MCL 450.1495, the trial court never reaches the merits of the underlying claims. Rather, the court may only conduct a limited inquiry into the process employed by the disinterested person or persons; i.e., whether the investigation was reasonable and whether the deter-

mination was made in good faith, if the independence of the process is challenged by the plaintiff. Otherwise, the business judgment of the disinterested person or persons is not subject to judicial scrutiny. Thus, the statute and court rule address different concerns at different stages of a civil proceeding. For these reasons, the statute and the court rule do not inherently conflict. *McDougall*, 461 Mich at 24.

Plaintiff also argues that MCL 450.1495 is unconstitutional because it mandates that a trial court delegate its judicial powers to a person or group of persons who are outside the judiciary.

"It is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of the citizens and to construe and apply the laws." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 121; 559 NW2d 54 (1996). As observed in *Carson Fisher*:

> The judicial branch is provided for in article 6 of our state constitution. Const 1963, art 6, § 1 provides:
>
> > The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.
>
> Further, Const 1963, art 6, § 27 provides:
>
> > The supreme court, the court of appeals, the circuit court, or any justices or judges thereof, shall not exercise any power of appointment to public office except as provided in this constitution.
>
> In Michigan, judicial power is vested in the courts under our state constitution. *Johnson v Kramer Bros*

> *Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959). Although the Supreme Court is empowered by the Michigan Constitution to authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments, Const 1963, art 6, § 23, there are no constitutional or statutory authorities permitting a circuit court judge the power to appoint a retired judge or any other person to sit as a court in a civil action. *Brockman v Brockman*, 113 Mich App 233, 237; 317 NW2d 327 (1982). Rather, Const 1963, art 6, § 27 specifically prohibits such action. [*Carson Fischer*, 220 Mich App at 120.]

Plaintiff's delegation-of-duties argument is predicated on a misapprehension of the workings of MCL 450.1495. The statute does not mandate a trial judge to delegate his or her judicial duties to an individual or individuals outside the judicial realm. Rather, as previously noted, the disinterested person or group of persons stands in the stead of the corporation, on behalf of which the derivative suit was brought, and exercises the decision-making authority of the corporation in good faith and after reasonable investigation to determine whether the best interests of the corporation will be served if the suit or any portion of the suit continues. The disinterested person does not make recommendations to the trial judge regarding the merits of the claim or claims advanced in the derivative action, and the trial judge makes no ruling on the merits. The statute only requires the court to respect and implement the business judgment of the disinterested person or persons regarding whether any portion of the suit should continue if the process by which the decision was made was reasonable and undertaken in good faith. For these reasons, plaintiff's constitutional challenge must fail.

Finally, plaintiff argues that even assuming that the statute is constitutional, the trial court erred by grant-

ing summary disposition when there were numerous questions of fact regarding plaintiff's claims for removing Kern-Koskela and Koskela as corporate officers and for an accounting, especially in light of the jury's later determination that the lease was unfair to Maxitrol. However, the trial court did not grant summary disposition under MCR 2.116(C)(10); instead, the trial court dismissed the action under MCL 450.1495:

> In the present motion, Maxitrol argues that certain of Plaintiff's claims should be dismissed as Mr. Serlin determined that continuing their pursuit was not in the corporations' best interests.
>
> In response, Plaintiff argues that Maxitrol's procedural choice to move under MCR 2.116(C)(10) is wrong because it would not allow the Court to consider Mr. Serlin's report. The Court agrees that Plaintiff's motion is one properly brought under MCL 450.1495 (and not MCR 2.116(C)(10)), but Maxitrol also brought the present motion under MCL 450.1495. As a result, the Court rejects each of Plaintiff's arguments related to the Court's ruling on a (C)(10) motion. The Court's ruling is based solely on application of MCL 450.1495.

We reject plaintiff's attempt to frame the issue in a manner that is inconsistent with the lower court record.

III. SUMMARY DISPOSITION IN FAVOR OF CORPORATE COUNSEL

Plaintiff argues that corporate counsel owed him a fiduciary duty under *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509; 309 NW2d 645 (1981), and that the trial court erred by granting corporate counsel summary disposition. We disagree.

Summary disposition under MCR 2.116(C)(10) should be granted when the affidavits or other docu-

mentary evidence show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). To avoid summary disposition under MCR 2.116(C)(10) the party opposing the motion must show, via affidavit or documentary evidence, that a genuine issue of fact exists for trial. *Smith*, 460 Mich at 455-456 n 2; MCR 2.116(G)(4). As a general rule, a motion for summary disposition under MCR 2.116(C)(10) is premature if discovery has not been completed, "unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009).

The trial court did not err when it granted summary disposition on plaintiff's breach-of-fiduciary-duty claim against corporate counsel. Even if the number of shareholders is very small, a corporation exists as a separate legal entity apart from its shareholders. *Fassihi*, 107 Mich App at 514. When an attorney is hired to represent a corporation, the client is the corporation rather than the shareholders of that corporation. *Prentis Family Foundation Inc v Karmanos Cancer Institute*, 266 Mich App 39, 44; 698 NW2d 900 (2005); *Fassihi*, 107 Mich App at 514. A fiduciary relationship may arise between corporate counsel and a shareholder when the nonclient shareholder reposed "faith, confidence, and trust" in the lawyer's advice or judgment. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260; 571 NW2d 716 (1997); see also *Prentis Family Foundation*, 266 Mich App at 43-44. However, that placement of trust, confidence, and reliance must be reasonable, and is not reasonable if the interests of the client and nonclient are adverse or potentially adverse. *Beaty*, 456 Mich at 260-261.

Plaintiff's claim against corporate counsel was not brought on behalf of Maxitrol, but instead on his own behalf as a shareholder of closely held corporations. While the shareholders of a closely held corporation may often "repose[] [their] faith, confidence, and trust" in the advice or judgment of the corporation's counsel, courts cannot assume that this is always true. *Fassihi*, 107 Mich App at 515. In this case, plaintiff presented no evidence to suggest that he reposed his faith, confidence, and trust in the advice or judgment of the corporate counsel. Plaintiff's own affidavit states that he communicated with the corporate attorneys through his own personal attorney and did so when demanding to review the corporate financial records. He has presented nothing to suggest that he had any other significant communications with the corporate attorneys. Given that plaintiff had no communications with corporate counsel, he did not place faith, confidence, or trust in their advice or judgment. Even if plaintiff had relied on communications or advice from the attorney defendants, that reliance would not have been reasonable under the circumstances. The context of plaintiff's contacts with corporate counsel, in which he communicated through his own counsel and demanded to review the corporations' financial records, indicates a potentially adverse relationship with corporate counsel.

Nor was it improper for the trial court to grant summary disposition on this issue before discovery was completed. Plaintiff was obviously aware of his own communications with the attorney defendants and should have been able to identify any instances in which he relied on or trusted their advice or judgment. He did not set forth any such facts in his own affidavit. Because there was no fair likelihood that further discovery would provide support for plaintiff's position,

the court properly granted summary disposition under MCR 2.116(C)(10) before discovery was completed.

IV. DISQUALIFICATION OF CORPORATE COUNSEL

Plaintiff argues that the trial court erred by denying plaintiff's motion to disqualify corporate counsel based on its conflict of interest. We decline to address this issue based on plaintiff's failure to provide the relevant transcripts.

Plaintiff moved to disqualify corporate counsel "under both MRPC 1.13 and 1.7, as well as *Fassihi*." Plaintiff argued that, under MRPC 1.13, a lawyer retained by an organization represents the organization and not the individual shareholders. Plaintiff alleged that corporate counsel had assisted the individual defendants with their "self-dealing and usurpation of corporate opportunity" by reviewing the M-Annex lease. Plaintiff argued that MRPC 1.7(b) required that corporate counsel be disqualified. The trial court denied the motion after a hearing on November 10, 2014. No hearing transcripts have been provided.

MCR 7.210(B)(1)(a) provides:

> The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.977(J)(3) or MCR 6.425(G)(2), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

"[T]his Court will refuse to consider issues for which the appellant failed to produce the transcript." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App

110, 151-152; 715 NW2d 398 (2006). However, the Court may consider an issue if the transcript was not relevant to the issue on appeal or if the issue on appeal is simply one of law. *Leelanau Co Sheriff v Kiessel*, 297 Mich App 285, 289; 824 NW2d 576 (2012). However, here the issue is one of fact. "The determination of the existence of a conflict of interest that disqualifies counsel is a *factual question* that we review for clear error." *Avink v SMG*, 282 Mich App 110, 116; 761 NW2d 826 (2009) (emphasis added). The trial court's cursory order denying plaintiff's motion to disqualify corporate counsel stated simply:

> This matter having come before the Court upon Plaintiff's Motion to Disqualify McDonald Hopkins as Corporate Counsel, the Court having held oral argument and being otherwise apprised therein:
>
> IT IS HEREBY ORDERED that Plaintiffs Motion to Disqualify McDonald Hopkins as Corporate Counsel is denied.

Absent the transcripts, we are unable to discern the trial court's reasoning and, therefore, we decline to address this issue.

V. JUDICIAL BIAS

During a September 12, 2014 pretrial status conference, plaintiff indicated that he intended to proceed with his statutory claim for removal. The trial judge, James M. Alexander, responded that removal "wasn't going to happen." Judge Alexander then threatened to "throw out" plaintiff's case in its entirety. Plaintiff argues that these statements show bias under MCR 2.003(C)(1)(a) and (b).[2] We disagree.

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[2] Our review is not hampered by plaintiff's failure to provide relevant transcripts because the trial court provided a detailed written opinion and order, which fully explained its decision.

"We review a trial court's factual findings regarding a motion for disqualification for an abuse of discretion and its application of the facts to the law de novo." *In re MKK*, 286 Mich App 546, 564; 781 NW2d 132 (2009). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted).

"Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). However, "[a] trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption." *Id*.; see also *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Grounds for disqualification are set forth in MCR 2.003(C), which provides in relevant part:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Under MCR 2.003(C)(1)(a), a judge must be disqualified from hearing a case in which he or she cannot act impartially or is biased against a party. "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible and

overcomes a heavy presumption of judicial impartiality.' " *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001), quoting *Cain*, 451 Mich at 496 (quotation marks and citation omitted). In fact, "a trial judge's remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias." *In re MKK*, 286 Mich App at 567. Under MCR 2.003(C)(1)(b), the test for determining whether there is an appearance of impropriety is " 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.' " *People v Aceval*, 486 Mich 887, 889 (2010) (statement by HATHAWAY, J.), quoting *Caperton*, 556 US at 888.

Plaintiff has failed to meet his heavy burden of demonstrating that Judge Alexander was biased. Judge Alexander's statement that he would not consider removing the individual defendants as officers is in keeping with Serlin's report that removal was not in the corporation's best interests. Additionally, Judge Alexander's comment that plaintiff's entire case might be dismissed was also based on Serlin's report, which concluded that the vast majority of plaintiff's claims were unfounded. In fact, Judge Alexander warned all parties at various times that they should seek settlement because no one would be happy with the outcome. The judge nevertheless conducted the extensive jury trial in a temperate and fair manner.

VI. COMPLETE AND ACCURATE JUDGMENT

Plaintiff argues that the trial court's judgment was incomplete and failed to show that plaintiff prevailed on Counts I and II (breach of fiduciary duty) of his complaint. We disagree.

MCR 2.602(B)(2) provides that a "court shall sign [a] judgment or order when its form is approved by all the parties and if, in the court's determination, it comports with the court's decision." "The proper interpretation and application of a court rule is a question of law, which we review de novo." *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

The jury verdict form posed the question: "Was the lease of the M Annex between Bates Group, LLC and Maxitrol Company fair to Maxitrol at the time of the transaction in 2010?" The jury answered, "No." The second question asked: "Did Maxitrol incur any damage as a result of the M Annex Lease between Bates Group, LLC and Maxitrol Company?" The jury answered, "Yes." Finally, the jury was asked: "What is the amount of damages that Maxitrol Company has incurred as a result of [the] Lease between Bates Group, LLC and Maxitrol Company?" The jury answered, "$51,015."

Defendants' proposed judgment provided:

> This matter having been tried before a jury, and the jury having returned a verdict in this matter in favor of Maxitrol Company and against Defendants Bonnie Kern Koskela and Larry Koskela in the amount of $51,015.00 for overpayment of rent;
>
> IT IS HEREBY ORDERED that a judgment of $51,015.00 is hereby entered in favor of Maxitrol Company and against Defendants Bonnie Kern Koskela and Larry Koskela.

Plaintiff objected to the proposed order, arguing that it failed to reflect the counts on which plaintiff prevailed. Plaintiff looked to the trial court's previous summary disposition order, which provided that the only surviving claims were plaintiff's breach-of-fiduciary-duty claims (Counts I and II). In that order, the trial court noted:

> For all of the foregoing reasons, the Court finds that Mr. Serlin's determination was made "in good faith after conducting a reasonable investigation." As a result, under MCL 450.1495, the Court DISMISSES with prejudice Plaintiff's Third Amended Complaint against Defendants Mertik Maxitrol and Kelly.
>
> The Court also DISMISSES Plaintiff's Third Amended Complaint as to Defendants Bonnie Kern-Koskela, Larry Koskela, and Maxitrol Company — with the exception of Plaintiff's claim "*related to the M Annex, and the Annex Lease*, entered into by and between Bates Group, LLC and Defendant Maxitrol Company" — which may proceed to trial. [Emphasis added.]

The trial court rejected plaintiff's proposed order and ultimately entered an order to reflect that the jury determined the M-Annex lease to be unfair:

> This matter having been tried before a jury, and the jury having determined that the lease between Maxitrol Company and Bates Group LLC was unfair to Maxitrol Company and that the Maxitrol Company suffered damages in the amount of $51,015.00 for overpayment of rent;
>
> IT IS HEREBY ORDERED that a judgment of $51,015.00 is hereby entered in favor of Maxitrol Company and against Defendants Bonnie Kern Koskela and Larry Koskela.

A review of the record makes it clear that the jury was asked to decide the very narrow issue of whether the lease was fair to Maxitrol under MCL 450.1545a, which provides, in relevant part:

> (1) A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:

> (a) The transaction was fair to the corporation at the time entered into.
>
> (b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the board, committee, or independent director or directors authorized, approved, or ratified the transaction.
>
> (c) The material facts of the transaction and the director's or officer's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction.
>
> (2) For purposes of subsection (1)(b), a transaction is authorized, approved, or ratified if it received the affirmative vote of the majority of the directors on the board or the committee who had no interest in the transaction, though less than a quorum, or all independent directors who had no interest in the transaction. The presence of, or a vote cast by, a director with an interest in the transaction does not affect the validity of the action taken under subsection (1)(b).

Notably absent from the statute is any language regarding fiduciary duty. Despite how plaintiff couches the issue, the very narrow question presented to the jury was whether the M-Annex lease was fair to Maxitrol. The jury determined that it was not and that Maxitrol suffered damages of approximately $51,000. The judgment was a fair representation of the jury's verdict and comported with the trial court's previous rulings.

VII. AMENDING THE JUDGMENT

Plaintiff argues that the trial court erred by denying plaintiff's motion to amend the judgment to provide for additional equitable relief. We disagree.

An appellate court reviews a trial court's ruling on a motion to amend a judgment for an abuse of discretion.

Ligon v Detroit, 276 Mich App 120, 124; 739 NW2d 900 (2007). To the extent these issues involve matters of statutory interpretation, they present questions of law that are reviewed de novo. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604-605; 886 NW2d 135 (2016).

Again, MCL 450.1545a(1) provides:

> A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:
>
> (a) The transaction was fair to the corporation at the time entered into.

Plaintiff reads the statute as one that prohibits "self-dealing." In so doing, plaintiff seeks to rewrite the statute to provide substantive relief when, in fact, the statute provides neither a substantive cause of action nor a remedy. Our Supreme Court has admonished:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to ascertain and give effect to the intent of the Legislature. We begin this analysis by examining the language of the statute itself, as this is the most reliable evidence of that intent. If the language of a statute is clear and unambiguous, we presume that the Legislature intended the meaning clearly expressed. Accordingly, the statute must be enforced as written and no further judicial construction is permitted. [*Gardner v Dep't of Treasury*, 498 Mich 1, 5-6; 869 NW2d 199 (2015) (citations omitted).]

The plain language of MCL 450.1545a makes no reference at all to "self-dealing." It does not set forth the elements of a cause of action, nor does it list specific

remedies. Instead, the plain language of the statute provides that the mere fact that a transaction involves an officer of a corporation does not mean that the transaction should be enjoined, set aside, or give rise to an award of damages or other sanctions if it is shown that the transaction was fair to the corporation at the time. The statute's focus is on whether a transaction is fair to the corporation, not the behavior of individual corporate officers.

In this case, the jury was not asked to judge the corporate officers' actions, but the jury did determine that the transaction was *not* fair to Maxitrol. In light of that finding, plaintiff sought to rescind the lease agreement entirely. However, plaintiff alternatively argued that "[a]s an alternative to rescission, the Court could reform the lease consistent with the terms as testified to by Plaintiff's real estate expert Mr. Milia." At the hearing on the motion to amend, the trial court cited *Thomas v Satfield Co*, 363 Mich 111, 123; 108 NW2d 907 (1961), and found that it was within the court's power to reform the lease: "The Court is going to avail itself of that opportunity and reform the lease . . . in conformance with the jury verdict . . . ." *Thomas* presented a similar situation to the case at bar involving two closely held corporations that conducted business with one another. After it was determined that the lease terms were not fair to one of the corporations, the trial court in that case reformed the lease. This Court affirmed, noting that "[o]n all the facts, it appears that the reformed lease reaches the result which all parties contemplated as being fair prior to its execution." *Thomas*, 363 Mich at 123.

In reforming the lease in this case, the trial court referred to its equitable powers under *Thomas* and made no reference to MCL 450.1545a. The jury had

clearly rejected Milia's opinion that the fair market value of the rental was $5.60/square foot. Therefore, the trial court properly reformed the lease, not on the basis of Milia's testimony, but to reflect the jury's verdict and provide a result that was fair to Maxitrol. Plaintiff, having requested reformation, should not be heard to complain about receiving what he asked for. A party may not claim error "premised on an error to which he contributed by plan or negligence." *People v Bosca*, 310 Mich App 1, 29; 871 NW2d 307 (2015), app for lv held in abeyance 872 NW2d 492 (Mich, 2015).

VIII. ATTORNEY FEES

Both plaintiff and the individual defendants believe they are entitled to attorney fees. We disagree.

An appellate court reviews a trial court's decision on attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

As to plaintiff's claim for attorney fees, the individual defendants aptly note that plaintiff did not seek attorney fees under the section of the act that enables the court to award costs and attorney fees in a derivative action. MCL 450.1497(b) provides:

> On termination of the derivative proceeding, the court *may* order 1 of the following:
>
> * * *
>
> (b) The corporation to pay the plaintiff's reasonable expenses, including reasonable attorney fees, incurred in the proceeding if it finds that the proceeding has *resulted in a substantial benefit* to the corporation. The court shall

> direct the plaintiff to account to the corporation for any proceeds received by the plaintiff in excess of expenses awarded by the court, except that this shall not apply to a judgment rendered for the benefit of an injured shareholder only and limited to a recovery of the loss or damage sustained by him or her. [Emphasis added.]

Although plaintiff cited MCL 450.1497(b) in his verified bill of taxable costs, he did not cite this provision or argue that it was applicable in his motion to amend the judgment. Nor does he mention the provision on appeal except in a footnote to his reply brief. In any event, plaintiff is not entitled to attorney fees and costs under MCL 450.1497. The statute specifically states that a court "may" order a corporation to pay the plaintiff's reasonable expenses and fees if it finds that the derivative action resulted in a substantial benefit to the corporation. "[T]he term 'may' is relevantly defined as being 'used to express opportunity or permission . . . .' In general, our courts have said that the term 'may' is 'permissive,' as opposed to the term 'shall,' which is considered 'mandatory[.]' " *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) (citations omitted). The trial court, therefore, had the discretion to award fees and declined to do so, having concluded that the jury's verdict provided only "de minimis damages" and, therefore, was not a substantial benefit to Maxitrol. Additionally, the trial court seemed to conclude that the $51,000 verdict reflected that plaintiff's expenditure of more than a million dollars was not "reasonable" under the statute.

Instead of addressing MCL 450.1497, plaintiff cites MCL 450.1562 and MCL 450.1564b(4) for an award of attorney fees. MCL 450.1562 provides:

> A corporation has the power to indemnify a person who was or is a party or is threatened to be made a party to a threatened, pending, or completed action or suit by or in the

> right of the corporation to procure a judgment in its favor by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other enterprise, whether for profit or not, against expenses, including attorneys' fees, and amounts paid in settlement actually and reasonably incurred by the person in connection with the action or suit, *if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation* or its shareholders. Indemnification shall not be made for a claim, issue, or matter in which the person has been found liable to the corporation except to the extent authorized in [MCL 450.1564c]. [MCL 450.1562 (emphasis added).]

There is a dearth of caselaw interpreting § 1562. In one unpublished case, *Hampton Block Co v Hampton*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2000 (Docket No. 211468), the plaintiff argued that the trial court abused its discretion by failing to award him attorney fees in his suit against his brother, a fellow officer in the company. This Court considered MCL 450.1562, along with MCL 450.1563, which provides:

> To the extent that a director or officer of a corporation has been successful on the merits or otherwise in defense of an action, suit, or proceeding referred to in [MCL 450.1561 or 1562], or in defense of a claim, issue, or matter in the action, suit, or proceeding, the corporation shall indemnify him or her against actual and reasonable expenses, including attorneys' fees, incurred by him or her in connection with the action, suit, or proceeding and an action, suit, or proceeding brought to enforce the mandatory indemnification provided in this section.

The Court concluded:

> Under the plain language of those statutes, [the plaintiff] is not entitled to attorney fees. The statutes indicate that directors and officers are protected in *defending* themselves against claims by a shareholder and do not compensate plaintiffs who bring suit against officers and directors of a corporation. MCL 450.1563; MSA 21.200(563) clearly states that indemnification applies when an officer or director is successful "in *defense* of an action" (emphasis added). Consequently, there is no support under either statute for [the plaintiff's] contention that he is entitled to attorney fees in connection with the suit that he brought against [his brother]. [*Hampton*, unpub op at 3.]

Although unpublished opinions are not binding precedent, MCR 7.215(C)(1), an unpublished opinion may be persuasive or instructive, *In re Kanjia*, 308 Mich App 660, 668 n 6; 866 NW2d 862 (2014). Along with the fact that these statutes seem to logically apply to indemnification of corporate officers who are made defendants in actions, plaintiff had the obstacle of showing that he acted in good faith and in a manner that he reasonably believed to be in Maxitrol's best interests. Again, this language gave the trial court a fair amount of discretion. Plaintiff filed a multicount complaint alleging a variety of claims against the individual defendants. Most of these claims were deemed without merit in Serlin's report. The trial court may have considered the fact that plaintiff, even if he acted in good faith, did not act reasonably, again as demonstrated by the relatively de minimis award in relation to the heavy expenditure.

Next, MCL 450.1564b(4) provides: "A provision in the articles of incorporation or bylaws, a resolution of the board or shareholders, or an agreement making indemnification mandatory shall also make the advancement of expenses mandatory unless the provision, resolution, or agreement specifically provides

otherwise." Article XI, § 11.02 of Maxitrol's bylaws somewhat mirrors MCL 450.1562. It provides:

> 11.02 Derivative Actions. Subject to all of the provisions of this Article XI, the corporation shall indemnify any person who was or is a party to or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director or officer of the corporation, or, while serving as a director or officer of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust or other enterprises, whether for profit or not, against expenses (including attorneys' fees) and amounts paid in settlement actually and reasonably incurred by the person in connection with such action or suit *if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation or its shareholders*. However, indemnification shall not be made for any claim, issue, or matter in which such person has been found liable to the corporation unless and only to the extent that the court in which such action or suit was brought has determined upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnification for the reasonable expenses incurred. [Emphasis added.]

However, Article XI, § 11.05 further provides:

> Contract Right: Limitation on Indemnity. The right to indemnification conferred in this Article XI shall be a contract right, and shall apply to services of a director or officer as an employee or agent of the corporation as well as in such person's capacity as a director or officer. Except as provided in Section 11.03 of these Bylaws, the corporation shall have no obligations under this Article XI to indemnify any person in connection with any proceeding,

> or part thereof, initiated by such person without authorization by the Board of Directors.

Therefore, there is no clear obligation to indemnify plaintiff under Maxitrol's bylaws. Article XI, § 11.02 requires that the director act in good faith and in a manner reasonably believed to be in Maxitrol's best interest. Article XI, § 11.05 provides that a director is not entitled to indemnification if a proceeding is initiated without the authorization of the board of directors.

Just as plaintiff was not, as a matter of law, entitled to attorney fees, neither were the individual defendants or Maxitrol under MCL 450.1497. MCL 450.1497 provides in part:

> On termination of the derivative proceeding, the court may order 1 of the following:
>
> (a) The plaintiff to pay any of the defendant's reasonable expenses, including reasonable attorney fees, incurred in defending the proceeding *if* it finds that the proceeding was commenced or maintained *in bad faith or without reasonable cause*. [Emphasis added.]

Again, "may" indicates that the trial court has discretion in ordering attorney fees. Specifically, the trial court *may* order costs *if* it determines that the action was commenced or maintained in bad faith or without reasonable cause. In this case, the trial court's comments clearly indicate that it questioned the reasonableness of plaintiff's action. Both the trial court and Serlin noted that Maxitrol was a profitable company that was properly managed. Still, the trial court was within its right to determine that plaintiff did not act in bad faith or without reasonable cause, especially given the fact that plaintiff prevailed on the issue of the fairness of the M-Annex lease. In light of the jury's verdict in Maxitrol's favor, it makes sense that the trial

court would decline to award the individual defendants their attorney fees. In addition, Maxitrol has another problem. The statute clearly provides that a trial court may order the payment of *defendant's* reasonable expenses. True, Maxitrol was a nominal defendant in the technical sense, but plaintiff was standing in Maxitrol's shoes in this shareholder derivative action. The jury's $51,000 verdict flowed directly to Maxitrol. Therefore, at least under these particular circumstances, the statute does not appear to apply to Maxitrol.

IX. TAXABLE COSTS

Finally, each party claims that the trial court erred by failing to award taxable costs. We disagree.

An appellate court reviews a trial court's decision on attorney fees and costs for an abuse of discretion. *Smith*, 481 Mich at 526.

MCR 2.625 provides, in relevant part:

> (A) Right to Costs.
>
> (1) In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.
>
> (2) Frivolous Claims and Defenses. In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.
>
> (B) Rules for Determining Prevailing Party.
>
> * * *
>
> (2) Actions With Several Issues or Counts. In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing

> on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

Additionally, MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

Plaintiff is not entitled to costs. His claim for costs is based on his assertion that he prevailed in full on Counts I and II of his third amended complaint. Plaintiff did not come close to prevailing on each of the allegations couched within Counts I and II of his third amended complaint. In fact, following Serlin's report,

many of these allegations were dismissed. However, neither were the individual defendants entitled to taxable costs. Most telling is the verdict against them in the amount of $51,000.

The trial court is entitled to discretion in awarding taxable costs. The court rule indicates that a prevailing party is entitled to costs, "*unless* . . . the court directs otherwise, for reasons stated in writing." Here, the trial court observed:

> This case has a long, torturous and pretty well-known history to the Court in parts. Mr. Kern has filed not less than three lawsuits seeking relief because he claims that he was--has been--because he claims that the directors, being his sister and brother-in-law, have entered into a willfully unfair and oppressive conduct [sic] and thus other damages.
>
> Plaintiffs filed a multi-count complaint. As a result of that, the Court appointed a disinterested director. This disinterested director came in and as a result of his report, in his long and--and completely thorough investigation, the Court dismissed all of the counts in the complaint, save the count regarding the--the lease between, basically the sister, Ms. Kern-Koskela and her husband and the company for a piece of land in Southfield.
>
> The case was tried to a jury. The jury came back and found the lease was unfair and awarded, really based on the type of case this was, de minimis damages in the amount of $50,000--$51,015. As a result, since the Court has--since the jury has found the lease unfair, the Court is, pursuant to MCL 450.1545a(1), the Court has pretty large powers to reform the lease.
>
> Under the Court's equitable powers, once the lease was determined to be unfair, the Court--Court is within its power to reform the lease, Thomas v Satfield, 363 Michigan 111. The Court is going to avail itself of that opportunity and reform the lease . . . in conformance with the jury verdict and will rule that the lease, for year six through ten, the lease rates are year six, $10.79 per square foot

> triple net; year seven, $11.29 per square foot triple net; year eight, $11.79 per square foot triple net; year nine, $12.29 per square foot triple net and year ten, $12.79 per square foot triple net.
>
> Next, the Court has to deal with the award for attorney fees--of attorney fees. The individual defendants, the corporation and the plaintiff has--have all sought reim--reimbursement for their attorney fees; however, in this case, neither party prevailed in full. Therefore, the Court will deny all requests for attorney fees and the individuals and the corporation will remain personally liable for their attorney's fees.
>
> The Court has also found that the actions of the defendant directors, although they may have been unfair, did not rise to the level of willfully unfair and oppressive conduct, far from it. While these bro--this brother and sister may still be upset about the fact that somebody got a nicer bike than the other one got 20 or 30 or 40 or 50 years ago, they don't get along. Okay.
>
> The business is successful. The business is running profitably. Everybody is making money on this deal. There is no willful and oppressive conduct. They don't like each other, but since the Court has found that there is no willful and oppressive conduct, the Court does not have authority or jurisdiction to do anything about corporate governance and therefore, the motion to amend the judgment and for equitable relief, is denied.

The trial court's statement indicates that no party truly prevailed in this action. It properly exercised its discretion in denying taxable costs to plaintiff and the individual defendants.

Affirmed.

STEPHENS, P.J., and K. F. KELLY and MURRAY, JJ., concurred.

JONES v JONES

Docket No. 334937. Submitted June 6, 2017, at Lansing. Decided June 22, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 911.

Plaintiff, Jeremy P. Jones, filed for divorce in the Barry Circuit Court, Family Division, alleging that he was not the legal father of a child, AJ, who was conceived through in vitro fertilization (IVF) involving an anonymous sperm donor and born to defendant, Sharon D. Jones, during the parties' marriage. The parties were married in 1998 and had a son, DJ, in 2001. In 2008, plaintiff moved to Bridgman, and defendant and DJ moved to Detroit. Defendant gave birth to AJ in 2013. Plaintiff testified that he had revoked his consent to the IVF procedures in January 2010 and that while he had driven defendant to a few appointments, he had not been aware that defendant was actively attempting to conceive a child. Plaintiff filed for divorce in 2015. The parties disputed the custody and support of DJ as well as whether plaintiff was AJ's legal father. During trial, the parties entered into a settlement agreement stipulating that plaintiff was not AJ's legal father, and the court accepted the stipulation. Defendant appealed, arguing that the court erred when it found that plaintiff was not AJ's legal father and when it entered a judgment under MCR 2.602(B)(3) that did not comport with the court's oral ruling at trial.

The Court of Appeals *held*:

1. Ordinarily, the fact that a party entered into a settlement agreement precludes appellate review; however, Michigan courts have limited the enforcement of settlement agreements when the agreements concern the well-being of children. In this case, because the settlement agreement at issue completely eliminated any right AJ may have to seek support from plaintiff, the issue whether the trial court properly terminated plaintiff's paternity under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., was reviewed for clear error.

2. The RPA was the proper statute to apply for the determination of AJ's paternity. The RPA expressly governs an action to determine that a presumed father is not a child's father, MCL 722.1435(4), and defines presumed father as a man who is

presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth, MCL 722.1433(e). Presuming paternity by the husband when a married couple has undergone assisted reproductive technology (ART) is consistent with the Legislature's general policy of recognizing the legitimacy of a child born through ART to a married couple; accordingly, the RPA applies to a child born through IVF. In this case, plaintiff was the presumed father of AJ by virtue of his marriage to defendant at the time AJ was conceived and born.

3. Under MCL 722.1441(2), if a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the presumed father within three years after the child's birth or if the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother. Under MCL 722.1443(4), the court may refuse to enter an order stating that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. MCL 722.1443(4) also provides that if the court refuses to enter the order, the court must state its reasons for refusal on the record. In this case, the trial court did not clearly err by determining that AJ was born out of wedlock. The parties had been separated for many years and lived separate lives on opposite sides of the state, plaintiff made no genetic donation to the IVF process, plaintiff expressly revoked his consent to the IVF procedures, plaintiff had no meaningful contact or bond with the child after the child was born, and the parties stipulated in court proceedings that plaintiff was not the father. Additionally, the trial court did not err when it found that the best-interest factors favored approval of the settlement agreement. The trial court was not required to make any explicit findings on the record with respect to any specific factor because MCL 722.1443(4) only requires that findings be made on the record when the court refuses to enter the order, and in this case, the court did enter the order.

4. MCR 2.602(B)(3) provides, in pertinent part, that the court clerk shall submit a proposed judgment to the court if no written objections to the proposed judgment are filed within seven days after the court clerk received the proposed judgment and that the court shall sign the proposed judgment if, in the court's determination, the proposed judgment comports with the court's decision. However, if the proposed judgment does not comport with the court's decision, then the court shall direct the clerk to notify the

parties to appear before the court on a specified date for settlement of the matter. In this case, the judgment that the trial court entered did not comport with its oral ruling. At the close of the divorce trial, the court stated that plaintiff would be required to provide all transportation to and from his parenting time with DJ, but plaintiff's proposed judgment instead provided that defendant was responsible for all transportation to and from parenting time. Defendant objected, and the trial court held a hearing regarding the objection. The trial court denied defendant's objections on the basis of defendant's failure to provide a copy of the transcript of the prior proceeding. The trial court erred as a matter of law when it rejected defendant's objections on the basis of defendant's failure to provide a transcript because there is no court rule or caselaw that requires a party who objects to the entry of a proposed judgment under MCR 2.602(B)(3) to provide a transcript. Therefore, the judgment was vacated and remanded to the trial court with instructions to enter a corrected judgment providing that plaintiff is responsible for all transportation to and from his parenting time with DJ and providing the correct spelling of AJ's name and date of birth.

Affirmed in part; vacated in part; case remanded for further proceedings.

PARENT AND CHILD — REVOCATION OF PATERNITY ACT — ASSISTED REPRODUCTIVE TECHNOLOGY — CHILDREN BORN THROUGH IN VITRO FERTILIZATION.

The Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., provides the procedures for courts to determine the paternity of children in certain situations; the RPA expressly governs an action to determine that a presumed father is not a child's father, MCL 722.1435(4), and defines presumed father as a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth, MCL 722.1433(e); presuming paternity by the husband when a married couple has undergone assisted reproductive technology (ART) is consistent with the Legislature's general policy of recognizing the legitimacy of a child born through ART to a married couple; the RPA applies to a child born through in vitro fertilization.

Speaker Law Firm (by *Jennifer M. Alberts* and *Liisa R. Speaker*) for Sharon D. Jones.

Before: SWARTZLE, P.J., and SAAD and O'CONNELL, JJ.

SAAD, J. Defendant appeals the judgment of divorce that the trial court entered. This case raises an issue of first impression regarding whether the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., is applicable to a child born through in vitro fertilization (IVF). For the reasons provided in this opinion, we hold that the RPA does apply in these circumstances, and we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

The parties' testimony was somewhat unclear regarding specific dates. Defendant and plaintiff married in 1998. On November 2, 2001, their son, DJ, was born. The parties lived together until approximately 2008, with the exception of one month when defendant and DJ lived apart from plaintiff. Around 2008, plaintiff moved to Bridgman in Berrien County to be closer to the Native American tribe to which he belonged, and defendant and DJ moved to Detroit. The parties maintained separate residences, but plaintiff would visit defendant approximately once a week through 2012 or 2014.

On November 18, 2013, defendant gave birth to a daughter, AJ, conceived by using assisted reproductive technology (ART)—in particular, IVF. The parties disputed the extent of plaintiff's involvement in AJ's conception. Plaintiff testified that he revoked his consent to the procedures in January 2010. Though he might not have provided defendant with a copy of the revocation, he testified that defendant was aware of his revocation. Plaintiff further testified that AJ's conception involved an anonymous sperm donor. Although plaintiff conceded to driving defendant to a few appointments, he believed that these appointments were

for other purposes, such as harvesting eggs for future use, rather than defendant actively attempting to conceive a child.

In 2015, plaintiff filed the instant suit for divorce. Plaintiff alleged that AJ was born out of wedlock and that, consequently, he was not AJ's legal father. The parties also disputed the custody and support of DJ. During trial, the parties entered into a settlement, which stipulated that plaintiff was not AJ's legal father, and the trial court accepted the stipulation.[1]

II. ANALYSIS

A. APPLICABILITY OF THE RPA

On appeal, defendant argues that the trial court erred when it found that plaintiff was not AJ's legal father. We disagree.

Ordinarily, the fact that a party entered into a settlement precludes appellate review. See *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001) ("A party cannot stipulate a matter and then argue on appeal that the resultant action was error."). However, our courts have limited the enforcement of settlement agreements when they concern the well-being of children. See *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994) (stating that a trial court is not bound to accept the parties' agreement to child custody but can accept it if it is in the child's best interests); *Johns v Johns*, 178 Mich App 101, 105-106; 443 NW2d 446 (1989) (holding that the plaintiff, who had acted as father to the children at issue for 15 years, could not disclaim paternity via stipulation during a custody battle). By revoking plain-

[1] At the conclusion of trial, the trial court also awarded sole legal and physical custody of DJ to defendant.

tiff's paternity, the settlement agreement at issue completely eliminates any right AJ may have to seek support from plaintiff. Accordingly, despite the parties' settlement agreement, we will analyze whether the trial court properly terminated plaintiff's paternity under the RPA.

This Court reviews a trial court's factual findings in proceedings under the RPA for clear error. *Demski v Petlick*, 309 Mich App 404, 431; 873 NW2d 596 (2015). "The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake." *Id*. at 431-432 (quotation marks and citation omitted). This Court reviews de novo the interpretation and application of statutory provisions. *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595 (2014).

"When interpreting a statute, a court must give effect [to] the Legislature's intent." *Id*. To determine the legislative intent, this Court first looks to the language of the statute itself, and if the language is unambiguous, "it must be enforced as written." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). Words of statutes are given their plain and ordinary meanings, while legal terms are construed according to their legal meanings. *Lech v Huntmore Estates Condo Ass'n (On Remand)*, 315 Mich App 288, 290; 890 NW2d 378 (2016). Statutes must be read as a whole, and this Court may not read statutory provisions in isolation. *Milot v Dep't of Transp*, 318 Mich App 272, 278; 897 NW2d 248 (2016).

The RPA provides the procedures for courts to determine the paternity of children in certain situations. Although defendant argues that the RPA is not the proper vehicle by which to determine AJ's paternity, the RPA expressly "governs an action to determine that a presumed father is not a child's father,"

MCL 722.1435(4), and this is the precise situation before us. The RPA defines a presumed father as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1433(e). Indeed, presuming paternity by the husband when a married couple has undergone ART to conceive is not contrary to the purpose of the RPA. In fact, it is consistent with the Legislature's general policy of recognizing the legitimacy of a child born through ART to a married couple. See, e.g., MCL 333.2824(6); MCL 700.2114(1)(a). Thus, as a starting point, plaintiff is the presumed father by virtue of his marriage to defendant at the time AJ was conceived and born, and the RPA is indeed the statute that applies to determine paternity.

The RPA provides that a presumed father who files for divorce may be declared to not be a child's father as follows:

> If a child has a presumed father, a court may determine that the child is born out of wedlock[2] for the purpose of establishing the child's paternity if an action is filed by the presumed father within 3 years after the child's birth or if the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act. [MCL 722.1441(2).]

Here, on the basis of the testimonial evidence, the trial court found that plaintiff made no genetic donation

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[2] We note that the RPA does not define the term "born out of wedlock"; however, the commonly understood meaning is reflected in the definition supplied by the Paternity Act, MCL 722.711 *et seq*., which provides that one aspect of the definition is to be "born or conceived during a marriage but not the issue of that marriage," MCL 722.711(a). It is this definition that is relevant here.

in the IVF process and that AJ was not a product of the parties' marriage. The trial court's findings are supported by the record and are not clearly erroneous. Plaintiff testified that he revoked his consent to defendant's IVF procedures in January 2010 and provided a copy of his revocation of consent to the trial court. Although plaintiff allegedly failed to provide a copy of the revocation of consent to defendant, plaintiff testified that defendant was aware of his revocation because the first fertility center they used subsequently refused to give defendant treatment. At the second fertility center used by defendant, the parties signed a financial waiver indicating that, for financial purposes, defendant should be treated as an unmarried woman. Further, although defendant testified that plaintiff was aware of her ongoing efforts to become pregnant, she also testified that she only told plaintiff of the procedures to which he drove her. Importantly, the parties have lived in separate residences on opposite sides of the state since approximately 2008. And finally, it is significant that the parties entered into a settlement that specifically provided that plaintiff is not the father. While this settlement may not be controlling, it is nonetheless substantial evidence on the matter at issue. In light of this evidence, we are not left with a definite and firm conviction that the trial court clearly erred when it found that AJ was not issue of the marriage and therefore was born out of wedlock under the RPA.

If a trial court determines that a child was born out of wedlock, the court nonetheless may refuse to enter an order stating that the child was born out of wedlock if it would not be in the child's best interests to do so. MCL 722.1443(4) provides that

> [a] court may refuse to enter an order . . . determining that a child is born out of wedlock if the court finds

> evidence that the order would not be in the best interests of the child. The court shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:
>
> (a) Whether the presumed father is estopped from denying parentage because of his conduct.
>
> (b) The length of time the presumed father was on notice that he might not be the child's father.
>
> (c) The facts surrounding the presumed father's discovery that he might not be the child's father.
>
> (d) The nature of the relationship between the child and the presumed or alleged father.
>
> (e) The age of the child.
>
> (f) The harm that may result to the child.
>
> (g) Other factors that may affect the equities arising from the disruption of the father-child relationship.
>
> (h) Any other factor that the court determines appropriate to consider.

Here, as defendant acknowledges, the trial court stated that it reviewed the best-interest factors under MCL 722.1443(4) and found that they favored approving the settlement. Defendant notes that the court did not make any explicit findings with respect to any specific factor, but MCL 722.1443(4) is quite clear on this point—it only requires such findings and reasons to be made on the record when it *refuses* to enter the order, i.e., when it does not alter the presumed father's status.[3] Therefore, because the trial court ultimately

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[3] To be clear, a court is required to always perform a best-interest evaluation under MCL 722.1443(4). Otherwise, the court would not be aware that the best interests indicate that the revocation should not be granted. Cf. *Helton v Beaman*, 497 Mich 1001, 1001 (2015) (stating that any order " 'setting aside a paternity determination' . . . is subject to a best interest analysis under MCL 722.1443(4)"). That being said, the court is only required to "state its reasons *for refusing to enter an order*

did alter the presumed father's status, the court clearly was not required to express its particular reasons. In any event, our review of the record does not leave us with a definite and firm conviction that the trial court made a mistake when it found that the best-interest factors favored approving the settlement. Most importantly, there is no bond between plaintiff and AJ, and there are no signs that any bond will materialize in the future because plaintiff has never demonstrated any desire to connect in any way with AJ, let alone as her father. The court heard the testimony and accordingly made its findings based on the best interests of the child, as required by the statute.[4]

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on the record." MCL 722.1443(4) (emphasis added). The Legislature's view here is understandable because at this point in the analysis, a court would have already found that the child is not the issue of the presumptive father. Hence, if a court rules that paternity remains despite the fact that the child is not the issue of the presumptive father, express reasons need to be placed on the record because of the unusual nature of the "conflicting" rulings.

[4] We reject defendant's argument that a court must find that the best-interest factors have been proved by clear and convincing evidence in order to revoke paternity. We note that nothing in the statute indicates that this level of proof is necessary. And the case defendant relies on, *Demski*, 309 Mich App at 431, did not suggest that this level of proof was necessary either. In *Demski*, the Court simply noted that while the trial court used this elevated evidentiary standard, the statute did not require it. *Id*. Hence, when a statute does not provide an evidentiary burden, the default "preponderance of the evidence" standard is utilized. See *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993). Further, defendant's reliance on intestate succession, MCL 700.2114(1), and child custody matters is misplaced because there is no question that this is neither an intestate succession nor a custody determination, see *Helton v Beaman*, 304 Mich App 97, 135; 850 NW2d 515 (2014) (SAWYER, P.J., dissenting) ("[T]his is only a revocation-of-paternity case and not a child custody case."). Indeed, the child's custody here will not change because the child had custody with defendant before the entry of the court's order and the child will continue to do so afterward. See *Brown v Loveman*, 260 Mich App 576, 585; 680 NW2d 432 (2004) ("When a modification of cus-

We further take this moment to address a concern defendant raises on appeal. Defendant opines that to allow the RPA to govern situations in which a child was born through IVF with the use of an anonymous sperm donor would allow any husband to easily revoke paternity later, regardless of the husband's intention and involvement during the IVF process. We believe that the best-interest factors of MCL 722.1443(4) already provide sufficient safeguards for such situations. In particular, MCL 722.1443(4)(a) allows a court to consider "[w]hether the presumed father is estopped from denying parentage because of his conduct." If a husband had full knowledge that his wife was attempting to get pregnant through IVF with an anonymous sperm donor and supported the process, it would be a simple matter for a court to find that the child's best interests would favor not revoking paternity under these circumstances. However, that situation is quite different from the facts in this case, in which the husband and wife had been separated for many years and lived separate lives on opposite sides of the state, the husband expressly revoked his consent to the IVF procedure, the husband had no meaningful contact or bond with the child after the child was born, and the parties already stipulated in court proceedings that plaintiff is not the father.

B. FAILURE OF WRITTEN ORDER TO COMPORT WITH ORAL PRONOUNCEMENTS

Defendant also argues that the trial court erred when it entered a judgment proposed by plaintiff under

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tody . . . would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest."). We note that defendant does not claim that any constitutional concerns require an elevated evidentiary burden; therefore, we decline to address that potential.

MCR 2.602(B)(3) that did not comport with the court's oral ruling at trial. Specifically, defendant argues that the judgment incorrectly provides that *defendant* is responsible for all transportation related to plaintiff's exercise of parenting time with DJ when the court previously stated that *plaintiff* is to be responsible. Defendant also notes that the proposed order misspelled AJ's name and used an incorrect date of birth. We agree.

Whether the judgment was properly entered pursuant to MCR 2.602(B) involves the interpretation and application of court rules, which are questions of law that this Court reviews de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). "[A]n error in a ruling or order, or an error or defect in anything done or omitted by the court . . . is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A).

MCR 2.602(B)(3) provides:

> Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.
>
> (a) If no written objections are filed within 7 days, the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the

> court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.
>
> (b) Objections regarding the accuracy or completeness of the judgment or order must state with specificity the inaccuracy or omission.
>
> (c) The party filing the objections must serve them on all parties as required by MCR 2.107, together with a notice of hearing and an alternative proposed judgment or order.

The judgment the trial court entered does not comport with its oral ruling. At the close of the divorce trial, the court stated,

> At this point I'm going to require the father to provide all transportation to and from parenting time. Transportation issues may be reviewed next summer if either party makes a formal request to do so or if they otherwise agree.

Plaintiff's proposed judgment did not reflect the trial court's oral ruling and, instead, provided that *defendant* was responsible for all transportation to and from parenting time. Defendant objected accordingly. The trial court held a hearing regarding defendant's objections and stated the following:

> The listed objections, there was no—*there was no transcript ordered*, there was no—nothing that I can see that would—would show me that I—that the proposed Judgment was incorrect . . . .
>
> * * *
>
> Well, at this point based on the—my recollection of—of the rulings that I made and *the lack of a—of a transcript that the objection—objecting party would need to provide*, I'm going to enter the Judgment or a copy of the Judgment that was submitted originally under the seven-day rule. [Emphasis added.]

It appears that the court primarily denied defendant's objections on the basis of defendant's failure to procure a copy of a transcript of the prior proceeding. Contrary to the trial court's statement, there is no court rule or caselaw that requires a party who objects to the entry of a proposed judgment under MCR 2.602(B)(3) to provide such a transcript. Indeed, given the compressed timing requirements under this court rule, it is doubtful that timely obtaining a copy of a transcript would be possible in most circumstances.

The trial court erred as a matter of law when it rejected defendant's objections on the basis of defendant's failure to provide a transcript. Further, when the trial court entered plaintiff's proposed judgment, it entered a judgment that did not comport with its earlier oral ruling.[5] Accordingly, we vacate the judgment and remand to the trial court with instructions to enter a corrected judgment that provides that plaintiff is responsible for all transportation to and from his parenting time with DJ. The trial court should also ensure that the spelling of AJ's name and her date of birth are correct in the final judgment.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SWARTZLE, P.J., and O'CONNELL, J., concurred with SAAD, J.

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[5] While we are cognizant that a court speaks through its written orders and not its oral pronouncements, *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009), the orders and judgments arising from MCR 2.602(B)(3) are to comport with those earlier oral pronouncements. Consequently, if the court modifies what it previously stated orally, some type of explanation, at a minimum, would be warranted.

STENZEL v BEST BUY CO, INC

Docket No. 328804. Submitted to conflict panel April 26, 2017, at Lansing. Decided June 27, 2017, at 9:00 a.m. Leave to appeal granted 501 Mich 1042.

Paulette Stenzel brought an action in the Ingham Circuit Court against Best Buy Co., Inc., in April 2014, alleging negligence, breach of contract, and breach of warranty after Best Buy sold her a refrigerator/freezer and installed it, the refrigerator/freezer started spraying water onto her kitchen floor, and she subsequently fell and sustained injuries as the result of either wet feet or a wet floor caused by the water. In May 2015, plaintiff amended her complaint to add Samsung Electronics America, Inc., the manufacturer of the refrigerator/freezer, as a party, doing so within 91 days of Samsung being identified in a notice as a nonparty at fault. Plaintiff did not move for leave to amend the complaint. The court, Rosemarie E. Aquilina, J., granted summary disposition in favor of Best Buy and Samsung, concluding that plaintiff failed to create a genuine issue of material fact with respect to causation and that plaintiff's claims against Samsung were barred by the applicable period of limitations in MCL 600.2957(2), as measured by the date the amended complaint was filed, not the date on which the suit was first initiated against Best Buy. Plaintiff appealed, arguing that under MCR 2.112(K)(4), she had filed an amended complaint within 91 days of the notice identifying Samsung as a nonparty at fault and that pursuant to MCL 600.2957(2), the amended complaint related back to the date of the original complaint. Defendant argued that because plaintiff filed her amended complaint without moving for leave to amend, the relation-back provision in MCL 600.2957(2) did not apply. The Court of Appeals, M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ., held that the trial court erred with regard to the issue of causation as to both Best Buy and Samsung and that because *Williams v Arbor Home, Inc*, 254 Mich App 439 (2002)[1] (holding that MCL 600.2957(2) and MCR 2.112(K)(4) were not in conflict and that leave of the court is required before an

[1] Vacated in part on other grounds 469 Mich 898 (2003).

amended pleading adding a nonparty becomes effective), was binding precedent and controlled, Samsung was not properly added as a party. 318 Mich App 411 (2016). However, the Court of Appeals panel indicated that had it not been constrained by the *Williams* decision, it would have held that because plaintiff followed the requirements of MCR 2.112(K)(4) with regard to amending the pleading, she properly added Samsung as a party defendant, making her amended complaint timely under the relation-back provision of MCL 600.2957(2). Therefore, pursuant to MCR 7.215(J), the Court of Appeals panel requested that a special conflict panel be convened to resolve the conflict between the *Stenzel* opinion and the *Williams* opinion. The Court of Appeals subsequently vacated Part II(C) of the *Stenzel* opinion and convened a special conflict panel to determine whether a party seeking to amend a pleading to add an identified nonparty at fault to the lawsuit must file a motion for leave to amend, as indicated by the Legislature in the first sentence of MCL 600.2957(2), or whether the party may file an amended pleading as a matter of course or right, assuming it to be timely, as indicated by the Supreme Court in MCR 2.112(K)(4) as well as the effect of this process on the relation-back language of MCL 600.2957(2) for purposes of the governing period of limitations. 318 Mich App 801 (2017).

On consideration by the special panel, the Court of Appeals *held*:

1. The Legislature enacted MCL 600.2957 as part of the 1995 tort-reform litigation that eliminated joint and several liability in certain tort actions and required fact-finders to allocate fault among all responsible tortfeasors. MCL 600.2957(2) provides that upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging one or more causes of action against that nonparty and that a cause of action added under MCL 600.2957(2) is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action. In November 1996, the Supreme Court promulgated MCR 2.112(K) in an effort to implement MCL 600.2957(2). Under MCR 2.112(K)(4), a party served with a notice identifying a nonparty at fault may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty.

2. Under MCR 2.118(A)(1) and (2), amendment by leave and amendment by right are two separate and distinct procedural

mechanisms. Recognizing that the Supreme Court promulgated MCR 2.112(K)(4) for the specific purpose of implementing MCL 600.2957(2), it would defy logic not to conclude that the Supreme Court, understanding the procedural difference between amendment by right and amendment by leave, intentionally deviated from the statutory language in order to streamline and simplify the process, allowing a party as a matter of right or course to amend a pleading within the 91-day period. The Supreme Court plainly did not deviate from the statutory language unwittingly or inadvertently. While there was no conflict between MCR 2.112(K)(4) and MCL 600.2957(2) with respect to the substantive principle and intended outcome that a party will, in fact, be given an opportunity to pursue and litigate an amended pleading, if done in timely fashion, there was a conflict concerning the amendment procedure itself: the Legislature only contemplated amendment by leave, and the Supreme Court called for amendment as a matter of course or right. Accordingly, contrary to the holding in *Williams*, a conflict existed between MCR 2.112(K)(4) and MCL 600.2957(2) with respect to the procedure to amend a pleading to add an identified nonparty at fault to an action. And *Williams*, 254 Mich App 439, had to be overruled to the extent that it held otherwise.

3. Article 6, § 5, of the 1963 Michigan Constitution provides that the Supreme Court shall, by general rules, establish, modify, amend, and simplify the practice and procedure in all courts of this state. Under MCR 1.104, rules of practice set forth in any statute, if not in conflict with any of the Michigan Court Rules of 1985, are effective until superseded by rules adopted by the Supreme Court. In general, when a court rule conflicts with a statute, the court rule controls when the matter pertains to practice and procedure, but the statute prevails if the matter concerns substantive law. The question whether a pleading can be amended as a matter of course or right or whether a motion for leave to amend must be filed is purely an issue of practice and procedure, falling within the exclusive province of the Supreme Court. It was well within the realm of the Supreme Court's authority to alter and simplify the amendment procedure enacted by the Legislature in MCL 600.2957(2). The Supreme Court, in crafting MCR 2.112(K)(4) and with the goal of judicial expediency and efficiency, intended to alter or streamline the process outlined by the Legislature, allowing a party to directly file an amended pleading instead of needlessly forcing the party to file a motion for leave to amend, which a court is mandated to grant under MCL 600.2957(2) without exception. Accordingly, the procedure set forth in MCR 2.112(K)(4) governed, and plaintiff proceeded prop-

erly in timely filing an amended complaint against Samsung without needing to file a motion for leave to amend.

4. The Supreme Court was silent in MCR 2.112(K) with respect to the statutory relation-back provision in the context of a party amending a pleading as a matter of course or right within the 91-day period; however, that silence could not be viewed as acceptance of the proposition that a pleading amended consistently with the court rule is not to be afforded the protection of the statutory relation-back provision. The substantive component in the first sentence of MCL 600.2957(2) reflected the Legislature's intent to allow a party, in all instances if done so timely, to amend a pleading to add an identified nonparty at fault. The Supreme Court's adoption of MCR 2.112(K)(4) fully honored that substantive goal and intended outcome, merely altering, simplifying, and bettering the process to achieve the goal and outcome, with the substantive component of the first sentence of MCL 600.2957(2) remaining alive and well. The Supreme Court's action in promulgating MCR 2.112(K)(4) was intended to provide assistance and details in implementing MCL 600.2957(2) where needed, not to nullify by silence the Legislature's clear desire to allow the relation back of an amended pleading for purposes of a given period of limitations. The relation-back provision contained in the second sentence of MCL 600.2957(2) is fully applicable, regardless of the fact that MCR 2.112(K)(4) ultimately controls the process with respect to amending a pleading to add an identified nonparty at fault. Accordingly, plaintiff was entitled to the protection of the relation-back provision in MCL 600.2957(2), and the trial court erred by summarily dismissing her action against Samsung on the basis that the period of limitations had elapsed.

Reversed and remanded.

GLEICHER, J., joined by SERVITTO, P.J., and SHAPIRO, J., concurring in result, would have held that because the statute and the court rule are capable of harmonious coexistence, no conflict existed. Because the statute and the court rule are entirely consistent with regard to the central and controlling issue—a plaintiff's right to timely amend a complaint to add an identified nonparty at fault as a party—the statute and court rule constitute equally acceptable alternatives. Read together, the two provisions permit a plaintiff to file a motion to amend, or not; either way, the result is the same: the amendment must be permitted if it is timely. Strategic reasons may motivate a plaintiff's choice to file a motion to add a nonparty, such as compelling the defendant to respond to certain allegations in the plaintiff's motion or educating the trial court about the issues.

Alternatively, if time is of the essence, a plaintiff may instead elect to simply file an amended complaint. Judge GLEICHER also would have held that no conflict existed with regard to the relation-back provision. MCL 600.2957(2) provides for tolling of the statute of limitations for claims against timely added nonparties at fault, and the absence of a relation-back provision in MCR 2.112(K)(4) does not create a conflict because there is no inconsistency in the language of the statute and court rule; the statute simply fills in for the court rule's silence on this subject. Accordingly, Judge GLEICHER would have held that plaintiff was permitted by both the statute and court rule to file her amended complaint with or without first filing a motion to amend and that the amendment relates back.

PLEADING — STATUTES — COURT RULES — PROCEDURE FOR AMENDING A PLEADING TO ADD AN IDENTIFIED NONPARTY AT FAULT TO AN ACTION.

MCL 600.2957(2) provides that upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging one or more causes of action against that nonparty and that a cause of action added under MCL 600.2957(2) is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action; MCR 2.112(K)(4) provides that a party served with a notice identifying a nonparty at fault may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty; a conflict existed between MCL 600.2957(2) and MCR 2.112(K)(4) with regard to the procedure of amending a pleading to add an identified nonparty at fault to an action, but no conflict existed with regard to the substantive principle that a party will be given an opportunity to pursue and litigate a timely filed amended pleading; the procedure set forth in MCR 2.112(K)(4) governs, and a plaintiff may file an amended complaint without needing to file a motion for leave to amend provided that the plaintiff complies with the 91-day deadline; the relation-back provision contained in MCL 600.2957(2) is fully applicable, regardless of the fact that MCR 2.112(K)(4) ultimately controls the process with respect to amending a pleading to add an identified nonparty at fault.

Nolan, Thomsen & Villas, PC (by *Lawrence P. Nolan* and *Gary G. Villas*), for Paulette Stenzel.

Dykema Gossett PLLC (by *Paul L. Nystrom* and *Jill M. Wheaton*) for Samsung Electronics America, Inc.

Before: SERVITTO, P.J., and MURPHY, CAVANAGH, FORT HOOD, BORRELLO, GLEICHER, and SHAPIRO, JJ.

MURPHY, J. Pursuant to MCR 7.215(J), this special panel was convened to resolve a conflict between the prior opinion issued in this case, *Stenzel v Best Buy Co, Inc*, 318 Mich App 411; 898 NW2d 236 (2016), vacated solely with respect to Part II(C) of the opinion, 318 Mich App 801 (2017), and this Court's opinion in *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 Mich 898 (2003). The conflict concerns the proper interpretation of and interplay between MCL 600.2957(2) and MCR 2.112(K)(4) in regard to the process of amending a pleading to add a party previously identified as a nonparty at fault and the effect of the process on the relation-back language of the statute for purposes of the governing period of limitations. We hold that there exists a conflict, on a matter of procedure, between the provisions of the court rule and the statute relative to whether a party must file a motion for leave to amend a pleading to add an identified nonparty at fault to an action, as provided by MCL 600.2957(2), or whether a party may simply file an amended pleading as a matter of course or right, as provided by MCR 2.112(K)(4), absent the need to seek court authorization for the amendment. There is no conflict between the statute and the court rule on the substantive principle and intended outcome that a party will, in fact, be given an opportunity to pursue and litigate an amended pleading, assuming compliance with the 91-day deadline. We further hold that the Michigan Supreme Court, in crafting the court rule and with the goal of judicial

expediency and efficiency, intended to alter or streamline the process outlined by the Legislature, allowing a party to directly file an amended pleading instead of needlessly forcing the party to file a motion for leave to amend, which a court is mandated to grant under MCL 600.2957(2) without exception. We additionally hold that our Supreme Court, under its constitutional authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state," Const 1963, art 6, § 5, was indeed empowered to modify and simplify the process set forth by the Legislature in MCL 600.2957(2). Finally, we hold that the relation-back provision contained in the second sentence of MCL 600.2957(2), which subject matter was not addressed by the Supreme Court in MCR 2.112(K), is fully applicable, regardless of the fact that MCR 2.112(K)(4) ultimately controls the process with respect to amending a pleading to add an identified nonparty at fault. Accordingly, we reverse the trial court's order granting summary disposition in favor of defendant Samsung Electronics America, Inc.

I. THE NATURE OF THE DISPUTE

As part of the 1995 tort-reform legislation that eliminated joint and several liability in certain tort actions and required fact-finders to allocate fault among all responsible tortfeasors, the Legislature enacted MCL 600.2957. See *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 50-51; 693 NW2d 149 (2005) (discussing MCL 600.2957, as well as MCL 600.2956 and MCL 600.6304); see also 1995 PA 161 and 1995 PA 249, effective March 28, 1996. MCL 600.2957 provides, in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or

> wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.
>
> (2) Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

As reflected in the first sentence of MCL 600.2957(2), the procedure for a party to amend a pleading in order to add an identified nonparty at fault to a pending lawsuit entails the filing of a motion for leave to amend the pleading within 91 days following the identification, which motion must be granted by the trial court without exception. There is no language in MCL 600.2957(2) that contemplates or envisions a party merely filing an amended pleading as a matter of course or right.[2] With respect to the second sentence of MCL 600.2957(2), any amendment of a pleading to add a cause of action against an identified nonparty at fault relates back to the date of the filing of the original action for purposes of assessing whether the applicable period of limitations has expired.

On November 6, 1996, the Michigan Supreme Court adopted MCR 2.112(K), adding Subrule (K) to the court rule to address the statutory changes made pursuant

[2] To be clear, when we speak throughout this opinion of amending a pleading as a matter of course or right, we mean doing so absent the need to file a motion for leave to amend.

to 1995 PA 161 and 1995 PA 249, which included the enactment of MCL 600.2957; Subrule (K) was made effective February 1, 1997. See 453 Mich cxix (1996); MCR 2.112(K)(1) ("This subrule applies to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death to which MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249, apply."); *Veltman v Detroit Edison Co*, 261 Mich App 685, 695; 683 NW2d 707 (2004); MCR 2.112, 453 Mich cxix, cxxii (staff comment). "MCR 2.112(K) was essentially intended to implement MCL 600.2957." *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003). Under MCR 2.112(K)(3)(a), "[a] party against whom a claim is asserted may give notice of a claim that a nonparty is wholly or partially at fault." "The notice shall designate the nonparty and set forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault." MCR 2.112(K)(3)(b). While allowing for a later filing under certain circumstances, the notice must generally be filed "within 91 days after the party files its first responsive pleading." MCR 2.112(K)(3)(c). Finally, and most importantly for our purposes, MCR 2.112(K)(4) provides:

> A party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty. The court may permit later amendment as provided in MCR 2.118.

As reflected in MCR 2.112(K)(4), our Supreme Court did not indicate that a motion for leave to amend a pleading must be filed to add a claim against an identified nonparty at fault; rather, the Court simply

provided that a party may directly file an amended pleading if done within the 91-day period. The Court did not speak to the issue whether an amended pleading filed within the 91-day period relates back to the filing of the original pleading.

The nature or crux of the dispute regards whether a party seeking to amend a pleading to add an identified nonparty at fault to the lawsuit must file a motion for leave to amend, as indicated by the Legislature in the first sentence of MCL 600.2957(2), or whether the party may file an amended pleading as a matter of course or right, assuming it to be timely, as indicated by our Supreme Court in MCR 2.112(K)(4). And in the context of resolving that dispute and of ultimate importance is the question concerning the expiration of the applicable period of limitations and whether a filing will relate back to the filing date of the original pleading.

II. THE *WILLIAMS* OPINION

In *Williams*, the plaintiff attempted to add Michigan Elevator Company (MEC) as a party through the filing of an amended complaint after Arbor Home, Inc., the originally named defendant, filed a notice of nonparty fault, identifying MEC; the plaintiff did not file a motion for leave to amend his complaint. *Williams*, 254 Mich App at 442-443. The plaintiff argued that MCL 600.2957(2) and MCR 2.112(K)(4) conflict and that the court rule prevails and governs because the matter concerns an issue of procedure. *Id*. at 443. The defendants maintained that the court rule and statute are not in conflict and that MCL 600.2957(2) merely includes more detail than MCR 2.112(K)(4). *Id*. The panel agreed with the defendants, reasoning as follows:

> The court rule plainly allows a plaintiff to file an amended complaint adding a nonparty but *does not specifically*

> *mention* whether leave of the court is also required. The statute, on the other hand, states that leave of the court is indeed required. As argued by defendants, the statute therefore merely includes more detail than the court rule. Moreover, the court rule specifically refers to MCL 600.2957, see MCR 2.112(K)(1), and the statute is again specifically mentioned in the staff comment to the 1997 amendment of MCR 2.112. The staff comment to the 1997 amendment indicates that the court rule was essentially meant to implement the statute. Reading the court rule and the statute in conjunction, we conclude that leave of the court is indeed required before an amended pleading adding a nonparty becomes effective.
>
> Because plaintiff did not seek leave of the court to add MEC as a party, MEC was never properly added to this lawsuit. Accordingly, we conclude upon our review de novo that the December 21, 1999, order was indeed the final order in this case. Therefore, plaintiff forewent his appeal by right. [*Id*. at 443-444.]

We note that the analysis in *Williams* was framed in terms of whether this Court had jurisdiction; there was no discussion regarding any period of limitations. Judge O'CONNELL dissented in part, contending that there is a conflict between the statute and the court rule, that the conflict concerns a matter of procedure, and that the court rule therefore controls. *Id*. at 445-446 (O'CONNELL, J., concurring in part and dissenting in part).

III. THE PRIOR *STENZEL* OPINION

In the instant case, *Stenzel*, plaintiff filed suit against Best Buy Co., Inc., in April 2014, alleging that Best Buy sold her a refrigerator/freezer and installed it, that the refrigerator/freezer later started spraying water onto her kitchen floor, and that due to either wet feet or a wet floor caused by the water, she subsequently fell in her sunroom and sustained injuries. In

May 2015, plaintiff amended her complaint to add Samsung Electronics America, Inc., the manufacturer of the refrigerator/freezer, as a party, doing so within 91 days of Samsung being identified in a notice as a nonparty at fault. Plaintiff did not file a motion for leave to amend the complaint. The trial court granted summary disposition in favor of Best Buy and Samsung, concluding that plaintiff failed to create a genuine issue of material fact with respect to causation. The trial court also ruled that plaintiff's claims against Samsung were barred by the applicable period of limitations, as measured by the date the amended complaint was filed, not the date on which the suit was first initiated against Best Buy. *Stenzel*, 318 Mich App at 413-415, 419. This Court held that the trial court erred in regard to the issue of causation as to both Best Buy and Samsung, and that decision was not vacated and remains intact. *Id*. at 415-418.

With respect to the period of limitations, plaintiff argued that because she had filed an amended complaint within 91 days of the notice identifying Samsung as a nonparty at fault, the amended complaint related back to the date of the original complaint, which had been filed within the applicable limitations period. Samsung contended that because plaintiff filed her amended complaint without filing a motion for leave to amend, the relation-back provision in MCL 600.2957(2) did not apply. *Id*. at 419. The prior *Stenzel* panel held that *Williams* was binding precedent and controlled, which dictated a conclusion that Samsung was never properly added as a party to the action because plaintiff did not seek leave to add Samsung as a party. *Id*. at 420-421. The panel indicated that if not constrained by the *Williams* decision it would have held that because plaintiff followed the requirements of MCR 2.112(K)(4), she properly added Samsung as a party defendant,

making her amended complaint timely under the relation-back provision of the statute. *Id*. at 423-424. In opining that *Williams* was wrongly decided, the panel stated that it agreed with the reasoning of Judge O'CONNELL in his partial dissent in *Williams*. *Id*. at 421-422. In the alternative, the panel concluded that *Williams* was wrongly decided for the reasons expressed by then Judge ZAHRA in his concurring opinion in *Bint v Doe*, 274 Mich App 232, 237-238; 732 NW2d 156 (2007).[3] *Stenzel*, 318 Mich App at 423 n 3.

IV. OUR ANALYSIS

A. STANDARD OF REVIEW

We review de novo issues concerning the interpretation of statutes and court rules, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008), rulings on motions for summary disposition, *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011), and questions regarding whether an action is barred by a period of limitations, *Caron v Cranbrook Ed Community*, 298 Mich App 629, 635; 828 NW2d 99 (2012).

B. PRINCIPLES OF STATUTORY AND COURT-RULE CONSTRUCTION

In *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), our Supreme Court articulated the principles that govern the interpretation or construction of a statute:

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[3] Judge ZAHRA concluded that there is no conflict between the statute and the court rule, that a party can elect to directly file an amended complaint under the court rule, that if a motion for leave to amend is instead filed, a court is mandated to grant it under the statute, and that the statute's relation-back provision applies in either instance. *Bint*, 274 Mich App at 237-238 (ZAHRA, P.J., concurring).

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [Citations omitted.]

"When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation." *Haliw v Sterling Hts*, 471 Mich 700, 704-705; 691 NW2d 753 (2005); see also *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). "Court rules should be interpreted to effect the intent of the drafter, the Michigan Supreme Court." *Fleet Business*, 274 Mich App at 591. Clear and unambiguous language contained in a court rule must be given its plain meaning and is enforced as written. *Id*.

"To determine whether there is a real conflict between a statute and a court rule, both are read according to their plain meaning." *Staff v Johnson*, 242 Mich App 521, 530; 619 NW2d 57 (2000).

C. DISCUSSION

1. THE EXISTENCE OF A CONFLICT

"Rules of practice set forth in any statute, if not in conflict with any of these rules [Michigan Court Rules of 1985], are effective until superseded by rules adopted by the Supreme Court." MCR 1.104. Absent an

inherent conflict between a court rule and a statute, there is no need to determine whether there was an infringement or supplantation of judicial or legislative authority. See *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 165; 665 NW2d 452 (2003); see also *Kaiser v Smith*, 188 Mich App 495, 499; 470 NW2d 88 (1991) (ruling that no conflict existed and that the court rule and statute could be read harmoniously).

Procedurally, there is a clear distinction in the law between amending a pleading as a matter of course or right and amending a pleading on leave granted; the latter requires the filing of a motion and approval by a court, while the former does not. See MCR 2.118(A)(1) and (2) (permitting a party to "amend a pleading once as a matter of course" within a set time period, but otherwise requiring "leave of the court" or written consent of an adverse party). Amendment by leave and amendment by right are two separate and distinct procedural mechanisms. And the Michigan Supreme Court, having exclusive authority with respect to all aspects of the court rules, Const 1963, art 6, § 5, and itself having established and adopted MCR 2.118, was unquestionably knowledgeable of the distinction when promulgating MCR 2.112(K) in its effort to implement MCL 600.2957(2). The Legislature, in drafting and enacting MCL 600.2957(2), made no mention of allowing or authorizing a party to file an amended pleading as a matter of course or right within the 91-day window following identification of a nonparty at fault. Instead, the Legislature couched the process to amend a pleading solely in terms of "leave," envisioning, first, the filing of a motion for leave to amend, followed by a court ruling that grants the motion. MCL 600.2957(2).

The process or procedure contemplated by the Legislature can accurately be characterized as wasteful in regard to time, energy, and resources as to both the courts and litigants. Conceptually, under the statute, the process could potentially entail the filing and service of a motion for leave to amend a pleading, the filing and service of a response to the motion, the scheduling of a hearing, the service of a notice of hearing, an appearance by counsel at the hearing, oral argument, and the court's preordained ruling as dictated by MCL 600.2957(2). See MCR 2.119 (motion practice). Our Supreme Court was, of course, familiar with the language in MCL 600.2957(2), considering that it engaged in the process of adopting MCR 2.112(K)(4) for the specific purpose of implementing MCL 600.2957(2). Therefore, the Supreme Court appreciated that the statute only speaks of amendment of a pleading by way of motion and leave granted, certainly realizing that the procedure is unnecessarily cumbersome and not conducive to judicial expediency and efficiency because a trial court, ultimately, has no discretion whatsoever in its ruling and is required to grant leave without exception.

In our view, it would defy logic not to recognize or conclude that our Supreme Court, understanding the procedural difference between amendment by right and amendment by leave, intentionally deviated from the statutory language in order to streamline and simplify the process, allowing a party as a matter of right or course to amend a pleading within the 91-day period. The Supreme Court plainly did not deviate from the statutory language unwittingly or inadvertently. While there is no conflict between MCR 2.112(K)(4) and MCL 600.2957(2) with respect to the substantive principle and intended outcome that a party will, in fact, be given an opportunity to pursue

and litigate an amended pleading, if done in timely fashion, there is a conflict concerning the amendment procedure itself. Although the conflict might be deemed hyper-technical, it is nonetheless a conflict because the Legislature only contemplated amendment by leave and our Supreme Court called for amendment as a matter of course or right.[4]

The majority in *Williams* concluded that the court rule and statute do not conflict and that the statute merely includes more detail than the court rule. *Williams*, 254 Mich App at 443. We find this reasoning flawed for the reasons expressed earlier in this opinion and because even a cursory reading of MCR 2.112(K) clearly reveals that it was the Supreme Court, and not the Legislature, providing the details so as to allow a smooth implementation of MCL 600.2957(2), which was extremely short on details. Indeed, the whole purpose of adopting MCR 2.112(K) in response to MCL 600.2957 was to fill the vacuum left by the Legislature. See *Taylor v Mich Petroleum Technologies, Inc*, 307 Mich App 189, 197-198; 859 NW2d 715 (2014) (noting that the Legislature failed to define in MCL 600.2957(2) what constitutes an "identification of a nonparty" and failed to address who must make the identification as well as stating that our Supreme Court later supplied the answers and details by promulgating the amendment to MCR 2.112). In sum, we hold, contrary to the ruling in *Williams*, that a conflict exists between MCL 600.2957(2) and MCR 2.112(K)(4) with respect to the procedure to amend a pleading to add an identified nonparty at fault.

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[4] We note that even if our assessment is wrong that the Supreme Court intentionally altered and simplified the amendment procedure, there would still remain a conflict.

2. PRACTICE AND PROCEDURE OR A MATTER OF SUBSTANTIVE LAW

Having concluded that a conflict exists, the next question that must be answered concerns whether the Supreme Court had the authority to override or supersede the Legislature and modify and simplify the amendment process. This is not a difficult question to resolve. Again, the Michigan Constitution, art 6, § 5, provides that "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state," and MCR 1.104 states that statutory rules of practice "are effective until superseded by rules adopted by the Supreme Court." In general, when a court rule conflicts with a statute, the court rule controls when the matter pertains to practice and procedure, but the statute prevails if the matter concerns substantive law. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002).

In *McDougall v Schanz*, 461 Mich 15, 26-27; 597 NW2d 148 (1999), the Supreme Court discussed Const 1963, art 6, § 5, and the Court's rulemaking authority, observing:

> It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court. Indeed, this Court's primacy in such matters is established in our 1963 Constitution[.]
>
> * * *
>
> This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles. Thus, in *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964), we properly emphasized that "[t]he function of enacting and amending judicial rules or practice and procedure has been committed exclusively to this Court . . . ; a function with which the

> legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will."
>
> At the same time, it cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. Rather, as is evident from the plain language of art 6, § 5, this Court's constitutional rule-making authority extends *only* to matters of practice and procedure. Accordingly, . . . we must determine whether the statute addresses purely procedural matters or substantive law. [Citations omitted.]

It is beyond rational argument that the question whether a pleading can be amended as a matter of course or right or whether a motion for leave to amend must be filed is indeed purely an issue of practice and procedure, falling within the exclusive province of our Supreme Court. The matter does not concern substantive law. It was well within the realm of the Supreme Court's authority to alter the amendment procedure enacted by the Legislature. Accordingly, the procedure set forth in MCR 2.112(K)(4) governs, and plaintiff proceeded properly in timely filing an amended complaint against Samsung absent the need to file a motion for leave to amend.

3. PERIOD OF LIMITATIONS AND THE RELATION-BACK PROVISION

Finally, plaintiff was also entitled to the protection of the relation-back provision in MCL 600.2957(2); therefore, the trial court erred by summarily dismissing her action against Samsung on the basis that the period of limitations had elapsed. Again, the second sentence in MCL 600.2957(2) provides that "[a] cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action." Samsung argues that because the Legislature referred to an action

"added under this subsection" for purposes of the relation-back provision, the relation-back provision is rendered inapplicable if an identified nonparty at fault, such as Samsung, is added to the suit *under MCR 2.112(K)(4)*. We disagree and hold that the relation-back language remains valid and applicable under our ruling.

The Supreme Court was silent in MCR 2.112(K) with respect to the statutory relation-back provision in the context of a party amending a pleading as a matter of course or right within the 91-day period. That silence cannot be viewed as acceptance of the proposition that a pleading amended consistent with the court rule is not to be afforded the protection of the statutory relation-back provision. Despite the fairly convoluted procedural component of the first sentence in MCL 600.2957(2), the substantive component reflected the Legislature's intent to allow a party, in all instances if done so timely, to amend a pleading to add an identified nonparty at fault. The Supreme Court's adoption of MCR 2.112(K)(4) fully honored that substantive goal and intended outcome, merely altering, simplifying, and, yes, bettering the process to achieve the goal and outcome, with the substantive component of the first sentence of MCL 600.2957(2) remaining alive and well. Our ruling follows down that same path. Samsung fails to understand that the Supreme Court's action in promulgating MCR 2.112(K)(4) was intended to provide assistance and details in implementing MCL 600.2957(2) where needed, not to nullify by silence the Legislature's clear desire to allow the relation back of an amended pleading for purposes of a given period of limitations. The Michigan Supreme Court left that matter untouched and the relation-back provision fully enforceable.

4. RESPONSE TO THE CONCURRENCE

Our concurring colleagues would hold that the statute and court rule do not conflict and can be harmonized, allowing a party the choice between filing a motion for leave that must be granted or simply filing an amended pleading. We respectfully disagree with this assessment. In effect, the concurring opinion reflects a conclusion that our Supreme Court intended to allow for the continuing viability of the statutory "leave" process while providing parties the alternative option of filing an amended pleading as a matter of right under the court rule. First, nothing in the plain language of MCR 2.112(K)(4) lends itself to such a construction. Further, we cannot imagine that the Supreme Court intended to leave in place a procedure that, quite frankly, makes no sense and is illogical.[5] Instead, our Supreme Court plainly intended, consistent with Const 1963, art 6, § 5, to "simplify" the amendment procedure and intended, consistent with MCR 1.104, to "supersede[]" the statutory rule of practice enacted by the Legislature, eliminating the "leave" process found in MCL 600.2957(2).

It is not that the Supreme Court intended to create a conflict just for the sake of creating a conflict; rather, the Court intended to streamline the amendment process, the result of which was the creation of a conflict between the court rule and the statute. Again, there is a clear distinction between amendment by right and amendment by leave. Amendment by right permits the immediate filing of an amended pleading, while

[5] Indeed, on the subject of the Legislature enacting a provision that calls for the filing of a motion *and then dictates how a court must rule on the motion*, we seriously question whether such a practice or procedure can survive principles regarding the separation of powers, Const 1963, art 3, § 2.

amendment by leave necessitates the filing of a motion; engagement in procedures associated with motion practice, including the payment of a motion fee; approval by a court; and *then* the formal filing of the amended pleading. The fact that the court's ruling is predetermined under the statute does not make the procedures—amendment by right and amendment by leave—interchangeable or the same; a party must still preliminarily jump through all the hoops connected to a motion for leave, which are almost entirely avoided with an amendment by right.

V. CONCLUSION

We hold that there exists a conflict, on a matter of procedure, between the provisions of the court rule and the statute relative to whether a party must file a motion for leave to amend a pleading to add an identified nonparty at fault to an action, as provided by MCL 600.2957(2), or whether a party may simply file an amended pleading as a matter of course or right, as provided by MCR 2.112(K)(4), absent the need to seek court authorization for the amendment. And we overrule *Williams*, 254 Mich App 439, to the extent that it held otherwise. We also conclude that there is no conflict between the statute and the court rule on the substantive principle and intended outcome that a party will, in fact, be given an opportunity to pursue and litigate an amended pleading, assuming compliance with the 91-day deadline. We further hold that the Michigan Supreme Court, in crafting the court rule and with the goal of judicial expediency and efficiency, intended to alter or streamline the process outlined by the Legislature, allowing a party to directly file an amended pleading instead of needlessly forcing the party to file a motion for leave to amend, which a court

is mandated to grant under MCL 600.2957(2) without exception. We additionally hold that our Supreme Court, under its constitutional authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state," Const 1963, art 6, § 5, was indeed empowered to modify and simplify the process set forth by the Legislature in MCL 600.2957(2). Finally, we hold that the relation-back provision contained in the second sentence of MCL 600.2957(2) is fully applicable, regardless of the fact that MCR 2.112(K)(4) ultimately controls the process with respect to amending a pleading to add an identified nonparty at fault. Accordingly, we reverse the trial court's order granting summary disposition in favor of Samsung.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, taxable costs are awarded to plaintiff under MCR 7.219.

CAVANAGH, FORT HOOD, and BORRELLO, JJ., concurred with MURPHY, J.

GLEICHER, J. (*concurring in result*). The majority holds that a statute and a court rule irreconcilably conflict and that the court rule controls. I would hold that because the statute and the court rule are capable of accommodation, no conflict exists. The two provisions advance precisely the same principle: a party must be permitted to timely add an identified nonparty to a pending case. The statute adds that the statute of limitations for the original claim does not bar the addition if the amendment meets a time deadline. My analysis harmonizes the two provisions and yields the same result reached by the majority.

I

In 1995, the Legislature abrogated joint and several liability in certain tort cases, including this one. In place of joint and several liability, the Legislature constructed a system for allocating fault among all potential tortfeasors, parties and nonparties alike. The system permits a plaintiff to transform an identified nonparty at fault into a party: "Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty." MCL 600.2957(2). The thrust of this sentence is clear. By using the word "shall," the Legislature declared that a party has a right to file an amended complaint converting a properly identified nonparty at fault into a party as long as the filing is accomplished within the 91-day window.

The Legislature foresaw that a newly added party might invoke the statute of limitations as a defense. It limited the availability of this escape hatch, however, by suspending the running of the statute of limitations: "A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action." MCL 600.2957(2). The Legislature thus decreed that if a plaintiff could have timely sued the nonparty when he or she filed the original lawsuit, the nonparty may not invoke the statute of limitations to avoid the suit.

The Supreme Court distilled these commandments in a subsection of MCR 2.112. MCR 2.112(K)(2) creates a notice requirement, and MCR 2.112(K)(3) details the information that must be included in the notice. A

party served with such notice, the court rule provides, "may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty." MCR 2.112(K)(4). The court rule makes no mention of the statute of limitations or of the related (and relevant) doctrine known as "relation back." A separate court rule addresses "relation back" 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 . . . in the original pleading. [MCR 2.118(D).]

Here, plaintiff filed a first amended complaint naming Samsung as a defendant without having filed a motion seeking leave to do so. Samsung successfully argued in the trial court that plaintiff's failure to file a motion nullified her ability to rely on the sentence in MCL 600.2957(2) invalidating a statute-of-limitations defense. Samsung urged that because plaintiff filed her amended complaint in conformity with the court rule, which does not require a motion, she was bound by the court rule. And since that rule includes no "relation back" language, Samsung contended, plaintiff has no right to enjoy "the best of both worlds" by relying on the statute. In the prior opinion issued in this case, *Stenzel v Best Buy Co, Inc*, 318 Mich App 411, 420; 898 NW2d 236 (2016), this Court elucidated the distinction as follows:

> Notably, unlike the statute, the court rule does not require leave of the court to file an amended complaint adding a nonparty if the amended complaint is filed within 91 days of the notice identifying the nonparty. Further, unlike the statute, the court rule does not expressly provide that the amended complaint will relate back to the date of the original complaint.

The majority holds that the amendment procedure in the statute and court rule conflict, "because the Legislature only contemplated amendment by leave and our Supreme Court called for amendment as a matter of course or right." This conflict must be resolved in favor of the court rule, the majority concludes, as the dispute involves a matter of practice and procedure rather than substantive law. And regardless of the court rule's silence regarding relation back, the majority posits, the Legislature clearly desired "to allow the relation back of an amended pleading," and that statutory provision remains "fully enforceable." Because plaintiff timely filed her amended complaint, the majority concludes, summary disposition was improperly granted to Samsung.

I believe that the two provisions are capable of harmonious coexistence, and therefore I would not declare them in conflict.

II

Other published cases in this Court have explored the very same issue presented here, and with one exception I can add nothing of value to the majority's recount of those decisions. The exception is *Bint v Doe*, 274 Mich App 232, 237; 732 NW2d 156 (2007) (ZAHRA, P.J., concurring), in which then Judge (now Justice) ZAHRA filed a concurring opinion expressing that the statute and court rule did not conflict "merely because the court rule uses the permissive word 'may' while the statute uses the mandatory word 'shall.' " Judge ZAHRA reasoned that the court rule "addresses the conduct of the parties," while the statute "is directed at the conduct of the court." *Id*. at 237-238. These are "consistent," Judge ZAHRA explained:

> The plaintiff may elect to amend the complaint. If the plaintiff so elects, the court shall grant the amendment. There being no conflict between the statute and the court rule, we are bound to implement the remainder of MCL 600.2957(2), which provides that a "cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action." [*Id*. at 238.]

I would expand slightly on Judge ZAHRA's analysis.

Preliminarily, it bears emphasis that "only in cases of irreconcilable conflict" should a court declare that a statute "supplants the Court's exclusive authority under Const 1963, art 6, § 5 to promulgate rules regarding the practice and procedure of the courts." *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). Usually the potential conflict arises when a newly enacted statute clashes with an established rule of procedure—in *Watkins*, MRE 404(b), and in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), MRE 702. This case distinctly differs from that norm. Here, the statute came first, and the court rule followed. The court rule was intended as an adjunct to the new nonparty-at-fault system. As this Court has previously explained, the Supreme Court promulgated MCR 2.112(K)(4) "to implement MCL 600.2957." *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003).

Indisputably, when the Supreme Court approved MCR 2.112(K)(4), it knew that the Legislature intended to remove the discretion of a trial court to *deny* a timely request to add an identified nonparty at fault as a party defendant: "the court *shall* grant leave to the moving party to file and serve an amended pleading . . . ." MCL 600.2957(2) (emphasis added). In other words, when drafting the court rule intended to

complement this statute, the Supreme Court understood that a timely request to amend had to be granted. "Upon motion," the words chosen by the Legislature, describe one way of amending. Those words generally mean "at the request of a party." Nothing in the statute precludes a party from achieving the same result—an amendment—by another means.

Accordingly, the Supreme Court evidently decided that the court rule would permit a plaintiff to file an amended complaint adding an identified nonparty as a party without first filing a motion. In my view, the court rule and the statute are entirely consistent with regard to the central and controlling issue: a plaintiff's right to timely amend a complaint to add an identified nonparty at fault as a party. Read together, the two provisions permit a plaintiff to file a motion to amend, or not. Either way, the result is the same: the amendment must be permitted if it is timely. I see no irreconcilable conflict.[1]

A somewhat analogous case, *Apsey v Mem Hosp*, 477 Mich 120; 730 NW2d 695 (2007), contributes to my reasoning. *Apsey* involved two statutes addressing the notarization of out-of-state affidavits. One statute required that such affidavits include a clerk's certification and seal. The other required only the signature of

[1] There is yet another way to resolve this case without declaring a conflict between the statute and the court rule. MCL 600.2301 provides:

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

Plaintiff's failure to file an amended complaint in this case amounts to a harmless error that the trial court should have disregarded.

the notary and an affixed seal. This Court decided that the more specific statute controlled. *Apsey v Mem Hosp (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005). The Supreme Court reversed, holding that the two methods of proving a notarial act constituted equally acceptable alternatives, explaining:

> The Legislature need not repeal every law in a given area before it enacts new laws that it intends to operate in addition to their preexisting counterparts. The Legislature has the power to enact laws to function and interact as it sees fit. And when it does so, this Court is bound to honor its intent. [*Apsey*, 477 Mich at 131.]

In my view, the statute and court rule at issue here are similarly complementary. If a plaintiff wishes to file a motion to add a nonparty, so be it. Strategic reasons may motivate this choice, such as compelling the defendant to respond to certain allegations in the plaintiff's motion or educating the trial court about the issues. If time is of the essence, a plaintiff may instead elect to simply file an amended complaint. As in *Apsey*, the two alternative methods of accomplishing the same goal can live happily together, side by side.

Nor does a conflict exist regarding "relation back." MCL 600.2957(2) states that the statute of limitations does not bar a "cause of action added under this subsection" unless the added cause would have been barred when the original case was filed. In essence, this subsection of the statute provides for tolling of the statute of limitations for claims against timely added nonparties at fault. That MCR 2.112(K) does not contain a similar tolling provision is of no moment. I cannot conceive of why the *absence* of a relation-back provision would foreclose relation back, given the Legislature's directive that the statute of limitations does not bar a claim against properly added parties. The

court rule's mere silence regarding the statute of limitations does not create a conflict. Rather, I would hold that the comprehensive statutory scheme created to replace joint and several liability includes a quasi-tolling provision applicable to added parties that the courts must enforce. Simply put, there is no inconsistency with the language of MCR 2.112(K). The statute specifically covers "relation back." The court rule does not. It would be antithetical to the Legislature's approach to hold that the relation-back provision in MCL 600.2957(2) does not apply. The statute fills in for the court rules' silence on this subject.

Indeed, even comparing the language of MCR 2.118(D) and the statute, I find harmony rather than discord. The former declares that "[a] claim . . . relates back to the date of the original pleading," and the latter states that "[a] cause of action added under this subsection is not barred by a period of limitation . . . ." These provisions agree, in my view.[2]

I would decide this case simply and cleanly by holding that plaintiff was permitted by both the statute and the court rule to file her amended complaint

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[2] I acknowledge that in *Miller v Chapman Contracting*, 477 Mich 102, 107; 730 NW2d 462 (2007), the Supreme Court held that the relation-back doctrine codified in MCR 2.118(D) does not encompass the addition of new parties. But when a comprehensive statutory scheme is intended to preempt the common law, the common law must yield. *Jackson v PKM Corp*, 430 Mich 262, 277; 422 NW2d 657 (1988). In crafting MCL 600.2957(2), the Legislature eliminated the common law of joint and several liability in certain tort cases, concomitantly opening the door to the timely addition as a party of a nonparty identified by a defendant as at fault. The nullification of a statute-of-limitations defense to the addition serves as an integral part of this sea change in Michigan law, as it permits the jury to fairly distribute fault among all identified tortfeasors. This clear expression of legislative intent constrains the Supreme Court's common-law interpretation of MCR 2.118(D) in cases falling under MCL 600.2957(2).

with or without first filing a motion to amend, and that the amendment relates back. Because the majority has adopted an analysis that creates constitutional conflict where none need exist, I concur only in the result.

SERVITTO, P.J., and SHAPIRO, J., concurred with GLEICHER, J.

PEOPLE v KAVANAUGH

Docket No. 330359. Submitted March 7, 2017, at Grand Rapids. Decided July 6, 2017, at 9:00 a.m. Leave to appeal sought.

Kevin P. Kavanaugh was convicted in the Berrien Circuit Court of possession with the intent to deliver between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(*ii*). Kavanaugh and a passenger were driving in Kavanaugh's automobile on I-196 when Michigan State Police Trooper Michael Daniels pulled them over after observing two traffic violations—an improperly affixed license plate, MCL 257.225(2), and the failure to signal a lane change onto an exit ramp, MCL 257.648(1). Kavanaugh had recently purchased the automobile and did not yet have a registration. Daniels instructed Kavanaugh to accompany him to the police car where Daniels ran a computer check on Kavanaugh's license and determined ownership of Kavanaugh's car. Kavanaugh sat in the passenger seat, and Daniels sat in the driver's seat. Daniels confirmed that the car belonged to Kavanaugh and, in talking to Kavanaugh, learned that he and his passenger had been in Grand Rapids for three days. Daniels walked back to Kavanaugh's car and spoke with the passenger. When Daniels returned to the police car where Kavanaugh had remained, he told Kavanaugh that he was not going to ticket him for the violations. Rather, Daniels issued Kavanaugh a warning. Daniels then asked for Kavanaugh's consent to search his car. Kavanaugh refused. Daniels told Kavanaugh that he was calling another officer with a drug-sniffing dog to the scene and that Kavanaugh would have to wait 15 minutes for the officer and dog to arrive. The officer and the dog arrived approximately 15 minutes later, and the dog alerted at the car's trunk where the police officers found marijuana. The entire event, from Daniels's initial observation of Kavanaugh's car through Kavanaugh's arrest, was captured on video. Kavanaugh moved before trial to suppress the evidence found in the trunk. The court, Charles T. LaSata, J., denied the motion without having viewed the video footage of the stop and arrest. Kavanaugh renewed his motion to suppress at trial. The court viewed the video and confirmed its ruling, and Kavanaugh was convicted of possession with intent to deliver marijuana. Kavanaugh appealed on two asserted Fourth Amendment bases: (1) Daniels lacked reason to

initiate the traffic stop, and (2) Daniels lacked lawful grounds to detain him after Daniels told Kavanaugh that he was not going to ticket him. Kavanaugh also claimed that the prosecution's failure to provide him with a photograph and video in its possession before trial constituted a violation of *Brady v Maryland*, 373 US 83 (1963).

The Court of Appeals *held*:

1. Generally, a police officer's decision to stop a vehicle and briefly detain the driver is reasonable when the officer has probable cause to believe that a traffic violation has occurred, even when the officer's decision to make the stop reflects a subjective intent to stop the vehicle on the basis of other factors. Daniels stopped Kavanaugh's car after he observed that the car's cardboard license plate was flapping and unreadable when the car was moving, a violation of MCL 257.225(2), and that the car moved into the exit lane without using a signal, a violation of MCL 257.648(1). The stop was proper because Daniels possessed the probable cause necessary to stop the vehicle, briefly detain the driver, and dispose of the matter. Kavanaugh's Fourth Amendment right to be free from unreasonable seizures was not violated by the initial traffic stop.

2. The length of a reasonable and constitutionally permissible traffic stop extends until the reason for the traffic stop has been resolved, ordinarily with the issuance of a ticket or a warning or, in some circumstances, arrest. A traffic stop may take longer than the time necessary to resolve a traffic violation if a new set of circumstances that gives rise to a reasonable suspicion of criminal activity is revealed during an otherwise routine stop. Whether a traffic stop may properly become an investigatory stop depends on the totality of the facts and circumstances specific to each case. A police officer must have more than an inchoate and unparticularized suspicion that the occupants of a vehicle are engaged in some criminal activity; that is, the officer must be able to articulate specific reasonable inferences he or she is entitled to draw from the facts in light of his or her experience. In this case, the permissible portion of the traffic stop ended when Daniels issued a warning to Kavanaugh. Without an articulable and reasonable suspicion that Kavanaugh was engaged in criminal activity—i.e., probable cause that some criminal activity was afoot—detaining Kavanaugh longer violated his constitutional right to be free from unreasonable seizure. Daniels gave the following reasons for summoning a drug-sniffing dog to the scene: (1) Kavanaugh did not pull over until he had nearly reached the end of the exit ramp, (2) Kavanaugh appeared nervous through-

out the encounter, (3) Kavanaugh could not produce the title or registration to the vehicle, (4) Kavanaugh did not close the passenger door when he and Daniels were seated in Daniels's police car, and (5) Kavanaugh and his passenger gave different answers to several questions he posed to both of them. None of the reasons given by Daniels adequately supported an inference of criminal activity under the facts and circumstances of this case. In particular, there was no place for Kavanaugh to pull over before the end of the exit ramp; the video did not support Daniels's claim that Kavanaugh was unusually nervous, and in any event nervousness is of limited value in determining the existence of reasonable suspicion; Daniels was able to quickly determine that Kavanaugh owned the vehicle; Daniels's observation that it was unusual for an individual to not close the car door did not indicate that Kavanaugh was engaged in criminal activity nor did it demonstrate a readiness to flee; and the fact that Kavanaugh and his companion gave slightly different answers to questions posed by Daniels did not support reasonable suspicion of criminal activity. Daniels simply could not, on the basis of the circumstances at the scene of the stop, articulate specific reasonable inferences leading to a conclusion that there was criminal activity afoot. Because of this, the trial court wrongly denied Kavanaugh's motion to suppress the marijuana found in Kavanaugh's trunk as a result of the unconstitutional detention.

Reversed and remanded.

1. CRIMINAL LAW — TRAFFIC STOP — DETENTION — NERVOUSNESS.

Nervousness is of limited value in determining whether there is reasonable suspicion sufficient to detain a driver during a traffic stop.

2. CRIMINAL LAW — TRAFFIC STOP — DETENTION — OCCUPANTS OF VEHICLE GIVE DIFFERING RESPONSES TO OFFICER'S QUESTIONS.

The fact that two people traveling together give slightly different answers to a few general questions posed by a law enforcement officer is not grounds to reasonably suspect the individuals of criminal activity when none of the questions concerns criminal activity and the officer cannot articulate a basis for connecting the differing answers to criminal activity.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Daniel W. Grow, PLLC (by *Daniel W. Grow*), for defendant.

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

PER CURIAM. Defendant was convicted of possession with the intent to deliver between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(*ii*). The marijuana was found in his car's trunk during a search conducted after a police dog alerted to the marijuana's smell. Defendant argues that the trial court erred by holding that the initial traffic stop was valid and by holding that the search did not violate his rights under the Fourth Amendment. He also argues that there was a *Brady*[1] violation regarding a photo and video that were not timely produced by the prosecution. For the reasons stated in this opinion, we reverse the trial court's ruling on the second Fourth Amendment claim and remand for further proceedings. Given our decision regarding defendant's second Fourth Amendment claim, the *Brady* issue is moot.

I. FACTS

Defendant was driving on I-196 with a female passenger when he was pulled over by Michigan State Police Trooper Michael Daniels. Daniels testified that he had observed two traffic violations: defendant's vehicle had an improperly affixed license plate,[2] and defendant failed to signal a lane change[3] onto an exit ramp.

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[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[2] The plate was a Florida temporary plate made of cardboard and was affixed by two bolts. See MCL 257.225.

[3] See MCL 257.648.

Daniels asked defendant for the car's registration. Defendant responded that he had just recently purchased the car and did not yet have a registration. Daniels then told defendant to exit the car and to follow him. The two walked back to the police cruiser leaving the passenger in defendant's car. Daniels told defendant to sit in the front passenger seat of the police car. Daniels got into the driver's seat and said he was going to run some computer checks. While running the computer checks on defendant's license and ownership of the vehicle, Daniels asked defendant several questions and learned that he and his female passenger had been in Grand Rapids for three days. Daniels then asked what defendant and his female companion were doing in the Grand Rapids area since they were from Florida. After completing the computer checks, which confirmed defendant's ownership of the car and revealed no outstanding warrants, Daniels told defendant to stay in the cruiser and walked back to defendant's car where he spoke with defendant's female companion.

After doing so, Daniels returned to the cruiser and told defendant that he was going to give him a warning rather than a ticket for the traffic violations. He then asked defendant for consent to search the car. When defendant declined to consent, Daniels informed him that he was going to radio a request for a dog to do a contraband sniff of defendant's vehicle and that defendant and his companion would have to remain until the dog and its handler arrived and the process was completed. After about 15 minutes,[4] the dog and his

[4] The video of the encounter indicates that at approximately the 15:25 mark defendant refused to consent to a search of his car, at which point the officer told him that he was going to have a police canine come to sniff the car. The dog and its handler arrived at the 30:07 mark.

officer arrived. The dog alerted at the car's trunk. The officers opened the trunk and found the marijuana. The entire course of events, from Daniels's initial observation of defendant's vehicle to defendant's arrest, was captured on video camera.

Defendant filed a pretrial motion to suppress the evidence found in the trunk. After an evidentiary hearing, the trial court denied the motion. For purposes of the hearing, the court did not watch the video, and although defense counsel noted that the video was available if the court wished to watch it, neither party specifically requested that the court do so. Defendant raised the issue again at trial, at which time the trial court watched the video and confirmed its prior ruling. Like the trial court, we have watched and listened to the recording. Having done so, we need not rely on the trial court's conclusions as to what the video contains. *People v Zahn*, 234 Mich App 438, 445-446; 594 NW2d 120 (1999) (holding that there is no reason to give deference to the trial court when the trial court was in no better position to assess the evidence).

II. FOURTH AMENDMENT ISSUES

Defendant raises two arguments grounded in the Fourth Amendment. First, he argues that Daniels lacked grounds to pull him over for a traffic stop. Second, he argues that Daniels lacked lawful grounds to detain him beyond the conclusion of the traffic stop. We disagree with defendant's first argument but agree with his second.

A. THE TRAFFIC STOP

Daniels testified at the pretrial suppression hearing and at trial. He stated that he stopped defendant

because he saw what he determined to be two traffic violations. First, Daniels concluded that defendant was in violation of MCL 257.225(2) because the vehicle's license plate was flapping in the wind and unreadable while the car was moving. Second, he concluded that when getting on an exit ramp defendant had violated MCL 257.648(1) by making the lane change without signaling. *People v Hrlic*, 277 Mich App 260, 263-266; 774 NW2d 221 (2007).

Defendant argued below, and argues again on appeal, that Daniels's stated explanations were mere pretexts for a stop that lacked a constitutional basis.[5] However, the United States Supreme Court has held that when there is probable cause to believe that a driver has violated a traffic law, it is constitutional to briefly detain the driver for purposes of addressing the violation even if the officer's subjective intent for stopping the car is based on other factors. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996). In this case, because Daniels had probable cause to stop defendant, the traffic stop was lawful and did not violate the Fourth Amendment.

[5] Prior to the stop, Daniels had received a radio call to watch for a silver Honda Accord with a Florida temporary plate. He was not provided with any reasons for the request, and there was no indication that defendant was suspected of a crime. In light of this, defendant argues that the alleged traffic violations were irrelevant and that the stop was unlawful. However, the prosecution correctly argued that the radio call was irrelevant, and that the constitutionality of Daniels's actions must be judged on the basis of what occurred from the time he observed defendant's car. This is consistent with the caselaw, and we review Daniels's actions based on his observations of defendant, defendant's passenger, and defendant's vehicle.

B. DETENTION AFTER THE TRAFFIC STOP

Defendant argues, and we agree, that the traffic stop was completed when Daniels determined that the vehicle was owned by defendant, gave him a warning about the traffic violations, and told him there would not be a ticket issued. After the traffic stop was completed, Daniels asked defendant for permission to search his car. Defendant did not consent, at which point Daniels told defendant that he was requesting that another officer bring a police dog to conduct a "sniff" for the presence of contraband in defendant's vehicle. Daniels ordered defendant to remain at the scene until the dog arrived and not to enter his car while waiting.

It is blackletter law that a "seizure" within the meaning of the Fourth Amendment occurs when, in view of all the circumstances, a reasonable person would conclude that he or she was not free to leave. *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980). Having been ordered by Daniels to remain at the scene, defendant was clearly seized under the law, and the prosecution does not disagree with this characterization.

Until the 2015 decision of the United States Supreme Court in *Rodriguez v United States*, 575 US ___; 135 S Ct 1609; 191 L Ed 2d 492 (2015), there was debate about whether requiring a driver to wait for a dog sniff after a traffic stop had concluded should be considered a seizure separate from the traffic stop itself or whether the basis for the traffic stop could encompass a brief additional delay for a dog sniff. In *Rodriguez*, the United States Supreme Court definitively resolved the debate, holding that "a dog sniff is not fairly characterized as part of the officer's traffic mission." *Id*. at ___; 135 S Ct at 1615. The Court explained that although police officers "may conduct

certain unrelated checks during an otherwise lawful traffic stop," they "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id*. at ___; 135 S Ct at 1615. The Court held, "[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Id*. at ___; 135 S Ct at 1612. Once the constitutionally sound basis for the traffic stop has been addressed, any further extension of the detention[6] in order to conduct "[o]n-scene investigation into other crimes" or for any other reason is a Fourth Amendment violation unless new facts come to light during the traffic stop that give rise to reasonable suspicion of criminal activity. *Id*. at ___; 135 S Ct at 1616.

In light of these constitutional principles, we begin our analysis with the understanding that the continued detention of defendant and his vehicle after the traffic stop's conclusion was unconstitutional unless "[the] traffic stop reveal[ed] a new set of circumstances," *People v Williams*, 472 Mich 308, 315; 696 NW2d 636 (2005), that led to "a reasonably articulable suspicion that criminal activity [was] afoot," *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). "Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances." *Id*. "A determination

[6] Even if the officer has not yet completed the traffic violation matters, if conducting a canine sniff causes that completion to be delayed, the delayed detention remains a constitutional violation. As stated in *Rodriguez*, the question is not "whether the dog sniff occurs before or after the officer issues a ticket," but "whether conducting the sniff 'prolongs'—i.e., adds time to—'the stop[.]' " *Rodriguez*, 575 US at ___; 135 S Ct at 1616.

regarding whether a reasonable suspicion exists 'must be based on commonsense judgments and inferences about human behavior.' " *Id*., quoting *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001) (citation omitted). "That suspicion must be reasonable and articulable . . . ." *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). "[I]n determining whether [a police] officer acted reasonably . . . , due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968) (examining the reasonableness of an officer's search for weapons).[7]

We have reviewed the relevant testimony as well as the complete audio-video recording of the encounter, from Daniels's first observation of defendant's car up to and including the arrest.[8] On the basis of this review, we have concluded that Daniels did not have a reasonable suspicion of any criminal activity sufficient to justify his extension of the traffic stop to allow for a dog sniff. Daniels's stated justifications were either not

[7] Defendant's refusal to consent to a search could not serve as grounds for reasonable suspicion. "A refusal to consent to a search cannot itself form the basis for reasonable suspicion: 'it should go without saying that consideration of such a refusal would violate the Fourth Amendment.' " *United States v Santos*, 403 F3d 1120, 1125-1126 (CA 10, 2005), quoting *United States v Wood*, 106 F3d 942, 946 (CA 10, 1997). As stated in *Santos*, "If refusal of consent were a basis for reasonable suspicion, nothing would be left of Fourth Amendment protections." *Santos*, 403 F3d at 1126.

[8] The video was recorded on a camera in Daniels's vehicle. Most of the time, the camera was directed forward out the front windshield to show defendant's car. However, when defendant was seated in the police car, Daniels turned the camera so that it recorded the events inside the car.

consistent with the video record or were not sufficient to support a reasonable suspicion of criminal activity.[9]

Daniels testified that his suspicions were first raised because defendant did not pull over until he had nearly reached the end of the exit ramp. However, Daniels agreed that defendant did not appear to be attempting to flee or attempting to avoid the stop. Perhaps more to the point, the video makes plain that, until the end of the ramp where the roadway widened, there was very little, if any, room for a car to pull over.[10] Given this fact and the absence of any indication of flight, Daniels's explanation carries very little weight.[11]

Daniels further testified that a factor in his decision to detain defendant was his belief that defendant appeared nervous throughout the encounter. Daniels stated that defendant's hands were shaking when he gave him his license, that he appeared increasingly nervous while sitting in the police car, and that he made little eye contact. The video does not include the

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[9] Real-time recordings of such encounters are of substantial assistance to both trial and appellate courts. Rather than relying on varied recollections and attempts to assess credibility, the court can, in large measure, hear and see the relevant facts for itself. This provides direct information and may also assist the court in assessing the reliability of witnesses who testify as to events seen in the video. Absent a claim that the recording is incomplete or somehow unreliable, a video record allows for fact-finding that does not depend on the vagaries of memory or bias. Therefore, whenever practicable, such videos should be provided to the court, the court should review them, and they should be made part of the record on appeal.

[10] The right side of the ramp had a very narrow shoulder and a guardrail, which did not provide enough space for defendant's vehicle to get off of the one-lane exit. Adjacent to the left side was a ditch.

[11] Daniels also testified that, while they were on the exit ramp, he saw defendant make movements as if to place something on the floor of the car. On review of the video, we cannot discern any such movement, but we agree that Daniels could have seen movement that the video did not capture.

passing of the license but, having viewed the video, we cannot discern any evidence of unusual or increasing levels of nervousness in defendant during his interaction with Daniels. In addition, the video shows defendant in the front seat of the police car for an extended period sitting both with Daniels and, for some time, alone. He does not display any overt nervousness, and any opportunity for eye contact was greatly limited by the fact that Daniels's eyes were at his computer screen at almost all times even when defendant attempted to engage him in conversation. Whether the license and vehicle check took this much attention or whether Daniels employed the time as an interrogation technique, the video clearly shows that opportunities to make eye contact with Daniels were not available and that defendant did not seem to be making any special efforts to avoid eye contact.[12] Moreover, many courts have given little weight to considerations of nervousness during a traffic stop. See, e.g., *United States v Richardson*, 385 F3d 625, 630-631 (CA 6, 2004) (stating that "nervousness . . . is an unreliable indicator, especially in the context of a traffic stop" and noting that "[m]any citizens become nervous during a traffic stop, even when they have nothing to hide or fear"); *United States v Simpson*, 609 F3d 1140, 1147-1148 (CA 10, 2010) (recognizing that "[n]ervousness is of limited value" in determining whether reasonable suspicion exists because most citizens exhibit signs of nervousness when confronted by law enforcement

[12] The trial court made findings consistent with Daniels's testimony in this regard, e.g., finding that defendant was "extremely nervous." We conclude that these findings are clearly erroneous in light of the video evidence. The disparity between Daniels's testimony and the events recorded on the video, particularly as the disparity concerns Daniels's testimony about defendant's nervousness, also raises questions about the trial court's finding that Daniels was credible.

whether they are innocent or guilty and absent "significant knowledge of a person, it is difficult, even for a skilled police officer, to evaluate whether a person is acting normally for them or nervously").

Daniels also pointed to the fact that defendant could not produce the registration or title for the vehicle and stated that he had only recently purchased it and had not yet been provided with all the paperwork. We agree that if defendant was driving an out-of-state car that did not belong to him it could provide reasonable suspicion that defendant may have stolen the car. However, Daniels promptly ran the vehicle's identification number and determined that defendant was in fact the vehicle's owner and that there were no warrants out for him. We cannot conclude that concern about the vehicle's ownership justified the subsequent detention, and Daniels did not explain why, based on his experience or knowledge, defendant's not having his registration provided grounds to suspect defendant of criminal activity.

Daniels claimed that his suspicions were further raised when he directed defendant to sit with him in the front of the parked police car and defendant did not close the passenger door. Daniels described this as unusual. However, Daniels failed to articulate any basis for the conclusion that this was suspicious behavior or that in his experience it indicated criminal activity.[13] The prosecution has similarly failed to refer us to any cases that support such an inference. Of course, it would have been highly suspicious had defendant actually attempted to leave, but merely allowing the door to remain open was not indicative of

[13] Indeed, Daniels even stated that he does not close the passenger door when placing individuals in the front seat of the cruiser in such situations "so that they feel like they're free to leave."

flight.[14] In the video it was clear that defendant made no movements suggesting that he was planning on fleeing and he obeyed Daniels's commands in all respects and with ready cooperation. We reject Daniels's proposition that the open door served as grounds to support reasonable suspicion.

Daniels also testified that he spoke separately with defendant and his passenger and that they gave differing answers to some questions. They agreed that they had driven from Florida and had been visiting friends in Grand Rapids, but when asked on the video recording if they were boyfriend and girlfriend, defendant said they were "just friends," while the passenger said "well, we're trying to be." We do not believe that these answers were necessarily inconsistent or that if they were inconsistent, that they indicated any likelihood of criminal activity. Daniels certainly did not articulate in his testimony why these answers suggested criminal activity. Defendant and his female passenger also named different hotels when asked where they had stayed in Grand Rapids,[15] and defendant said they did not do anything special, while his passenger said they went to an "art festival" and "apple orchard." The provision of slightly different answers by two people traveling together to three general questions, none of which goes to criminal activity, is not grounds to reasonably suspect them of criminal activity in the absence of an articulated basis connecting the answers to criminal activity.

It is not enough that an officer have an "inchoate and unparticularized suspicion or 'hunch.' " *Terry*, 392 US at

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[14] Some might even feel it improper to close the door when an officer purposely left it open.

[15] The passenger said they stayed at the Grand Village Inn, and defendant said they stayed at "Travel Lodge."

27. The officer must be able to articulate "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id*. Here, Daniels has recounted some aspects of the stop that he found "unusual." As we have already observed, however, some of his testimony is not consistent with the video record. More to the point is the fact that in his testimony Daniels was never able to articulate any specific inferences of possible criminal activity.[16] We understand that police officers have extensive experience and that their

[16] The facts of this case contrast sharply with those in *People v Oliver*, 464 Mich 184; 627 NW2d 297 (2001), in which a stop was upheld against a Fourth Amendment challenge. In *Oliver*, the facts did clearly provide an articulable inference of criminal activity. The Court made the following observations regarding a vehicle and its occupants stopped shortly after a local bank robbery:

> (1) [T]he deputy encountered the car near the crime scene, given that the apartment complex was within a quarter mile of the bank; (2) the time was short, with at most fifteen minutes elapsing from the time of the report of the robbery to the traffic stop; (3) the car was occupied by individuals who comported with the limited description that the officer had at his disposal; (4) [the deputy] had tentatively eliminated the direction north of the bank as an escape route on the basis of the information he received from the carpet store employees; (5) on the basis of his familiarity with the area and experience with crimes of this nature, [the deputy] formed the reasonable and well-articulated hypothesis that the robbers had fled to the secluded Westbay Apartments; (6) the deputy also reasonably hypothesized on the basis of his experience that the robbers would use a getaway car to try to escape from the area; (7) [the deputy] also reasonably inferred on the basis of his experience that a driver would probably be at the getaway car waiting for the actual robbers; (8) the behavior of each of the car's four occupants in seeming to avoid looking in the direction of the deputy's marked police car was atypical; (9) the car was *leaving* the apartment complex, which is consistent with it being a getaway car whose occupants were attempting to leave the area; (10) the car followed a circuitous route that avoided driving by the site of the bank robbery. [*Id*. at 200-201.]

hunches sometimes turn out to be correct. However, the constitutional requirement is clear. A hunch is not enough. *Id*. See also *Nelson*, 443 Mich at 632 (a suspicion must be articulable and reasonable). If a hunch was sufficient to support a detention like the one that occurred in this case, many more unconstitutional detentions would occur. The requirement that law enforcement officers possess more than a hunch is necessary even when a suspect is actually guilty in order to preserve the rights of innocent individuals against unlawful police detentions and searches.[17]

We reverse the trial court and hold that the detention after the end of the traffic stop in order to wait for the dog was unlawful under *Rodriguez*. Accordingly, the evidence obtained as a result of that detention must be suppressed.

III. *BRADY* ISSUES

Defendant argues that two pieces of evidence were not provided in a timely fashion to his attorney: an enlarged color photo of the defendant's license plate and a second video of the scene that was recorded from the police car that brought the dog. Defendant argues that this delay constituted a due-process violation. This issue is moot. Defendant is now in possession of the evidence he claims was wrongfully withheld by the prosecution. If this case is again tried after remand, defendant will have the evidence. See *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004) ("An issue is moot when

[17] In a situation in which a search reveals no evidence of crime, the driver will likely not be arrested and the legality of the seizure will never be tested in court. Maintaining respect for the Fourth Amendment therefore requires nothing less than its consistent enforcement even when the illegal search reveals clear evidence of guilt.

an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy.").

IV. CONCLUSION

Detaining defendant to wait for a drug-sniffing dog and its handler to arrive and perform their work was an unconstitutional seizure of defendant's person. The fruits of this wrongful seizure should not have been admitted. For this reason, we reverse defendant's conviction and remand this case to the trial court for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

STEPHENS, P.J., and SHAPIRO and GADOLA, JJ., concurred.

In re MJG

Docket No. 332928. Submitted December 9, 2016, at Detroit. Decided July 11, 2017, at 9:00 a.m. Application for leave to appeal dismissed 501 Mich 985.

MJG's adoptive parents (petitioners) contracted with the Adoption Network Law Center (ANLC) for assistance with their search for a child to adopt, and petitioners ultimately adopted MJG after receiving services from ANLC. ANLC is a California law corporation. MJG was born in Michigan, and the adoption was finalized in Michigan. Petitioners live in Indiana. The contract between petitioners and ANLC required petitioners to pay ANLC $21,400 for services it was to provide to facilitate petitioners' search for, and adoption of, a child. MCL 710.54(7)(a) of the Michigan Adoption Code requires adoptive parents to file a verified accounting of fees paid to a non-Michigan entity that facilitated an adoption finalized in Michigan. Petitioners submitted their verified accounting and a supplement to the accounting to the Oakland Circuit Court for the court's approval of the fee petitioners paid to ANLC for services related to the adoption. ANLC charged petitioners four separate fees totaling $21,400 for services provided in three phases during the adoption process. Because ANLC was a law corporation, petitioners categorized their payments to ANLC as attorney fees. The court, Joan E. Young, J., ruled that none of the $21,400 paid to ANLC constituted an allowable expense under MCL 710.54, and ANLC was required to return the money to petitioners. According to the court, MCL 710.54(3)(f) authorizes adoptive parents to pay legal fees in connection with an adoption, but the owner and only shareholder of ANLC was not a licensed attorney in Michigan and therefore could not properly recover money designated as attorney fees. In addition, the court noted that none of the fees charged actually pertained to the delivery of any legal services. The court also determined that ANLC was not a child-placing agency and could not recover fees under MCL 710.54(3)(a). Although it was not a party to the initial action in the circuit court, ANLC appealed the denial of petitioners' request for approval of the $21,400 in fees petitioners had paid to ANLC.

The Court of Appeals *held*:

1. MCL 710.54 governs charges and fees in adoption cases. Specifically, MCL 710.54 accomplishes the following: it prohibits an individual from paying costs related to certain services or items in the adoption process unless approved by the court, MCL 710.54(1); it prohibits compensation for certain services unless performed by a child-placing agency, MCL 710.54(2); it authorizes an adoptive parent to pay a reasonable charge for certain expenses and services, MCL 710.54(3); and it mandates an adoptive parent to pay for specific services, MCL 710.54(4) and (5). MCL 710.54(7)(a) requires petitioners to submit to the circuit court a verified accounting that itemizes all monetary payments made, or things of value given, by or on behalf of a petitioner in connection with an adoption, and MCL 710.54(10) requires a circuit court to approve or disapprove all fees and expenses within the scope of MCL 710.54. Determining whether a fee or expense falls within the scope of MCL 710.54 requires the court to analyze whether the fee or expense occurred "in connection with" the adoption. The statute does not define "in connection with," but a dictionary definition indicates that "connection" means "relationship in fact." Therefore, a court must ask whether the fee or expense is related in fact to the adoption. If the fee or expense is not, the court's inquiry is finished, and the court may not preclude the fee or expense. If the fee or expense is related to the adoption, the court must ask whether the fee or expense is prohibited under MCL 710.54(1) or (2). If the fee or expense is not prohibited, the court must determine whether the fee or expense is allowed under MCL 710.54(3) or mandated under MCL 710.54(4) or (5). A court may only review expenses that have a relationship in fact with the adoption. When parties to a contract agree to charge for and pay fees and expenses that are not related in fact to the adoption, that is, fees and expenses that are not within the scope of the statute, the court has no authority to disapprove them. To do so would interfere with the parties' freedom to contract. In short, a circuit court must approve or disapprove of all fees and expenses within the scope of MCL 710.54, but it must not take any action against a fee or an expense not within the scope of the statute. Simply because petitioners place certain fees and expenses before the court in verified accountings does not alone confer authority on the court to permit or prohibit those fees or expenses. A trial court's authority to approve or disapprove of fees and expenses depends on whether the fee or expense is related in fact to the adoption. If it is not, the court may not preclude it.

2. The trial court should not have rejected the $21,400 in fees listed in petitioners' verified accounting simply because petitioners labeled them as "attorney fees" they had paid to ANLC. Petitioners' label was not controlling. Notably, ANLC did not label the fee, petitioners did, and to hold that petitioners' label was binding on ANLC would have been inherently unjust.

3. ANLC's preliminary and administrative services fee in Phase I did not fall within the scope of MCL 710.54 because it was not connected with MJG's adoption; the preliminary and administrative services fee was connected with services performed when petitioners were merely prospective clients. Because the fee was not within the scope of the statute, the trial court erred by disapproving it. The Phase 1 client liaison services fee related to services provided after petitioners had become clients; those services included apprising petitioners of various birth mothers. Therefore, the performance of ANLC's client liaison services was connected with the adoption. Although the services were related in fact to the adoption and fell within the scope of the statute, MCL 710.54(2) prohibits payment for assisting a potential adoptive parent in evaluating a parent or guardian or adoptee and for referring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption. The client liaison services fell within these prohibitions, and the trial court therefore properly disapproved of the client liaison services fee. The total fee for ANLC's preliminary and administrative services and client liaison services was $4,000, but there was no indication of how much of that $4,000 was apportioned between the two different services. On remand, the trial court would have to determine the specific apportionment.

4. The marketing services fee charged by ANLC in Phase I involved marketing services that occurred before any adoption and were provided to petitioners at the time they were simply potential adoptive parents. The services were performed without identifying any potential adoptee or birth mother, and only informed a national and perhaps international audience that petitioners were available to adopt. Therefore, the marketing services were not within the scope of the statute. That is, the marketing services were not performed in connection with the adoption, and the fee for the marketing services should not have been disallowed by the trial court.

5. ANLC's Phase II fundamental readying and legal analysis services fee included services related in fact to the adoption—e.g., generating the birth mother's profile, obtaining medical information about the birth parents and child, obtaining information

about the birth father, assisting the birth mother to obtain prenatal care, and analyzing the legal requirements and applicable state laws for adoption. The services were related to the birth mother or the prospective adoption and clearly qualified as being connected with the adoption. Consequently, the services fell within the scope of the statute, and the trial court properly reviewed them. Payment for some of the services, however, was not permissible under MCL 710.54(1) or (2). The prohibited services included generating the birth mother's profile, comparing the birth mother's and the adoptive parents' preferences, and presenting an adoption opportunity to the clients. The remainder of the fundamental readying and legal analysis services were compensable: ascertaining required information about the adoptee and the adoptee's biological family, MCL 710.54(3)(e); providing to the adoptive parents information concerning the health and genetic history of the child and the child's biological family, MCL 710.54(1)(b) and (c); assisting the birth mother with obtaining prenatal care, MCL 710.54(1)(c); and analyzing the legal requirements and applicable state laws, MCL 710.54(3)(f). Because some of the services were within the scope of the statute but expressly prohibited by it, only part of the $5,800 fee was properly payable to ANLC. Because it was not clear what portion of the fee should be apportioned among the compensable services and awarded to ANLC, the case had to be remanded to the trial court to determine the proper apportionment.

6. ANLC's adoption opportunity services fee in Phase III included the provision of several different services, all but one of which were clearly performed in connection with the adoption and were subject to the trial court's approval. Services such as arranging for the birth mother's housing, food, essential pregnancy-related needs, and transportation, and assisting the birth mother during and after the adoption process related in fact to the adoption. Of the fees paid in this phase, one was prohibited by MCL 710.54(2)—the fee for services related to introducing the birth mother to petitioners. Specifically, Subdivisions (c) and (d) prohibit any fee from being paid regarding referrals among prospective adoptive parents and birth mothers for the purpose of adoption. The fees for a few additional services in this phase were not allowable because they are not expressly enumerated in MCL 710.54(3), e.g., managing the adoption plan and communicating with legal entities. Whether counseling for petitioners was compensable was unclear from the record because no information indicated the purpose or extent of the counseling, and therefore, whether the counseling was related in fact to the adoption was unknown. MCL 710.54(3)(c) does not authorize compensation for

counseling provided to petitioners because the statute only expressly allows counseling fees for services provided to the prospective adoptee and the prospective adoptee's parent or guardian. Use of "parent" in MCL 710.54 does not include adoptive parents because throughout the statute there is a distinction made between adoptive parents and the parents or guardian of the adoptee, and the statutory language clearly indicates that a counseling fee may be charged specifically for counseling of the adoptee or the adoptee's parent or guardian. The fee charged for the adoption opportunity services was partly authorized, and the trial court erred by disapproving the entire amount. On remand, the trial court would have to determine the proper apportionment of the $8,500 fee and award the proper amount to ANLC for the allowable services it provided.

Affirmed in part, reversed in part, and remanded.

1. ADOPTION — SCOPE OF FEES AND EXPENSES PAYABLE — DEFINITION OF "IN CONNECTION WITH."

Under MCL 710.54(10), a trial court must approve or disapprove all fees and expenses in connection with an adoption; "in connection with" means "related in fact to"; therefore, fees and expenses subject to a court's review—i.e., within the scope of MCL 710.54—are limited to those that are connected with an adoption; a trial court may not preclude payment for any fee or expense not related in fact to an adoption because an unrelated fee or expense falls outside the scope of fees and expenses subject to the court's review.

2. ADOPTION — DETERMINING WHICH FEES AND EXPENSES ARE PAYABLE — RELATED IN FACT TO ADOPTION — PERMISSIBLE OR PROHIBITED FEES AND EXPENSES.

A trial court must decide whether a fee or expense requested in an adoption case is compensable by first determining whether the fee or expense falls within the scope of MCL 710.54, that is, whether the fee or expense is connected with, i.e., related in fact to, the adoption; if the fee or expense is related to the adoption, the court must determine whether it is enumerated as permitted, mandated, or prohibited under MCL 710.54.

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Amici Curiae:

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Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Jonathan S. Ludwig*, Assistant Attorney General, for the Michigan Department of Health and Human Services.

Before: SAAD, P.J., and METER and MURRAY, JJ.

SAAD, P.J. This case arises from the adoption of MJG, a minor child, by the adoptive parents-petitioners under the Michigan Adoption Code, MCL 710.21 *et seq*., and specifically involves the fees paid by petitioners to appellant, Adoption Network Law Center (ANLC), for services performed that may have been related to the adoption process. After a hearing was held regarding the fees, the circuit court denied petitioners' request for approval of the $21,400 in fees they paid to ANLC, and the court required that the money be returned. ANLC appeals, and for the reasons set forth herein, we affirm in part, reverse in part, and remand.

I. NATURE OF THE CASE

As the Attorney General correctly points out in his amicus brief, the adoption of children may be used for good or ill. The adoption of children can either be a special opportunity for childless adults who long to be parents and Michigan children who would benefit greatly from a home with caring parents, or adoption may be used as a cover for baby selling, which is repugnant, unlawful, and contrary to the best interests of the children involved. And, unquestionably, the focus of Michigan law is to advance the best interests of children, whether the specific issue is custody, termination of parental rights, or, as here, adoption.

While courts normally do not interject themselves into contractual matters between competent parties when no party takes exception to how the contract was performed, the Legislature, through its enactment of MCL 710.54, requires courts to review payments made in connection with Michigan adoptions. This legislation seeks to promote the best interests of children by providing for adoption by adoptive parents, while also minimizing the risk of baby selling. To accomplish this dual goal, the Michigan Legislature gave courts supervisory power over the adoption process, including, and important to our analysis, the power to permit or prohibit certain fees paid by adoptive parents "in connection with the adoption."

Complications arise when, as here, adoptive parents from outside Michigan enter into a contract with a non-Michigan entity to broadcast, on a worldwide or nationwide basis, the adoptive parents' desire and availability to adopt a child. The issue is further complicated when many of these contracted-for services are performed outside Michigan and long before the adoption process begins in Michigan. These com-

plications arise because adoptive parents from outside Michigan who find a child to adopt in Michigan must, as part of the adoption process, submit to a Michigan court a verified accounting of fees paid to the non-Michigan entity. And the statute that outlines which fees are prohibited, mandated, and permitted is complicated and includes criminal penalties for violations of its fee-reporting provisions.

In this case, pursuant to MCL 710.54, the adoptive parents of MJG submitted their list of fees and expenses to the circuit court. And though both the adoptive parents and ANLC agreed that the $21,400 in fees was acceptable, the circuit court ultimately rejected all of the fees, and ANLC was required to return the money. Although not a party to the proceedings in the circuit court, ANLC filed an appeal in this Court. Again, this case presents a somewhat unusual situation because neither the adoptive parents nor ANLC disputed the legitimacy of the fees or the amount of the fees in the circuit court, and on appeal, both ANLC and the adoptive parents continue to maintain that the fees were appropriate and that the court erred when it disallowed them.[1]

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[1] Because of the nature of the complicated issues presented, we invited the parties to submit supplemental briefs after oral argument. Additionally, because ANLC and the adoptive parents maintain the same position on appeal and because the issues presented are of first impression and relate to the important issue of adoption, we invited the State Bar of Michigan's Family Law Section Adoption Committee, the American Academy of Adoption Attorneys, and "[o]ther persons or groups" who are "interested in the determination of the issues presented" to file amicus curiae briefs. *In re MJG*, unpublished order of the Court of Appeals, entered November 22, 2016 (Docket Nos. 332928). We thank Bethany Christian Services, the American Academy of Adoption Attorneys, Supporting Members of the State Bar of Michigan Whose Adoption Cases Comprise a Significant Portion of Their Legal Practice, and the Attorney General for filing their respective amicus curiae briefs with the Court.

Although MCL 710.54(10) requires the circuit court to approve or disapprove "all fees," when this mandate is considered in context with the rest of the statute, it is clear that the court only has authority to approve or disapprove fees for services that were required to be submitted to the court for approval in the first instance. For fees that fall under MCL 710.54(7)(a), this means that only fees that were for services made "in connection with the adoption" require court approval. Thus, before a court disapproves any submitted fees, it should determine whether the fees actually fall under the scope of the statute.

As explained below, although some fees were properly denied, the trial court erred when it rejected certain fees paid because those fees fall outside the purview of the statute. As an example, we preliminarily note that the marketing fee paid by the adoptive parents to broadcast via the Internet their availability to adopt is not a fee paid "in connection with the adoption," and therefore, it is not subject to court approval. Accordingly, we affirm the court's denial of some fees, reverse the denial of others, and remand for clarification regarding other fees.

II. BASIC FACTS

ANLC is a California law corporation, petitioners reside in Indiana, and the adoption was finalized in Michigan where MJG was born. Before any adoptee was identified for petitioners, petitioners and ANLC entered into an Adoption Services Agreement, which provided that petitioners would pay a total of $21,400 for ANLC's services. According to testimony, ANLC's costs are purportedly comparable to those of other agencies and law firms that provide similar services to

adoptive parents throughout the United States. The $21,400 fee was divided among the following three phases:

Phase I	
Preliminary and Administrative and Client Liaison Services Fee	$4,000
Marketing Services Fee	$5,800
Phase II	
Fundamental Readying and Legal Analysis Fee	$5,800
Phase III	
Adoption Opportunity Services Fee	$5,800

The $4,000 fee in Phase I is for preliminary and administrative services and client liaison services. The preliminary and administrative services include consultations with prospective clients, assistance in completing a confidential adoption questionnaire, assessment of the prospective clients' objectives and challenges, and assistance with other paperwork. The client liaison services include the services of a liaison employee after adoptive parents are retained as clients. The liaison works with other staff to ensure that the clients are informed of the availability of various birth mothers. Marketing services involve efforts to expose the clients to birth mothers throughout the United States. ANLC creates a family profile for the clients and markets the clients through search engine optimization on the Internet, outreach with hard copy materials to clients and pregnancy centers, and Internet advertising and marketing.

The Phase II services of fundamental readying and legal analysis begin when a birth mother desires to meet ANLC's clients. The services include obtaining the birth mother's medical records, determining her

emotional and financial needs, and assisting her in obtaining prenatal care if necessary.

The Phase III services occur after the clients are introduced to the birth mother. These services include managing the adoption plan, communicating with legal entities, and coaching the relationship between the birth mother and the clients. ANLC also handles the trust account for birth mother expenses.

As required by the statute at issue, petitioners submitted a verified accounting and a supplement to their verified accounting, which detailed the payments they made to ANLC that were "related" to the adoption. MCL 710.54(7)(a). Notably, petitioners categorized all of ANLC's fees as "attorney fees" on the accounting forms they submitted to the circuit court. Petitioners explained that they used "attorney fees" because ANLC is a law firm but said that they were open to using other categories on the form, if the circuit court desired.

At the hearing related to the fees, ANLC's owner and chief counsel, Kristin Yellin, testified by telephone. According to Yellin, while ANLC only represents potential adoptive parents, it does provide support services to birth mothers. After Yellin testified, the circuit court noted that although the fees were "listed under attorney fees" in petitioners' request, the court "didn't hear [Yellin] say one single word about providing legal services[.]"

In its opinion and order, the circuit court first acknowledged that pursuant to MCL 710.54(3)(f), legal fees are an allowable expense that can be charged to adoptive parents. However, the court ruled that none of the fees at issue was recoverable as an attorney fee because neither Yellin nor ANLC could charge attorney fees given that Yellin was not licensed to practice law

in Michigan. The circuit court also held that none of the fees actually pertained to the delivery of any legal services. Thus, even if Yellin were admitted to practice law in Michigan, the fees were not legal fees and, accordingly, were not recoverable under MCL 710.54(3)(f). The circuit court also ruled that ANLC failed to meet the statutory requirements of a "child placing agency," which further precluded it from recovering fees under MCL 710.54(3)(a). Consequently, the circuit court denied petitioners' request for approval of the $21,400 listed as "attorney fees" in petitioner's verified accounting.

III. STANDARD OF REVIEW

On appeal, we review whether the circuit court properly denied payment of the $21,400 in fees. Because this issue is predicated on the interpretation of a statute, our review is de novo. *Stanton v Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002). "We construe a statute in order to determine and give effect to the Legislature's intent. The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute." *Auto-Owners Ins Co v Dep't of Treasury*, 313 Mich App 56, 68-69; 880 NW2d 337 (2015) (quotation marks and citations omitted). When a statute's language is unambiguous, "we give the words their plain meaning and apply the statute as written." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

IV. MCL 710.54

MCL 710.54 of the Michigan Adoption Code governs authorized charges and fees in adoption cases. The interpretation of this statute is an issue of first impression. We quote the language of the statute in full:

(1) Except for charges and fees approved by the court, a person shall not pay or give, offer to pay or give, or request, receive, or accept any money or other consideration or thing of value, directly or indirectly, in connection with any of the following:

(a) The placing of a child for adoption.

(b) The registration, recording, or communication of the existence of a child available for adoption.

(c) A release.

(d) A consent.

(e) A petition.

(2) Except for a child placing agency's preparation of a preplacement assessment described in section 23f of this chapter or investigation under section 46 of this chapter, a person shall not be compensated for the following activities:

(a) Assisting a parent or guardian in evaluating a potential adoptive parent.

(b) Assisting a potential adoptive parent in evaluating a parent or guardian or adoptee.

(c) Referring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption.

(d) Referring a parent or guardian of a child to a prospective adoptive parent for purposes of adoption.

(3) An adoptive parent may pay the reasonable and actual charge for all of the following:

(a) The services of a child placing agency in connection with an adoption.

(b) Medical, hospital, nursing, or pharmaceutical expenses incurred by the birth mother or the adoptee in connection with the birth or any illness of the adoptee, if not covered by the birth parent's private health care payment or benefits plan or by Medicaid.

(c) Counseling services related to the adoption for a parent, a guardian, or the adoptee.

(d) Living expenses of a mother before the birth of the child and for no more than 6 weeks after the birth.

(e) Expenses incurred in ascertaining the information required under this chapter about an adoptee and the adoptee's biological family.

(f) Legal fees charged for consultation and legal advice, preparation of papers, and representation in connection with an adoption proceeding, including legal services performed for a biological parent or a guardian and necessary court costs in an adoption proceeding.

(g) Traveling expenses necessitated by the adoption.

(4) An adoptive parent shall pay the reasonable and actual charge for preparation of the preplacement assessment and any additional investigation ordered pursuant to section 46 of this chapter.

(5) A prospective adoptive parent shall pay for counseling for the parent or guardian related to the adoption, unless the parent or guardian waives the counseling pursuant to section 29 or 44.

(6) A payment authorized by subsection (3) shall not be made contingent on the placement of the child for adoption, release of the child, consent to the adoption, or cooperation in the completion of the adoption. If the adoption is not completed, an individual who has made payments authorized by subsection (3) may not recover them.

(7) At least 7 days before formal placement of a child under section 51 of this chapter, the following documents shall be filed with the court:

(a) A verified accounting signed by the petitioner itemizing all payments or disbursements of money or anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption. The accounting shall include the date and amount of each payment or disbursement made, the name and address of each recipient, and the purpose of each payment or disbursement. Receipts shall be attached to the accounting.

(b) A verified statement of the attorney for each peti-

tioner itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child. If the attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

(*i*) The attorney meets the requirements for an adoption attorney under section 22 of this chapter.

(*ii*) The attorney did not request or receive any compensation for services described in section 54(2) of this chapter.

(c) A verified statement of the attorney for each parent of the adoptee itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child. If the attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

(*i*) The attorney meets the requirements for an adoption attorney under section 22 of this chapter.

(*ii*) The attorney did not request or receive any compensation for services described in section 54(2) of this chapter.

(d) A verified statement of the child placing agency or the department itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the child placing agency or the department for, or incidental to, the adoption of the child, and containing a statement that the child placing agency or the department did not request or receive any compensation for services described in section 54(2) of this chapter.

(8) At least 21 days before the entry of the final order of adoption, the documents described in subsection (7) shall be updated and filed with the court.

(9) To assure compliance with limitations imposed by this section and section 55 of this chapter and by section 14

> of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements that, directly or indirectly, led to placement of the individual for adoption.
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> (10) The court shall approve or disapprove all fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.
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> (11) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both, for the first violation, and of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both, for each subsequent violation. The court may enjoin from further violations any person who violates this section. [MCL 710.54.]

Contrary to ANLC's argument that only the services listed in MCL 710.54(1)(a) through (e) are required to be approved by the court, the plain language of MCL 710.54(10) requires court approval of "*all* fees and expenses." (Emphasis added.) However, when read in context, "all fees" should not and cannot include fees paid for services that do not fall within the purview of the statute. See *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 40; 761 NW2d 269 (2008) (stating that statutes are to be read and interpreted in the context of the whole act in which they appear). For the types of fees at issue in this appeal, MCL 710.54(7)(a)[2] provides that petitioners are to submit to the circuit court "[a] verified accounting . . . itemizing

[2] MCL 710.54(7)(b) through (d) cover other types of expenses—fees paid to the petitioners' legal counsel, fees paid to the legal counsel for the adoptee's family, and fees paid to a child-placing agency. None of those fees is implicated in this appeal.

all payments or disbursements of money or anything of value made or agreed to be made by or on behalf of the petitioner *in connection with the adoption*." (Emphasis added.) The Legislature did not define the phrase "in connection with," and therefore we may consult a dictionary to learn the phrase's " 'common and approved usage,' " *Alvan Motor Freight*, 281 Mich App at 43, quoting MCL 8.3a. Under the word "connection," there are many definitions, but one definition is linked to the particular usage here: "relationship in fact."[3] *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, it is clear that the circuit court can only review the expenses under MCL 710.54(7)(a) that have a relationship in fact with the adoption. In other words, if a fee is for a service that is not related to the adoption itself, then it does not fall within the scope of the statute, and the circuit court has no authority to preclude the expense. Indeed, to preclude an expense not related to the adoption would amount to an unwarranted abrogation of contractual rights.

Looking further at the statutory scheme, MCL 710.54(1) merely prohibits charges and fees for the items enumerated in that subsection unless the charges and fees are approved by the court. Thus, absent any authorization from a court, the expenses listed in MCL 710.54(1) are squarely prohibited. The statute similarly prohibits compensation for the activities in MCL 710.54(2) unless they are done for particular purposes and are performed by a "child placing agency,"[4] which ANLC admits on appeal that it is not.

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[3] The language used in the statute is "in connection with," and for this definition, the dictionary gives the example "wanted in [connection] with a robbery." *Merriam-Webster's Collegiate Dictionary* (11th ed).

[4] MCL 710.22(k) defines a "child placing agency" as "a private organization licensed under 1973 PA 116, MCL 722.111 to 722.128, to place children for adoption."

MCL 710.54(3) lists the charges that adoptive parents may pay. Because such charges are authorized under Subsection (3), the circuit court must approve fees that fall under this subsection if they represent reasonable and actual charges. MCL 710.54(3). Notably, Subsection (3) does not use open-ended terms like "such as" or "including" to indicate that the list is not exhaustive; therefore, the list of permissible expenses in this subsection *is* exhaustive. MCL 710.54(4) and (5) list fees that adoptive parents must pay, and, thus, the circuit court is also required to approve fees that fall under these subsections.

Accordingly, we hold that simply including certain fees or expenses in a verified accounting does not give a court authority to permit or prohibit those fees. Rather, it is incumbent on the trial court to determine in the first instance whether a submitted or requested fee falls within the purview of the statute. Unquestionably, MCL 710.54 is complex and multilayered and could easily cause prospective adoptive parents to be over-inclusive in their submissions, especially considering that the court has the right to affirm or deny the adoption, and the statute also provides criminal penalties for making omissions in the verified accounting.

Therefore, we believe the proper framework for analyzing fees under the statute involves these inquiries:

(1) Do ANLC's fees fall within the scope of the statute? That is, are the fees related to the adoption? If not, then the court has no authority to disapprove the fees.

(2) If the fees are related to the adoption, are they prohibited by Subsections (1) or (2)?

(3) If the fees are not prohibited under Subsections (1) or (2), are they permitted under Subsection (3)?[5]

V. CIRCUIT COURT'S RELIANCE ON "ATTORNEY FEES" LABEL

The trial court should not have rejected the entirety of the $21,400 in fees simply because petitioners labeled them as attorney fees. The label petitioners attached to the fees does not end the inquiry, nor does it justify the rejection of all fees simply and solely because of the label. Cf. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) (indicating that in the context of determining the gravamen of a plaintiff's complaint, the plaintiff's labels are not controlling). This is especially true because petitioners reasonably explained that they thought the different fees were appropriately called legal/attorney fees because the fees were in fact paid to a law firm. Additionally, when the circuit court questioned whether the fees were truly attorney fees, petitioners offered to revise the form and use other categories if the court desired. Notably, ANLC did not place the "attorney fees" label on the fees—petitioners did. To hold that petitioners' choice of labels is binding on ANLC under these circumstances would serve no purpose and would be unjust.

VI. APPLICATION OF MCL 710.54

A. PRELIMINARY AND ADMINISTRATIVE AND CLIENT LIAISON SERVICES FEE

The preliminary and administrative services include consultations with prospective clients, assistance

[5] We need not consider whether any of the individual fees are payable under Subsections (4) or (5) because ANLC does not claim that these subsections are implicated.

in completing a confidential adoption questionnaire, assessment of the prospective clients' objectives and challenges, and assistance with other paperwork. The client liaison services include the services of a liaison after adoptive parents are retained as clients. The liaison works with other staff to ensure that the clients are apprised of various birth mothers.

First, it is clear that the preliminary and administrative services are not connected to any adoption, much less the specific Michigan adoption of MJG. Instead, these are preliminary services that take place well before any potential adoptees or birth mothers are identified. Indeed, to highlight the fact that these services are not connected with any adoption, these services are done for *prospective* clients. Accordingly, they do not fall within the scope of MCL 710.54, and the trial court abused its discretion when it denied the preliminary and administrative fee.

However, the client liaison services fee is another matter, as those services take place after adoptive parents have been retained as clients. Further, the services include apprising the clients of various birth mothers. In this case, client liaison services include apprising petitioners of MJG's birth mother, and therefore, the client liaison fee was inherently connected with, or related in fact to, the adoption.

While MCL 710.54(1) does not prohibit the client liaison services fee, MCL 710.54(2) does. MCL 710.54(2)(b) and (c) prohibit fees for "[a]ssisting a potential adoptive parent in evaluating a parent or guardian or adoptee" and "[r]eferring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption," respectively. Accordingly, we hold that the client liaison fee payable to ANLC is prohibited by statute, and the trial court did not err when it disapproved this particular fee.

Therefore, the preliminary and administrative fee should not have been disallowed, but the client liaison services fee was properly disapproved. And while the record shows that the total of both of these fees was $4,000, we do not know how much of the $4,000 is allowable as the preliminary and administrative fee. Therefore, on remand, the trial court is to make that determination.

B. MARKETING SERVICES FEE

The primary purpose of the marketing fee is to let potential birth mothers throughout the United States (and perhaps worldwide) know of the desire and qualifications of ANLC's clients—potential adoptive parents. Here, the marketing fee was for services that disseminated information to the world at large that petitioners were available to adopt. Importantly, these services were performed without the identification of any potential adoptee or birth mother and without any guarantee that an adoption ultimately would take place. Because the status of any adoption at this time necessarily would have been speculative, we hold that the marketing services provided were not done "in connection with the adoption." Clearly, the marketing fee at issue was not sufficiently connected with the Michigan adoption, and therefore it was not necessary to submit the fee to the circuit court for its approval. And because submission to the circuit court was not required, it necessarily follows that the circuit court had no authority to reject the fee. Accordingly, the circuit court erred when it disallowed the $5,800 marketing fee.[6]

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[6] ANLC argues on appeal that if the marketing fee was not allowable under the statute, then the statute impermissibly infringed its First Amendment right to free speech. While it is clear that MCL 710.54(3)

C. FUNDAMENTAL READYING AND LEGAL ANALYSIS SERVICES FEE

The fundamental readying and legal analysis services include intake meetings with birth mothers; generating a profile for the birth mother, including her pregnancy-related financial needs; obtaining medical and statistical information on the birth parents and child; and directing and assisting the birth mother to have a physical evaluation, screenings, and testing. The readying and legal analysis services also include obtaining the birth mother's medical records, obtaining information on the birth father to assist in terminating his parental rights, and comparing the preferences of the birth mother and the adoptive parents. Finally, the readying and legal analysis services include analyzing the legal requirements and applicable laws in the clients' and the birth mother's states and presenting an adoption opportunity to the clients.

Because these services are related to the birth mother or the prospective adoption, these services clearly qualify as being connected with the adoption and, accordingly, the court properly ruled on the legality of the fees. Some of the services in this phase are prohibited under MCL 710.54(1) or (2). The prohibited services include generating a profile for the birth mother, comparing the preferences of the birth mother and the adoptive parents, and presenting an adoption opportunity to the clients. Generating a profile for the birth mother and comparing the preferences of the birth mother to the preferences of the adoptive parents is akin to assisting the birth mother and adoptive parents in evaluating one another. MCL 710.54(2)(a) and (b). Presenting an adoption opportunity to the

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does not allow for the payment of marketing fees, we need not address ANLC's constitutional concern because MCL 710.54 does not apply to the marketing fee and it is therefore not subject to the court's approval.

clients (i.e., prospective adoptive parents) is akin to the "communication of the existence of a child available for adoption," MCL 710.54(1)(b), or "[r]eferring a parent or guardian of a child to a prospective adoptive parent for purposes of adoption," MCL 710.54(2)(d). Therefore, the fees associated with these particular services are prohibited.

However, we agree with ANLC that the remainder of the services in the readying and legal analysis phase fall under MCL 710.54(3). An intake meeting with a birth mother falls under MCL 710.54(3)(c) as counseling a parent. Obtaining medical and statistical information about the birth parents and child, obtaining the birth mother's medical records, and obtaining information about the birth father fall under MCL 710.54(3)(e) as "[e]xpenses incurred in ascertaining the information required under this chapter about an adoptee and the adoptee's biological family." MCL 710.27(1)(b) and (c) require accounts of the health and genetic history of the child and biological parents to be provided to the prospective adoptive parents.[7] Directing and assisting the birth mother to have a physical evaluation, screenings, and testing also falls under Subdivision (c) as counseling services to a parent. Finally, analyzing the legal requirements and applicable laws falls under MCL 710.54(3)(f) as legal services.

From the foregoing, it is clear that part of this $5,800 fee was authorized and, thus, the circuit court erred when it disapproved the entire amount. Because the record is silent regarding the apportionment of the

[7] Although information about a biological father is intended to assist with the legal termination of his parental rights, his identity is also required to determine his health and genetic history.

$5,800 fee between the approved and disapproved services, we remand for the circuit court to determine the proper allocation.

D. ADOPTION OPPORTUNITY SERVICES FEE

The adoption opportunity services include arranging an introduction between the clients and the birth mother; counseling of the clients; referring the clients to the appropriate out-of-state agencies, social workers, and attorneys; and managing the adoption plan. The adoption opportunity services also include communicating with legal entities; providing to the clients any subsequently received medical records regarding the birth mother's obstetrical care; arranging for the birth mother's housing, food, essential pregnancy-related needs, and transportation; administering the Trust Account for the birth mother's expenses; and assisting the birth mother in applying for state medical insurance or other health coverage if necessary. Finally, the adoption opportunity services include securing professional counseling for the birth mother; Birthmother Peer-Mentoring Support Services; and continuing to support and aid the birth mother during and after the adoption process. With the exception of the counseling for petitioners,[8] it is clear that these services were performed in connection with the adoption and therefore are subject to the court's approval.

While MCL 710.54(1) does not prohibit the fees for any of these services, MCL 710.54(2) does prohibit the fee for services related to introducing the birth mother to the clients. Specifically, MCL 710.54(2)(c) and (d) preclude any fee to be paid in conjunction with any

[8] As we will explain, it is not readily apparent whether the counseling provided to petitioners was sufficiently connected to the adoption.

referral between prospective adoptive parents and birth parents for purposes of adoption. Because introducing the birth mother to petitioners is the equivalent of referring the birth mother to the petitioners, the fee for this service is prohibited.

MCL 710.54(3) allows fees for some of these other services. Providing medical records falls under MCL 710.54(3)(e). The birth mother's needs and transportation expenses fall under MCL 710.54(3)(d) and (g). Assisting the birth mother in applying for insurance and in securing professional counseling and mentoring support services falls under Subdivision (c).

The fee for the remaining adoption opportunity services, however, is not allowable under MCL 710.54(3). Referring clients to agencies, social workers, and attorneys; managing the adoption plan; and communicating with legal entities are not enumerated services under MCL 710.54(3).[9]

Further, the fee for counseling services for clients, i.e., the adopting petitioners, is not permitted under MCL 710.54(3)(c) because that provision only allows fees for counseling services provided to the prospective adoptee and the prospective adoptee's parents or guardians. MCL 710.54(3)(c) permits payment of a fee for "[c]ounseling services related to the adoption for *a parent, a guardian, or the adoptee*." (Emphasis added.) ANLC's claim that "a parent" in the statute refers to *any* parent, including a potential adoptive parent, is not persuasive. Looking elsewhere in the statute, it is clear that when the Legislature refers to "a parent," it

[9] There is no indication that the fees charged for referring clients to attorneys and communicating with legal entities are necessarily performed by an attorney, and it is not clear whether the fee for those services would fall under MCL 710.54(3)(f) as allowable legal fees for consultation or legal advice.

is referring to the parent of the child who is to be adopted and not an adoptive parent. For instance, in the immediately preceding subsection, MCL 710.54(2), the Legislature repeatedly uses the term "a parent" along with the term "adoptive parent," which demonstrates that these are two distinct concepts. Likewise, MCL 710.54(5) also differentiates between an "adoptive parent" and "the parent" in the same sentence. Thus, it is clear that when the statute uses the phrase "a parent," it is referring to a person who was a parent to the child before the adoption occurred. And when the statute refers to the adopting parents, it instead uses the explicit term "adoptive parent." As a result, any fee related to counseling services was not intended for petitioners and is not allowable under MCL 710.54(3)(c).

And yet we note that despite the fact that counseling *for the adoptive parents* is not payable under MCL 710.54(3)(c), it would be payable if these counseling services fell outside the purview of the statute by failing to meet the threshold criteria of being performed "in connection with the adoption."[10] We note that there is insufficient information in the record for us to make this evaluation; therefore, on remand the circuit court is to make this determination.

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[10] To be clear, we believe that most counseling services for the adoptive parents would likely fall outside the purview of the statute. Similar to the marketing services discussed earlier, some counseling could have occurred before any adoptee was ever identified. Further, such counseling could in fact address areas such as parenting, which is only incidentally related to the adoption itself. Many a potential parent takes parenting classes to be better equipped for the arrival of a child. Indeed, such a prohibition would prevent an adoptive parent from merely purchasing a self-help or how-to parenting book because that expense would not be enumerated under MCL 710.54(3). In these circumstances, it is hard to see how such "counseling" then would be considered to be connected to the adoption, per se.

Accordingly, part of this $5,800 fee was authorized, and the circuit court erred when it disapproved the entire amount. Therefore, because the record does not show how this $5,800 fee was apportioned between the various individual services, we remand for the circuit court to make this determination. Again, because the record is not fully developed on what actually comprised *petitioners'* counseling services, it is not clear whether these services fall under the scope of the statute; therefore, the circuit court is to determine whether these counseling services were connected to the adoption and fall under the ambit of the statute.

VII. CONCLUSION

We hold that the circuit court erred when it denied the entirety of the $21,400 in fees. Specifically, the court should not have disapproved part of the $4,000 preliminary and administrative fee and client liaison services fee in Phase I because the portion allocated to the preliminary and administrative fee was not subject to court approval. But because the record does not identify how this $4,000 was apportioned between the two aspects of the fee, the circuit court is to determine the correct apportionment. Similarly, the $5,800 marketing fee is allowed because that service does not fall within the purview of the statute, which only governs fees for services that are connected with, or related in fact to, the adoption. Regarding the $5,800 Phase II fee and the $5,800 Phase III fee, parts of these two fees were properly disallowed but others should have been approved. Again, because these Phase II and Phase III fees were not separated into amounts for each particular service, the circuit court is to determine the proper dollar amount that should have been approved. Further, a portion of the Phase III fee is for counseling

services that were provided to petitioners. While fees for counseling adoptive parents are not permitted under MCL 710.54, it is questionable whether these types of counseling fees require court approval in the first instance because the statute only authorizes a trial court to approve or reject fees that are for services performed in connection with the adoption. On remand, the circuit court is to determine whether these counseling services are sufficiently connected with, or related in fact to, the adoption. Consequently, if the services are not connected with the adoption, then the circuit court is to allow the fees.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs, as no party prevailed in full and ANLC and petitioners were not opposing each other. MCR 7.219.

METER and MURRAY, JJ., concurred with SAAD, P.J.

In re BGP

In re JSP

Docket Nos. 333700 and 333813. Submitted December 9, 2016, at Detroit. Decided July 11, 2017, at 9:05 a.m. Application for leave to appeal dismissed 501 Mich 985.

Petitioners filed unrelated actions in the Oakland Circuit Court, seeking to finalize their individual adoptions of different minor children born in Michigan. Petitioners each filed a verified accounting with the court as required by MCL 710.54(7) of the Michigan Adoption Code, MCL 710.21 *et seq*., detailing the payments that each had purportedly made in connection with their respective adoptions of the children. Petitioners in both cases identified nonparty American Adoptions, Inc., as the payee of the administrative fee they had paid and American Family Media, LLC, as the payee of the marketing fee they had paid. In each case, petitioners attached a letter from American Adoptions that explained the administrative fee; the administrative fees were imposed to cover American Adoptions' monthly overhead expenses, including general contract labor, IT services, payroll, health insurance, professional insurance, office supplies, and rent. In Docket No. 333700, the court, Jeffrey S. Matis, J., approved all the requested fees except for petitioners' payment of American Adoptions' administrative fee and American Family Media's marketing fee. In Docket No. 333813, the court, Lisa Langton, J., similarly approved all the requested fees except for petitioners' payment of American Adoptions' administrative fee and American Family Media's marketing fee. American Adoptions moved for reconsideration of the orders, which each court denied. American Adoptions appealed in each case, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. To have a protected property interest under the Due Process Clauses of the United States Constitution and the Michigan Constitution, a claimant must have a legitimate claim of entitlement to the claimed interest, not just a unilateral expectation to the claimed interest. Due process at its core requires the opportunity to be heard at a meaningful time and in a meaningful manner, but an oral hearing is not necessary to

provide a meaningful opportunity to be heard. In this case, American Adoptions had a property interest in the administrative fees because the adoptive parents contracted with American Adoptions to pay those fees. However, the courts' denial of the administrative fees without American Adoptions' participation in the respective proceedings was not a denial of due process because its interest in the fees was presented to the courts through American Adoptions' fee-explanation letters. Accordingly, American Adoptions failed to demonstrate plain error on the basis of this unpreserved constitutional issue.

2. MCL 710.54(1) prohibits charges and fees for certain enumerated items, and MCL 710.54(2) prohibits fees and charges for certain enumerated activities unless they are done for particular purposes and performed by a child-placing agency as defined in MCL 710.22(k). While MCL 710.54(10) provides that a court must approve *all* fees and expenses related to the adoption of a child born in Michigan, MCL 710.54(7)(a) provides that a petitioner must only submit for approval those payments or disbursements that were made in connection with the adoption. Accordingly, if a fee is for a service that is not related to the adoption itself, then it does not fall within the scope of the statute, and the court has no authority to approve or preclude the expense. The fact that a fee is not prohibited under MCL 710.54(1) or (2) does not mean that the fee is therefore allowed under MCL 710.54; instead, a fee must be authorized under MCL 710.54 before a court has authority to approve or deny the fee. American Adoptions's administrative fee in each case represented the company's overhead expenses, which were not connected or related in fact to the individual adoptions; the courts accordingly did not have authority to deny the fees. The trial courts had to approve American Adoptions' administrative fees on remand.

3. American Adoptions did not have standing to challenge the courts' denial of marketing fees because the company did not have an identifiable interest in the fees.

In Docket Nos. 333700 and 333813, reversed in part and remanded.

The Law Office of Dion E. Roddy, PLLC (by *Dion E. Roddy*), for the adoptive petitioners.

Speaker Law Firm PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*) for American Adoptions, Inc.

Amici Curiae:

Warner Norcross & Judd LLP (by *Jonathan Lauderbach*, *Conor B. Dugan*, and *Emily S. Rucker*) for Bethany Christian Services.

Lauran F. Howard for the American Academy of Adoption Attorneys.

Williams Williams Rattner & Plunkett, PC (by *Donna Marie Medina*), and *Conklin Law Firm* (by *Mary M. Conklin*) for Supporting Members of the State Bar of Michigan Whose Adoption Cases Comprise a Significant Portion of Their Legal Practice.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Jonathon S. Ludwig*, Assistant Attorney General, for the Michigan Department of Health and Human Services.

Before: SAAD, P.J., and METER and MURRAY, JJ.

SAAD, P.J. In these consolidated cases, nonparty[1] American Adoptions, Inc., appeals the circuit court orders that disallowed the payment of administrative and marketing fees by the adoptive parents related to the adoption of two minors in Michigan. For the reasons provided below, we reverse in part and remand.

I. BACKGROUND

Both cases arise from the adoption of a minor child under the Michigan Adoption Code, MCL 710.21 *et seq*.

[1] American Adoptions was not a party in the respective trial court proceedings, but because the trial court denied fees that were to be paid to it, American Adoptions filed the appeal in this Court.

These cases specifically involve the fees paid by the respective adoptive parents (petitioners) for services ostensibly related to the adoption process. American Adoptions is a not-for-profit adoption agency based in Kansas, petitioners reside outside of Michigan,[2] and the adoptee children were born in Michigan.

As required by MCL 710.54(7), the adoptive parents in each case submitted a verified accounting and a supplement to their verified accounting, which detailed the payments made purportedly in connection with their adoption of children born in Michigan. In both cases, petitioners identified American Adoptions as the payee of the administrative fee and American Family Media as the payee of the marketing fee. Petitioners attached, in addition to other documents, a letter from American Adoptions that explained its fees.[3] The letters were written by Wade Morris, the Director of Community Resources for American Adoptions, and addressed to petitioners' attorney (same attorney in each case). Presumably, Morris's letters did not refer to any marketing fees because American Family Media—and not American Adoptions—received the marketing fees from petitioners. With respect to the administrative fees, Morris stated the following, in pertinent part:

> This fee covers other general overhead expenses relating to various administrative functions of American Adoptions or other Adoption Professionals, including but not limited to the many and various administrative functions that American Adoptions or other Adoption Professionals un-

[2] The petitioners in Docket No. 333700 reside in Hawaii, and the petitioners in Docket No. 333813 reside in Nebraska.

[3] The submitted letters in both cases are essentially the same except for the background information pertaining to the respective petitioners and the respective adoptee children.

> dertake prior to an adoption opportunity. This fee is fully refundable if the adoption opportunity is ultimately unsuccessful.[4]

Morris explained that American Adoptions' monthly cost for such overhead expenses totaled approximately $267,000.

The circuit court approved all of the requested fees and costs, with the exception of the administrative fees and marketing fees. In Docket No. 333700, the circuit court disallowed the $7,250 administrative fee and the $4,000 marketing fee. In Docket No. 333813, the circuit court rejected the $4,495 administrative fee and the $10,000 marketing fee. The circuit court in both cases did not provide any explanation for its denial of these particular fees.[5]

II. DUE PROCESS

American Adoptions argues on appeal that it was denied due process because it was unable to participate in a hearing related to the approval of the fees. We review this unpreserved constitutional issue for plain error affecting substantial rights.[6] *Demski v Petlick*, 309 Mich App 404, 463; 873 NW2d 596 (2015).

The United States and Michigan Constitutions provide that "[n]o person may be deprived of life, liberty, or

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[4] Morris provided a nonexhaustive list of examples of overhead expenses: contract labor, IT services, its legal fees, postage, payroll, health insurance, professional insurance, telephone, medical records, office supplies, and rent.

[5] American Adoptions unsuccessfully sought to have the trial court reconsider its decision in both cases.

[6] Although American Adoptions raised the issue in its respective motions for reconsideration, "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

property without due process of law." *Murphy-DuBay v Dep't of Licensing & Regulatory Affairs*, 311 Mich App 539, 558; 876 NW2d 598 (2015), citing US Const, Am V and Am XIV, § 1; Const 1963, art 1, § 17. Thus, "[d]ue-process protections are only required when a life, liberty, or property interest is at stake." *Id*. "To have a protected property interest, one must possess more than a unilateral expectation to the claimed interest; the claimant must have a legitimate claim of entitlement." *York v Civil Serv Comm*, 263 Mich App 694, 702-703; 689 NW2d 533 (2004) (quotation marks and citation omitted). Here, there is no doubt that American Adoptions had a property interest in the administrative fees because the adoptive parents were contractually bound to pay these fees to American Adoptions.[7]

At its core, "[d]ue process requires the opportunity to be heard at a meaningful time and in a meaningful manner." *Id*. at 702 (quotation marks and citations omitted). Here, American Adoptions cannot show how any plain error affected its substantial rights. First, although American Adoptions may not have been formally invited to participate in the proceedings in the circuit court because it was not a party to the adoption, it nonetheless was able to successfully present its views regarding the administrative fees to the circuit court through the "fee explanation" letters written by

[7] However, American Adoptions did not have a property interest in any marketing/advertising fee because it was not the recipient of such a fee (American Family Media was), and there is nothing in the record to show that American Adoptions was entitled to a portion of any marketing fee. Additionally, American Adoptions stated in its briefs on appeal that, although it recommends American Family Media to its clients, these prospective adoptive parents are free to hire any media company they desire. Accordingly, with respect to the marketing fees, American Adoptions was not entitled to due process.

Morris. Thus, the court received materials to consider when reviewing petitioners' request to approve the fees, and among those materials was American Adoptions' letters outlining what the administrative fees covered. Importantly, "an oral hearing is not necessary to provide a meaningful opportunity to be heard." *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 460; 688 NW2d 523 (2004).[8] Consequently, American Adoptions has failed to prove any plain error by virtue of the fact that no formal hearing was held.

III. ADMINISTRATIVE FEES

American Adoptions claims that the circuit court erred when it denied the approval of the administrative fees. We review the circuit court's decision for an abuse of discretion. See *In re KMN*, 309 Mich App 274, 294; 870 NW2d 75 (2015). And we review issues of statutory interpretation de novo. *Auto-Owners Ins Co v Dep't of Treasury*, 313 Mich App 56, 68-69; 880 NW2d 337 (2015).

"MCL 710.54 of the Michigan Adoption Code governs authorized charges and fees in adoption cases." *In re MJG*, 320 Mich App 310, 321; 906 NW2d 815 (2017). The statute provides as follows:

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[8] In fact, counsel for American Adoptions at oral argument in this Court took the position that the letters written by Morris were sufficient to convey American Adoptions' interests and position, such that no further hearing should have been necessary. Counsel instead claimed that a hearing was necessary only when the court issued the adverse decision. We find no support for the view that an adverse decision acts to implicate or trigger due process. The key is whether there was a meaningful opportunity to be heard *before* the decision was rendered, and in this case, the information American Adoptions wanted to present to the trial court was indeed presented.

(1) Except for charges and fees approved by the court, a person shall not pay or give, offer to pay or give, or request, receive, or accept any money or other consideration or thing of value, directly or indirectly, in connection with any of the following:

(a) The placing of a child for adoption.

(b) The registration, recording, or communication of the existence of a child available for adoption.

(c) A release.

(d) A consent.

(e) A petition.

(2) Except for a child placing agency's preparation of a preplacement assessment described in section 23f of this chapter or investigation under section 46 of this chapter, a person shall not be compensated for the following activities:

(a) Assisting a parent or guardian in evaluating a potential adoptive parent.

(b) Assisting a potential adoptive parent in evaluating a parent or guardian or adoptee.

(c) Referring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption.

(d) Referring a parent or guardian of a child to a prospective adoptive parent for purposes of adoption.

(3) An adoptive parent may pay the reasonable and actual charge for all of the following:

(a) The services of a child placing agency in connection with an adoption.

(b) Medical, hospital, nursing, or pharmaceutical expenses incurred by the birth mother or the adoptee in connection with the birth or any illness of the adoptee, if not covered by the birth parent's private health care payment or benefits plan or by Medicaid.

(c) Counseling services related to the adoption for a parent, a guardian, or the adoptee.

(d) Living expenses of a mother before the birth of the child and for no more than 6 weeks after the birth.

(e) Expenses incurred in ascertaining the information required under this chapter about an adoptee and the adoptee's biological family.

(f) Legal fees charged for consultation and legal advice, preparation of papers, and representation in connection with an adoption proceeding, including legal services performed for a biological parent or a guardian and necessary court costs in an adoption proceeding.

(g) Traveling expenses necessitated by the adoption.

(4) An adoptive parent shall pay the reasonable and actual charge for preparation of the preplacement assessment and any additional investigation ordered pursuant to section 46 of this chapter.

(5) A prospective adoptive parent shall pay for counseling for the parent or guardian related to the adoption, unless the parent or guardian waives the counseling pursuant to section 29 or 44.

(6) A payment authorized by subsection (3) shall not be made contingent on the placement of the child for adoption, release of the child, consent to the adoption, or cooperation in the completion of the adoption. If the adoption is not completed, an individual who has made payments authorized by subsection (3) may not recover them.

(7) At least 7 days before formal placement of a child under section 51 of this chapter, the following documents shall be filed with the court:

(a) A verified accounting signed by the petitioner itemizing all payments or disbursements of money or anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption. The accounting shall include the date and amount of each payment or disbursement made, the name and address of each recipient, and the purpose of each payment or disbursement. Receipts shall be attached to the accounting.

(b) A verified statement of the attorney for each peti-

tioner itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child. If the attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

(*i*) The attorney meets the requirements for an adoption attorney under section 22 of this chapter.

(*ii*) The attorney did not request or receive any compensation for services described in section 54(2) of this chapter.

(c) A verified statement of the attorney for each parent of the adoptee itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child. If the attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

(*i*) The attorney meets the requirements for an adoption attorney under section 22 of this chapter.

(*ii*) The attorney did not request or receive any compensation for services described in section 54(2) of this chapter.

(d) A verified statement of the child placing agency or the department itemizing the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the child placing agency or the department for, or incidental to, the adoption of the child, and containing a statement that the child placing agency or the department did not request or receive any compensation for services described in section 54(2) of this chapter.

(8) At least 21 days before the entry of the final order of adoption, the documents described in subsection (7) shall be updated and filed with the court.

> (9) To assure compliance with limitations imposed by this section and section 55 of this chapter and by section 14 of Act No. 116 of the Public Acts of 1973, being section 722.124 of the Michigan Compiled Laws, the court may require sworn testimony from persons who were involved in any way in informing, notifying, exchanging information, identifying, locating, assisting, or in any other way participating in the contracts or arrangements that, directly or indirectly, led to placement of the individual for adoption.
>
> (10) The court shall approve or disapprove all fees and expenses. Acceptance or retention of amounts in excess of those approved by the court constitutes a violation of this section.
>
> (11) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both, for the first violation, and of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both, for each subsequent violation. The court may enjoin from further violations any person who violates this section. [MCL 710.54.]

At the outset, while "the plain language of MCL 710.54(10) requires court approval of '*all* fees and expenses,' " this must be read in context with the initial requirement under MCL 710.54(7)(a) that only those payments or disbursements that were made "in connection with the adoption" need to be submitted. *In re MJG*, 320 Mich App at 325-326. Simply put, "if a fee is for a service that is not related to the adoption itself, then it does not fall within the scope of the statute, and the circuit court has no authority to preclude the expense." *Id*. at 326. Thus, the approval process of MCL 710.54 is only implicated if the fee at issue is for a service that is connected with the adoption itself. *Id*. Once it is determined that a particular fee is subject to court approval, the statutory scheme is as follows:

> MCL 710.54(1) merely prohibits charges and fees for the items enumerated in that subsection unless the charges and fees are approved by the court. Thus, absent any authorization from a court, the expenses listed in MCL 710.54(2) are squarely prohibited. The statute similarly prohibits compensation for the activities in MCL 710.54(2) unless they are done for particular purposes and are performed by a "child placing agency," [as defined in MCL 710.22(k)] . . . . MCL 710.54(3) lists the charges that adoptive parents may pay. Because such charges are authorized under Subsection (3), the circuit court must approve fees that fall under this subsection if they represent reasonable and actual charges. MCL 710.54(3). [*Id*. at 326-327.]

Importantly, the list of allowable expenses for adoptive parents under Subsection (3) is exhaustive. *Id*. at 327. Further, "MCL 710.54(4) and (5) list fees that adoptive parents must pay, and, thus, the circuit court is also required to approve fees that fall under these subsections" as well. *Id*.

In its briefs on appeal, American Adoptions initially claimed that it is entitled to its administrative fees because, as a child-placing agency, the fees are explicitly permitted under MCL 710.54(3)(a). A "child placing agency" is defined as "a private organization licensed under 1973 PA 116, MCL 722.111 to 722.128, to place children for adoption." MCL 710.22(k). However, there is no evidence that American Adoptions is licensed under 1973 PA 116. Indeed, American Adoptions has conceded in its reply briefs on appeal that it does not qualify as a child-placing agency.

Instead, in its reply briefs, American Adoptions asserts that the administrative fees should have been approved because they are not prohibited under MCL 710.54(1) or (2). But merely because a fee is not prohibited under MCL 710.54(1) or (2) does not mean

that it is automatically allowable. If the fee is properly before the court, it must also be authorized under some other subsection.

American Adoptions fails to identify which subsection authorizes these administrative fees. However, this failure is not fatal to its appeal because after reviewing the administrative services, we do not believe that these services were specifically performed in connection with the adoptions that occurred here. In other words, American Adoptions' administrative overhead expenses did not have a relationship in fact with the particular adoptions, which means that the court was not authorized to rule on the appropriateness of the fees. See *In re MJG*, 320 Mich App at 326. Here, the fee was for overhead expenses that were not specifically related to any particular adoption. Indeed, the expenses were for items such as general contract labor, IT services, payroll, health insurance, professional insurance, office supplies, and rent. Due to the nature of what these overhead services entailed, we hold that the services were not connected, or related in fact, to the two adoptions.[9] As a result, the circuit court had no authority to deny these fees. On remand, the circuit court is to approve these administrative fees.

IV. MARKETING FEES

American Adoptions also argues that the circuit court erred when it failed to approve the $4,000 and

[9] We agree with American Adoptions' view that the mere fact that a petitioner lists fees on the approval form does not mean that they all necessarily fall under the scope of the statute. It is incumbent on the circuit court, when disapproving fees, to ensure that they fall under the scope of the statute. Because the failure to properly disclose fees can be a criminal offense, MCL 710.54(11), petitioners may be inclined to list more than is actually required under the statute.

$10,000 marketing fees in the two cases. While we held in a companion case, *In re MJG*, *id*. at 330, 336, that these types of marketing fees fall outside the scope of the statute and that therefore a court has no authority to deny such fees, we hold that American Adoptions lacks standing to raise this issue here.

> To have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. The party must have a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . . A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. [*People v Sledge*, 312 Mich App 516, 525; 879 NW2d 884 (2015) (quotation marks and citations omitted).]

The record is clear that the marketing fees were initially paid to a company called American Family Media, LLC. This is undisputed as (1) petitioners' verified accounting forms show that the money was paid to American Family Media, (2) the refunded money (after the court disapproved the fee) was issued to petitioners by American Family Media, (3) American Adoptions in its fee-explanation letters did not refer to the marketing fees, (4) American Adoptions acknowledged in its filings with this Court and the circuit court that the marketing fees are "from a separate company, American Family Media, LLC," and (5) American Adoptions allows adoptive parents to utilize the media company of their choice. Because there is no evidence of any connection between the marketing fees at issue and American Adoptions, we hold that American Adoptions lacks standing to challenge the denial of the marketing fees. No decision we make on this issue can affect American Adoptions. The only parties who would have standing to challenge the denial of the marketing

fees are petitioners and American Family Media. This is distinguishable from the facts in *In re MJG*, where the appellant firm was the recipient of the marketing fee and had an identifiable interest in the matter. *In re MJG*, 320 Mich App at 318-319, 330. Accordingly, because American Adoptions lacks standing, we decline to address the circuit court's denial of the marketing fees.[10]

In both Docket No. 333700 and Docket No. 333813, we reverse in part and remand for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs because no party on appeal prevailed in full.

METER and MURRAY, JJ., concurred with SAAD, P.J.

[10] Likewise, American Adoptions is precluded from raising any First Amendment issues related to the marketing fee.

SOUTHFIELD EDUCATION ASSOCIATION v BOARD OF EDUCATION OF THE SOUTHFIELD PUBLIC SCHOOLS

Docket No. 331087. Submitted July 6, 2017, at Detroit. Decided July 11, 2017, at 9:10 a.m. Leave to appeal denied 501 Mich 985.

Southfield Education Association, the teachers' union in this case, and Velma Smith, a former Southfield Public Schools teacher, filed suit in the Oakland Circuit Court against the Southfield Public Schools Board of Education and the Southfield Public Schools after the district failed to hire Smith to fill an available teaching position. Smith was seeking employment in the school system because the position she had previously held with the district was eliminated at the end of the 2013–2014 school year, and she was laid off. Smith had been a tenured technology teacher for 19 years in the district, and defendants had evaluated her performance as highly effective for the two school years during which an evaluation system was in place (2012–2013 and 2013–2014). Plaintiffs' complaint contained five counts. Counts I, II, and III alleged statutory violations of MCL 380.1248 (failing or refusing to recall Smith), MCL 380.1249 (failing to comply with defendants' own recall policies), and the teachers' tenure act (TTA), MCL 38.71 *et seq*. (discontinuing Smith's continuous employment as a tenured teacher). Count IV cited the lack of due process afforded Smith regarding her right to retain her teaching position, and Count V sought a writ of mandamus ordering defendants to reinstate Smith to a full-time technology teaching position. Rather than file an answer to plaintiffs' complaint, defendants moved for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and MCR 2.116(C)(8) (failure to state a claim). The court, Daniel Patrick O'Brien, J., granted defendants' motion for summary disposition with regard to Counts II through V, but denied defendants' motion with regard to Count I because there existed a question of fact concerning which teachers were considered for the open teaching position that Smith was refused. Defendants filed an answer to plaintiffs' remaining claim, Count I, and plaintiffs moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Defendants opposed plaintiffs' motion and requested that the court instead grant defendants

summary disposition under MCR 2.116(I)(2) (nonmoving party entitled to summary disposition). The court denied plaintiffs' motion and, pursuant to MCR 2.116(I)(2), granted summary disposition to defendants regarding Count I. Plaintiffs appealed.

The Court of Appeals *held*:

1. In general, MCL 380.1248 requires school districts to focus on retaining effective teachers when making personnel decisions, including workforce reductions, hiring decisions, and staffing after a workforce reduction—a process that entails both recalling and hiring personnel. MCL 380.1248(1)(b) specifically requires school districts to adopt, implement, maintain, and comply with a policy that bases all personnel decisions on the retention of effective teachers. The evaluation system is governed by MCL 380.1249 and must ensure that a teacher rated as ineffective is not given preference over a teacher rated as minimally effective, effective, or highly effective. In this case, Smith, a highly effective teacher, was passed over for employment in an open position for which she was qualified and that she had, in fact, held in 2010–2011, in favor of an external candidate whose effectiveness rating was unknown. According to Smith, the school district's decision violated MCL 380.1248 because it did not further the stated purpose of retaining effective teachers. Defendants contended that the Legislature's 2011 amendments of the TTA, the Public Employee Relations Act, MCL 423.201 *et seq*., and the Revised School Code (RSC), MCL 380.1 *et seq*., clearly established a legislative intent to make recalls nonactionable under MCL 380.1248. According to defendants, after the 2011 amendments there could be no statutory right to recall without ignoring the Legislature's pronouncement that school districts had the right to hire after layoffs. The dispositive factor in this case was not whether Smith was qualified—she was clearly qualified, given that she had taught the same class in 2010–2011. The dispositive factor—the reason why there was no actionable cause—was that she taught the class before the evaluation procedure was made mandatory and so she had not yet been evaluated as a highly effective teacher. Therefore, the school district could, without repercussion, properly hire the external candidate without knowing whether that teacher was effective at that time because Smith had not yet been evaluated as effective, and defendants were properly granted summary disposition regarding Count I.

2. Under MCL 380.1249, a public school district must adopt and implement a rigorous, transparent, and fair performance evaluation system for reviewing the performance of all teachers and school administrators. The evaluations must be used, at a

minimum, to inform the board's decisions about teachers' effectiveness and to ensure that they are provided ample opportunities for improvement. MCL 380.1249(1)(d)(*ii*) requires that the evaluation program be used to determine the propriety of promoting, retaining, and developing teachers and school administrators. Plaintiffs did not challenge defendants' decision to lay off Smith when her position was eliminated. Rather, plaintiffs argued that defendants violated MCL 380.1249 because they failed to comply with the mandate aimed at retaining effective teachers. However, there is no right to a private cause of action under MCL 380.1249. Notwithstanding the lack of a private action, a teacher can challenge a school district's failure to adhere to the requirements in MCL 380.1249 when the challenge is part of a claim brought under MCL 380.1248. That is, a person may contest a layoff decision when the employment decision was based on a performance evaluation that did not comply with the requirements of MCL 380.1249. But plaintiffs failed to do that, and summary disposition in favor of defendants was therefore appropriately granted regarding Count II.

3. The purpose of the TTA is to protect tenured teachers from demotion or discharge without just and reasonable cause. The TTA requires that written charges be filed against a teacher subject to potential demotion or discharge and that the teacher be given notice of the date of a hearing on the matter. A layoff prompted by a necessary reduction in personnel cannot be equated with a demotion or discharge, and the TTA does not apply to layoffs because the right to recall from a layoff was repealed by 2011 PA 101. The protections of the TTA apply only to demotions and discharges. Plaintiffs claimed that Smith had a vested property right to continuous employment under MCL 38.91(1) of the TTA, but the TTA no longer governs teacher layoffs. Layoffs are now governed by the RSC, and there is no due-process right to recall. Although Smith did have a protected property interest in her tenured position, the scope of that property interest was defined by the state, and state law provides no protection from a bona fide reduction in personnel. Even though the trial court erred by granting defendants summary disposition of plaintiffs' due-process claim under MCR 2.116(C)(4) for lack of jurisdiction, the outcome was not erroneous. The trial court reached the right result, albeit for the wrong reason. Defendants were entitled to summary disposition regarding Counts III and IV under MCR 2.116(C)(8) for plaintiffs' failure to state a claim on which relief could be granted.

4. On appeal, plaintiffs alleged that the trial court erred by dismissing Southfield Education Association from the action for lack of standing, but the issue was not properly before the Court of Appeals. Defendants did not move for summary disposition under MCR 2.116(C)(5), and there was no evidence that the trial court dismissed Southfield Education Association for lack of standing. Accordingly, there was no adverse action by which plaintiffs were aggrieved.

5. A writ of mandamus is an extraordinary remedy that will only be issued when the plaintiff has satisfied the following four conditions: (1) the plaintiff had a clear legal right to performance of the duty sought to be compelled, (2) the defendant had a clear legal duty to perform the requested act, (3) the act was ministerial, and (4) no other legal or equitable remedy existed to achieve the same result. In this case, plaintiffs had a legal remedy—seeking reinstatement under MCL 380.1248(3), and the trial court did not abuse its discretion by denying plaintiffs' request for a writ of mandamus.

Affirmed.

1. SCHOOLS — EMPLOYMENT — RECALL OR HIRING OF EFFECTIVE TEACHERS — EVALUATION.

Under MCL 380.1248, when hiring after a staffing or program reduction, a school board must base its decisions on the performance evaluation system the school board developed under MCL 380.1249 and on the other factors listed in MCL 380.1248; a school board may hire an external candidate when a laid-off teacher does not have an effectiveness rating related to the open position.

2. SCHOOLS — EMPLOYMENT — LAYOFFS — NO RIGHT TO RECALL.

A teacher has no due-process right to recall after a layoff; state law defines the scope of a teacher's protected property interest in a tenured position, and state law provides no protection against a bona fide reduction in personnel.

White Schneider PC (by *Jeffrey S. Donahue* and *Erika P. Thorn*) for plaintiffs.

The Allen Law Group, PC (by *Kevin J. Campbell* and *George K. Pitchford*), for defendants.

Before: O'BRIEN, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM. Plaintiffs, Southfield Education Association (the union) and Velma Smith, appeal as of right an order denying plaintiffs' motion for summary disposition of Count I (violation of MCL 380.1248) of plaintiffs' five-count complaint and, instead, granting summary disposition in favor of defendants, the Board of Education of the Southfield Public Schools and Southfield Public Schools, pursuant to MCR 2.116(I)(2) (judgment for opposing party). Pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and MCR 2.116(C)(8) (failure to state a claim), the trial court had previously granted summary disposition to defendants on all four other counts: Count II (violation of MCL 380.1249), Count III (violation of the teachers' tenure act (TTA), MCL 38.71 *et seq*.), Count IV (due process), and Count V (mandamus). We affirm.

Defendants employed Smith for 19 years as a tenured technology teacher. Smith is certified and qualified to teach technology, and holds endorsements to teach industrial technology in grades K through 12 and educational technology in grades 6 through 12. Smith taught PLATO, an online remedial education course offered through the Southfield Regional Academic Campus, an alternative high school within defendants' district, during the 2012–2013 and 2013–2014 school years. For both academic years, defendants rated Smith's performance as "highly effective." At the end of the 2013–2014 school year, defendants eliminated the PLATO position, and Smith was laid off.

In July 2014, defendants posted a part-time technology position at Birney School, a K through 8 school in defendants' district. Defendants admit that Smith was qualified for the position. In fact, she had held the position during the 2010–2011 school year. However, her "effectiveness" was not evaluated under the perfor-

mance review system implemented before the 2012–2013 school year. Smith applied for the Birney position, but defendants hired an external candidate. That candidate resigned after one year. Defendants reposted the Birney position, claiming that it required endorsements for grades K through 6. On investigation, the union discovered that the class consisted only of students in grades 6 through 8 and that Smith remained qualified for the position. Thereafter, defendants again interviewed Smith for the Birney position but did not hire her to fill the position. According to plaintiffs, the Birney position remained vacant until defendants hired an external candidate "whose effectiveness was unknown to her former employer."

Plaintiffs brought a five-count complaint in the circuit court, alleging (1) that defendants violated MCL 380.1248 of the Revised School Code (RSC), MCL 380.1 *et seq*., by failing or refusing to recall Smith, (2) that defendants violated MCL 380.1249 when they failed to comply with their own personnel policies requiring Smith's recall, (3) that defendants violated the TTA when they effectively discontinued Smith's continuous employment as a tenured teacher, (4) that defendants violated Smith's due process right to retain her teaching position and tenure status, and (5) that Smith was entitled to a writ of mandamus ordering defendants to reinstate Smith to a full-time technology teaching position. In lieu of filing a responsive pleading, defendants moved for summary disposition under MCR 2.116(C)(4) (subject-matter jurisdiction)[1] and (C)(8) (failure to state a claim). Relying in part on this Court's decision in *Summer v Southfield Bd of Ed*, 310 Mich App 660; 874 NW2d 150 (2015), defendants argued that plaintiffs'

[1] The motion under MCR 2.116(C)(4) pertained to plaintiffs' claim under the TTA (Count III).

claims were facially untenable "because, among other reasons, they are premised on a non-existent legal right. Since 2011, there has been no right to recall for tenured teachers under Michigan law." Defendants also argued that plaintiffs had no private right of action under MCL 380.1249. Therefore, according to defendants, plaintiffs had failed to state a claim on which relief could be granted in Counts I, II, III, IV, and V. With respect to Count III, defendants also noted that the trial court lacked subject-matter jurisdiction over the claim because Smith had failed to exhaust her administrative remedies under the TTA when she failed to appeal to the State Tenure Commission (STC).

Plaintiffs responded that their position was not that defendants were required to recall Smith, but rather that defendants were required to rehire Smith *unless* there were other candidates who "had an effectiveness rating equal [to] or higher" than Smith's. Because the effectiveness rating of the person hired was unknown, plaintiffs claimed that defendants were required to hire Smith because "there were no other Southfield teachers who could teach that course."

Defendants acknowledged that identification of the specific applicants considered for the Birney position would present a factual question, and the trial court denied defendants' motion for summary disposition with respect to Count I. However, the trial court "adopt[ed] defendants' arguments" with respect to Counts II through V and granted defendants' motion for summary disposition on those four counts.

After defendants filed an answer to plaintiff's remaining claim, plaintiffs brought a motion for summary disposition of Count I pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiffs maintained:

> Section 1248(b)(1) is unambiguous about a school board's obligation to base its personnel decisions on teacher effectiveness, with the primary goal of retaining effective teachers following a staffing or program reduction. Southfield has not assigned Smith, a highly effective teacher, to any of the positions for which she is certified and highly qualified to teach that became available as soon as July 2014 and as recently as August 31, 2015.[2]
>
> By its conduct, Southfield has failed to retain Smith, a highly effective teacher, in violation of Section 1248 of the Revised School Code. Because there is no genuine issue of material fact that Smith is a highly effective teacher and that Southfield failed to recall Smith to available positions for which she was qualified and certified, Smith is entitled to judgment as a matter of law.

In opposing plaintiffs' motion and requesting summary disposition under MCR 2.116(I)(2), defendants again argued that the Legislature's elimination of recall rights for tenured teachers barred plaintiffs' claim as a matter of law. Defendants also argued, for the first time, that even if the Legislature had not eliminated the statutory basis for plaintiffs' claim, plaintiffs' claim was factually unsupported because (1) Smith was not evaluated as "effective or better when she taught" in the technology position at Birney in the 2010–2011 school year, and (2) the position at issue was different than the one for which Smith was rated "highly effective" during the 2012–2013 and 2013–2014 school years.

After a second hearing, the trial court adopted defendants' arguments and denied plaintiffs' motion

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[2] In the complaint, plaintiffs also alleged violations of MCL 380.1248 for defendants' failure to hire Smith for a full-time technology position at Thompson Academy, another K through 8 school in defendants' district. However, there is no evidence that Smith ever applied for that position, and plaintiffs conceded in the lower court that Smith lacked the required endorsements to qualify for the Thompson position.

for summary disposition. Finding defendants entitled to judgment as a matter of law, the trial court granted summary disposition of Count I in favor of defendants under MCR 2.116(I)(2).

I. VIOLATION OF MCL 380.1248

On appeal, plaintiffs argue that the trial court erred by granting summary disposition in favor of defendants on Count I of their complaint because defendants clearly violated MCL 380.1248, which required defendants to adopt, implement, maintain, and comply with a policy prioritizing retention of effective teachers when recalling a teacher after a layoff or hiring a teacher after a layoff. According to plaintiffs, they were therefore entitled to judgment as a matter of law. We agree in part and disagree in part.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition is warranted under this rule "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). This Court must consider "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. "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. MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Resolution of this issue requires that the Court engage in statutory interpretation, an issue of law that is also reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is "to discern and give effect to the Legislature's intent." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Courts begin by examining the plain language of the statute. *Id*. When the language is unambiguous, it is presumed "that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Id*.

MCL 380.1249 requires all Michigan school district boards and intermediate school district boards and the boards of directors of public school academies to adopt and implement a "performance evaluation system" that assesses teacher effectiveness and performance and provides a detailed set of factors that any school's performance evaluation system must include. Specifically, § 1249 requires that any performance evaluation system must rate its teachers as falling within one of four classes: (1) highly effective, (2) effective, (3) minimally effective, or (4) ineffective. MCL 380.1249(1)(c).

MCL 380.1248 requires that school districts focus on retaining effective teachers when making personnel decisions, such as decisions on personnel reductions and staffing after a staff reduction, which includes recalling and hiring personnel. In pertinent part, MCL 380.1248(1) provides:

For teachers, as defined in . . . MCL 38.71, all of the following apply to policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, *or in hiring after a staffing or program reduction* or any other personnel determination resulting in the elimination of a position by a school district or intermediate school district:

* * *

(b) Subject to subdivision (c), the board of a school district or intermediate school district shall ensure that the school district or intermediate school district adopts, implements, maintains, and *complies with a policy that provides that all personnel decisions . . . are based on retaining effective teachers*. The policy shall ensure that a teacher who has been rated as ineffective under the performance evaluation system under section 1249 is not given any preference that would result in that teacher being retained over a teacher who is evaluated as minimally effective, effective, or highly effective under the performance evaluation system under section 1249. Effectiveness shall be measured by the performance evaluation system under section 1249, and the personnel decisions shall be made based on the following factors:

(*i*) Individual performance shall be the majority factor in making the decision, and shall consist of but is not limited to all of the following:

(A) Evidence of student growth, which shall be the predominant factor in assessing an employee's individual performance.

(B) The teacher's demonstrated pedagogical skills, including at least a special determination concerning the teacher's knowledge of his or her subject area and the ability to impart that knowledge through planning, delivering rigorous content, checking for and building higher-

level understanding, differentiating, and managing a classroom; and consistent preparation to maximize instructional time.

(C) The teacher's management of the classroom, manner and efficacy of disciplining pupils, rapport with parents and other teachers, and ability to withstand the strain of teaching.

(D) The teacher's attendance and disciplinary record, if any.

(*ii*) Significant, relevant accomplishments and contributions. This factor shall be based on whether the individual contributes to the overall performance of the school by making clear, significant, relevant contributions above the normal expectations for an individual in his or her peer group and having demonstrated a record of exceptional performance.

(*iii*) Relevant special training. This factor shall be based on completion of relevant training other than the professional development or continuing education that is required by the employer or by state law, and integration of that training into instruction in a meaningful way.

(c) Except as otherwise provided in this subdivision, length of service or tenure status shall not be a factor in a personnel decision described in subdivision (a) or (b). However, if that personnel decision involves 2 or more employees and all other factors distinguishing those employees from each other are equal, then length of service or tenure status may be considered as a tiebreaker. [Emphasis added.]

On appeal, plaintiffs argue that if a school district recalls or hires teachers after implementing a layoff, MCL 380.1248 requires that the school district's decisions reflect the policy goal of maintaining the employment of teachers with a performance rating of effective. Plaintiffs' argument rests on the mandate in MCL 380.1248(1)(b) that all "policies regarding personnel decisions . . . are based on retaining effective

teachers." Plaintiffs contend that the Legislature's use of the word "retain" reveals an intent to limit a school district's staffing decisions following a reduction in staffing in order to satisfy the goal of retaining effective teachers. Thus, plaintiffs claim that defendants violated MCL 380.1248 by hiring for the Birney position an external candidate whose effectiveness rating was unknown, instead of retaining Smith, who was rated highly effective.

Defendants argue to the contrary. They suggest that three legislative actions—(1) the Legislature's 2011 repeal of the statutory basis for a right to recall under the TTA, (2) the amendment of the Public Employee Relations Act (PERA), MCL 423.201 *et seq*., to add layoff and recall policies to the list of prohibited subjects of collective bargaining, and (3) the amendment of the RSC to provide two post-layoff alternatives (recall or hire)—evinced a clear legislative intent to make recalls nonactionable under MCL 380.1248. Defendants contend that plaintiffs' proposed construction of the phrase "retaining effective teachers" as creating a statutory right to be recalled would "require one to ignore the plain right given to districts to hire after layoffs, and the other statutory amendments eviscerating recall rights."

In *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 524-531; 872 NW2d 837 (2015), this Court considered the import of § 1248 within the context of teacher layoffs. Although the issue in *Baumgartner* involved jurisdiction, this Court summarized the 2011 tie-barred legislative amendments to the TTA, the RSC, and PERA, which caused a "dramatic shift in the law of teacher layoffs." *Id*. at 512. The *Baumgartner* Court explained that the 2011 amendments

> clearly outlined a teacher's rights and a school district's responsibilities in the event that a layoff became necessary. 2011 PAs 100, 101, 102, and 103 work in tandem to (1) bar teacher layoffs from being a subject of collective-bargaining agreements, thus preventing teachers from challenging layoff decisions before [the Michigan Employment Relations Commission] as an unfair labor practice under PERA, (2) require that layoff decisions be based on teacher effectiveness, not seniority, and (3) make clear that only the courts—not any administrative agency, including the STC—have jurisdiction over layoff-related claims. [*Id.* at 524.]

2011 PA 101, effective July 19, 2011, repealed MCL 38.105 of the TTA, which had provided, "For a period of 3 years after the effective date of the termination of the teacher's services, a teacher on continuing tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which the teacher is certified and qualified." In addition, 2011 PA 103, among other things, amended PERA to remove layoffs from the collective bargaining process and to emphasize that the RSC, not PERA or the TTA, governs teacher layoffs. *Baumgartner*, 309 Mich App at 525.

2011 PA 102 amended the RSC and added MCL 380.1248 and MCL 380.1249. "Among other things," *Baumgartner* noted, the RSC "governs 'the regulation of school teachers and certain other school employees' and emphasizes that *local authorities—not state officials*—are primarily responsible for the governance of school districts." *Baumgartner*, 309 Mich App at 526, quoting 1976 PA 451, title, as amended by 1995 PA 289 (emphasis in *Baumgartner*). The Court explained how 2011 PA 102 fit within the relevant legal framework:

> 2011 PA 102 is part of this broader legal framework and enacted a comprehensive revision of the Revised School

> Code's treatment of teacher layoffs through the addition of two new sections, MCL 380.1248 and MCL 380.1249. Section 1249 requires all Michigan school districts and intermediate school districts and the boards of directors of public school academies to adopt a "performance evaluation system" that assesses teacher effectiveness and performance and provides a detailed set of factors that any school district's performance evaluation system must include. . . .
>
> Section 1248 then mandates that all "policies regarding personnel decisions when conducting a *staffing or program reduction*"—i.e., *layoffs*—must be conducted on (1) the basis of the performance evaluation system the school district developed in compliance with § 1249; and (2) other specific factors listed in § 1248. . . .
>
> In other words, if layoffs become necessary, § 1248 requires school districts to base their decision of which teachers to lay off on the effectiveness of each teacher. So, after conducting a performance evaluation using the criteria outlined in § 1249, a school district must rank its teachers in order, based on their success (or lack thereof) in the performance evaluation. The teachers who received the lowest performance ranking ("ineffective") will be laid off before those who received higher performance rankings. The statutory mandate anticipates that talented and more effective teachers will be retained, while mediocre and ineffective teachers will be laid off. [*Baumgartner*, 309 Mich App at 526-528.]

Under the clear language of § 1248 and the interpretation of the 2011 amendments set forth in *Baumgartner*, personnel decisions when conducting a recall from or when hiring after a staffing or program reduction must be made on the basis of (1) the performance evaluation system the school district developed in compliance with § 1249, and (2) other specific factors listed in § 1248. See MCL 380.1248(1)(b)(*i*) through (*iii*). Similar to the Court's pronouncement in *Baumgartner* with respect to layoffs, the statutory mandate anticipates

that talented and more effective teachers will be recalled or hired, while ineffective teachers will not. A school district must consider the relative effectiveness ratings of candidates for open teaching positions, whether as part of a recall *or a new hire* after a staffing or program reduction.

However, while we agree with plaintiffs' interpretation of § 1248, we cannot agree with plaintiffs' assertion that defendants violated § 1248 when they hired an external candidate for the Birney position. Smith simply could not claim an effectiveness rating related to the available position, and the school district was therefore not required to consider whether she would be relatively more or less effective than any other candidate for the position.

Nothing in the language of § 1248 suggests that a teacher's effectiveness evaluation for teaching one subject requires that teacher's recall or rehire to teach a different subject. Indeed, several of the factors on which personnel decisions "shall be based" are position specific. Further, to interpret § 1248 as requiring a school district to recall or rehire a teacher to a specific position for which she may be qualified but has not been proven effective is contrary to the purpose of the 2011 legislative amendments. Again, as we explained in *Baumgartner*, 309 Mich App at 526, the RSC "emphasizes that *local authorities—not state officials*—are primarily responsible for the governance of school districts." The Legislature has left school districts with the authority to ensure that each available position is matched with the most effective teacher for that particular position. It is not for this Court to place limits on the school district's authority that the Legislature has not.

Plaintiffs presented documentary evidence that Smith was certified and qualified for the Birney posi-

tion. However, while plaintiffs claim that Smith received an effectiveness rating of "highly effective" on her 2012–2013 and 2013–2014 performance evaluations, plaintiffs have offered no evidence to rebut defendants' assertion that Smith's effectiveness rating was received while teaching a class substantially different from the class to be taught in the Birney position. Smith was rated "highly effective" during two school years in which she taught PLATO, an online remediation course requiring individualized, interactive instruction at an alternative high school for credit-deficient students and students at high risk of dropping out. The PLATO position was eliminated, and Smith sought a part-time teaching position at Birney Middle School. Smith was indisputably qualified for the Birney position, having taught the same class during the 2010–2011 school year. However, she did not receive an effectiveness evaluation pursuant to § 1249 for that school year. The Birney position is at a middle school, while the PLATO position required working with high school students. And unlike the PLATO position, the Birney position involved whole classroom instruction, rather than individualized instruction, on various subjects within the field of technology. Smith's effectiveness in that position was therefore a matter of speculation. Plaintiffs cannot show that Smith had obtained an effectiveness rating triggering the school district's obligation under § 1248 to engage in a comparison. Summary disposition in favor of defendants was therefore appropriate. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) ("[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact.").

The trial court did not err by granting summary disposition under MCR 2.116(I)(2) in favor of defendants because no genuine issue of material fact existed and, with respect to plaintiffs' claimed violation of § 1248, defendants were entitled to judgment as a matter of law.

II. VIOLATION OF MCL 380.1249

Next, plaintiffs argue that the trial court erred when it granted defendants' motion for summary disposition of Count II of plaintiffs' complaint because defendants failed to comply with their own policy of retaining highly effective teachers as required by MCL 380.1249. We disagree.

With respect to Count II of plaintiffs' complaint, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8). "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). Summary disposition under MCR 2.116(C)(8) is appropriate when "[t]he opposing party has failed to state a claim on which relief can be granted."

MCL 380.1249(1) requires the board of a public school district to "adopt and implement for all teachers and school administrators a rigorous, transparent, and fair performance evaluation system . . . ." MCL 380.1249(1)(d) requires that the evaluations be used, "at a minimum," to inform decisions regarding (1) "[t]he effectiveness of teachers and school administrators, ensuring that they are given ample opportunities for improvement," and (2) "[p]romotion, retention, and development of teachers and school administrators, including providing relevant coaching, instruc-

tion support, or professional development." MCL 380.1249(1)(d)(*i*) and (*ii*). Plaintiffs conceded in their complaint that defendants' performance evaluation system complies with MCL 380.1249. They also conceded that they were not challenging defendants' decision to lay off Smith when her position was eliminated. However, they argue that defendants violated the mandate in § 1249(1) that their "performance rating system [be used] to retain effective teachers such as Plaintiff Smith."

In *Summer*, 310 Mich App at 676, this Court explicitly held that there was no private cause of action under § 1249. Relying on *Garden City Ed Ass'n v Garden City Sch Dist*, 975 F Supp 2d 780 (ED Mich, 2013), the Court explained:

> As observed by the *Garden City* court, it is evident that the Legislature provided a detailed enforcement scheme to ensure compliance with the Revised School Code, including compliance with § 1249. Notably, the plain language of § 1249 includes no reference to a private right of action. "[W]here a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred." Accordingly, given the extensive enforcement mechanisms already provided in the Revised School Code, we decline to infer a private right of action in MCL 380.1249 and conclude that the trial court properly determined that MCL 380.1249 does not establish a private cause of action under which plaintiff may bring the instant case. [*Summer*, 310 Mich App at 676 (citation omitted).]

This Court held, however, that this did not foreclose a teacher from challenging a school district's failure to adhere to the requirements set forth in § 1249 when that challenge was part of a claim brought under

§ 1248. *Id*. at 681. Reasoning that the Legislature specifically intended to allow teachers to challenge layoff decisions that were based on performance evaluations that did not comply with the requirements in § 1249, the *Summer* Court explained as follows:

> [B]ased on the specific language of § 1248, the requirement that the school district must use a performance evaluation system in compliance with § 1249 as it evaluates teachers and makes layoff decisions is one of the requirements with regard to which a teacher may assert a private cause of action under § 1248(3). Accordingly, if a school district lays off a teacher because the teacher is deemed ineffective, but the school district measured the teacher's effectiveness using a performance evaluation system that did not comply with § 1249 (e.g., if a school district failed to use a "rigorous, transparent, and fair performance evaluation system," MCL 380.1249(1)), or made a personnel decision that was not based on the factors delineated in MCL 380.1248(1)(b)(*i*) through (*iii*), the teacher could assert a cause of action under § 1248(3) based on a violation of § 1248(1)(b). [*Summer*, 310 Mich App at 679.]

In this case, in light of *Summer*, plaintiffs' claim under § 1248 in Count I properly alleged a violation of § 1249. However, plaintiffs are not entitled to a separate cause of action under § 1249 as they pleaded in Count II. We are bound by *Summer*. MCR 7.215(J)(1). Summary disposition of Count II under MCR 2.116(C)(8) was therefore proper.

III. VIOLATION OF THE TEACHERS' TENURE ACT AND DUE PROCESS

Plaintiffs also argue that the trial court erred when it granted defendants' motion for summary disposition of Count III of plaintiffs' complaint. According to plaintiffs, defendants violated the TTA by failing or refusing

to recall Smith to positions for which she was certified and highly qualified. We disagree.

Although the trial court, in its written order, did not explicitly state its statutory basis for granting summary disposition in favor of defendants with respect to Count III of plaintiffs' complaint, defendants requested summary disposition of this count under MCR 2.116(C)(4) (lack of jurisdiction). Defendants argued that the STC had jurisdiction over claims arising under the TTA and that plaintiffs were required to exhaust their administrative remedies before they could pursue their claims in the circuit court. The trial court seems to have agreed with defendants' argument that the STC had exclusive jurisdiction over plaintiffs' claim. Explaining its decision to grant defendants' motion for summary disposition of Counts II through V at the first summary disposition hearing, the trial court stated: "(C)(4) pertains only to one count, I think. And it's granted for that reason."

"We review a trial court's decision on a motion for summary disposition based on MCR 2.116(C)(4) de novo to determine if the moving party was entitled to judgment as a matter of law, or if affidavits or other proofs demonstrate there is an issue of material fact." *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). Summary disposition is appropriate under MCR 2.116(C)(4) when "[t]he court lacks jurisdiction of the subject matter." Whether a court has subject-matter jurisdiction to decide a case is a question of law that this Court also reviews de novo. *Trostel, Ltd v Dep't of Treasury*, 269 Mich App 433, 440; 713 NW2d 279 (2006).

To the extent the trial court relied on MCR 2.116(C)(4) as its basis for summary disposition, we find that it erred. Plaintiffs allege that Smith, as a

tenured teacher, possessed the right to "continuous employment" under MCL 38.91 and that defendant violated the TTA by "failing and/or refusing to recall her to positions for which she is certified and qualified to teach." However, the essence of plaintiffs' argument is that defendants "fail[ed] to comply with Sections 1248 and 1249 of the [RSC] to retain or continue the employment of a highly effective teacher . . . ." In *Baumgartner*, 309 Mich App at 521, this Court stated, "The STC's 'jurisdiction and administrative expertise is limited to questions traditionally arising under the [TTA],' and it does not possess jurisdiction over disputes that arise under and are governed by separate legislative acts." (Citation omitted; alteration in original). Therefore, the trial court erroneously determined that it did not have jurisdiction because plaintiffs had failed to exhaust their administrative remedies.

However, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). We find reversal of the trial court's decision on Count III of plaintiffs' complaint unnecessary because summary disposition of Count III was appropriate under MCR 2.116(C)(8).

Plaintiffs argue that Smith was deprived of her vested property right to continuous employment without due process of law. Plaintiffs have not argued that defendants' elimination of Smith's teaching position or defendants' decision to lay off Smith was contrary to law or policy. And plaintiffs concede that Smith has no right to mandatory recall. However, plaintiffs suggest that Smith maintained a right to continuous employment under MCL 38.91(1), which provides:

> After the satisfactory completion of the probationary period, a teacher is considered to be on continuing tenure

> under this act. A teacher on continuing tenure shall be employed continuously by the controlling board under which the probationary period has been completed and *shall not be dismissed or demoted* except as specified in this act. Continuing tenure is held only in accordance with this act. [Emphasis added.]

Because the Legislature left this provision of the TTA substantively unchanged when it implemented the July 2011 amendments and repealed the statutory right to recall, plaintiffs argue that the Legislature "clearly intended for an effective teacher to maintain her right to continuous employment."[3] Therefore, according to plaintiffs, "[d]efendants cannot fail or refuse to recall Plaintiff Smith without due process of law simply because the statutory right to recall has been eliminated."

We are not persuaded by plaintiffs' arguments. Smith has no due process right to recall, and the right of continuous employment for tenured teachers simply does not apply in this case. A public employee who has received tenure through state law has a property interest as defined by state law. *Cleveland Bd of Ed v Loudermill*, 470 US 532, 541; 105 S Ct 1487; 84 L Ed 2d 494 (1985). A state law that grants a property interest may define the boundaries of that property interest. *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). In other words, a state law that creates the interest can define the scope of the interest, how it may be gained, and

[3] MCL 38.91(1) was slightly changed as a result of the July 2011 amendments, although its general substance remained intact. Before the 2011 amendments, MCL 38.91(1) provided, "After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act."

how it may be taken away. Considering the TTA, our Supreme Court has stated that "the very purpose of the act is to protect tenured teachers from being demoted or discharged unless the board can show just and reasonable cause, and only after written charges are filed and the teacher has been furnished with notice of the date of a hearing." *Tomiak v Hamtramck Sch Dist*, 426 Mich 678, 688-689; 397 NW2d 770 (1986). Although the TTA initially provided a right of recall to tenured teachers, that right was removed with the repeal of MCL 38.105 by 2011 PA 101. In *Baumgartner*, 309 Mich at 530, we explained that following the repeal of MCL 38.105, "[t]he 'general purpose' of the TTA no longer includes teacher layoffs, which are now governed by the Revised School Code."

A layoff because of a necessary reduction in personnel is not a discharge or demotion. *Id*. at 529 (noting that it is impossible to equate "discharge" under the TTA with "layoff" because "the two terms are separate and distinct"), citing *Tomiak*, 426 Mich at 688.[4] "Thus, by definition, a school that lays off a teacher does not 'demote' that teacher in the context of the TTA."[5] *Baumgartner*, 309 Mich App at 529. With respect to layoffs, it has long been established that Michigan law does not protect a tenured teacher's employment from a bona fide reduction in personnel. *Chester v Harper Woods Sch Dist*, 87 Mich App 235, 244; 273 NW2d 916 (1978). Therefore, no process is due a tenured teacher who is laid off unless the reduction in workforce is not bona fide. Plaintiffs have not alleged or argued that the elimination of Smith's position was not bona fide, nor

[4] Although *Tomiak* concerned the repealed MCL 38.105, that statute addressed layoffs because of a necessary reduction in personnel, and *Tomiak*, therefore, is analogous to the present case.

[5] 2011 PA 100, effective July 19, 2011, revised the definition of "demote" to eliminate "reduction in personnel."

do they suggest that the layoff was a subterfuge to avoid the protections of the TTA. Therefore, plaintiffs have failed to state a claim for due process violations in this case.

IV. STANDING ISSUES

Next, plaintiffs argue that the trial court erred by "dismissing [the union] from the action on the ground that the union did not have standing" in this matter. Generally, this Court reviews de novo questions of standing. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013). However, we decline to consider the issue of standing because it is not properly before this Court.

In the lower court, defendants challenged the union's standing with respect to plaintiffs' claims under MCL 380.1248, MCL 380.1249, and the TTA in their motion for summary disposition, and again with respect to MCL 380.1248 in their answer in opposition to plaintiffs' motion for summary disposition. However, defendants did not bring a motion for summary disposition under MCR 2.116(C)(5) ("The party asserting the claim lacks the legal capacity to sue."). Further, there is no evidence in the record that the trial court dismissed the union as a party for lack of standing. Thus, there is no adverse action by which plaintiffs were aggrieved. In the absence of a ruling by the trial court, this Court has nothing to review. *People v Buie*, 491 Mich 294, 311; 817 NW2d 33 (2012).

On appeal, defendants acknowledge that the trial court did not squarely address defendants' argument that the union lacked standing to assert claims under MCL 380.1248 and MCL 380.1249, and defendants suggest that this Court should decide the issue because it "involves a straightforward legal issue." Defendants

could have raised this issue on cross-appeal, MCR 7.207, but failed to do so. Accordingly, the issue of standing is not properly before this Court. *Shipman v Fontaine Truck Equip Co*, 184 Mich App 706, 714; 459 NW2d 30 (1990).

V. WRIT OF MANDAMUS

Finally, plaintiffs contend that the trial court erred when it denied plaintiffs' request for a writ of mandamus because plaintiffs pleaded the required elements in their complaint. We disagree.

A writ of mandamus is an extraordinary remedy that will only be issued if (1) the party seeking the writ "has a clear legal right to the performance of the duty sought to be compelled," (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result. *Barrow v Detroit Election Comm*, 305 Mich App 649, 661-662; 854 NW2d 489 (2014) (citation omitted). The burden of proving entitlement to a writ of mandamus is on the plaintiff. *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004).

This Court reviews for an abuse of discretion a trial court's grant or denial of a writ of mandamus. *Wilcoxon v Detroit Election Comm*, 301 Mich App 619, 630; 838 NW2d 183 (2013). An abuse of discretion occurs when the trial court "chooses an outcome that falls outside the range of reasonable and principled outcomes." *Fette v Peters Constr Co*, 310 Mich App 535, 547; 871 NW2d 877 (2015). However, whether the first two elements required for issuance of a writ of mandamus are present is a question of law, which this Court reviews

de novo. *Coal for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012).

Plaintiffs' argument with respect to this issue is cursory at best. Plaintiffs merely announce that they pleaded the elements of a mandamus action and assert that they had no other adequate remedy at law. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). "[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Further, plaintiffs have an adequate legal remedy as reflected in Count I of their complaint—plaintiffs sought Smith's reinstatement to a technology teaching position in the school district pursuant to MCL 380.1248(3). The trial court did not abuse its discretion by denying plaintiffs' request for a writ of mandamus.

Affirmed.

O'BRIEN, P.J., and JANSEN and STEPHENS, JJ., concurred.

JOUGHIN v JOUGHIN

Docket No. 329993. Submitted March 8, 2017, at Detroit. Decided July 11, 2017, at 9:15 a.m.

Plaintiff, Connie Joughin, submitted proposed qualified domestic relations orders (QDROs) in the Lenawee Circuit Court, Family Division, to transfer interest in the profit-sharing annuity plan of defendant, William Joughin, to herself. Plaintiff and defendant's April 28, 2003 judgment of divorce ordered that the parties execute a QDRO to transfer the interest to plaintiff, but plaintiff did not submit any proposed QDROs until June 30, 2015, approximately 12 years after the judgment of divorce had been entered. Defendant objected to plaintiff's proposed QDROs, arguing that plaintiff's action was barred by the 10-year statutory period of limitations in MCL 600.5809(3). In response, plaintiff argued that under MCL 600.5809(1), the statutory period of limitations to bring an action to enforce a noncontractual money obligation does not begin to run until there is a triggering event and, therefore, that a claim to retirement benefits accrues when a party subject to that claim retires. Because defendant had not yet retired, plaintiff argued that her claim on defendant's retirement benefits had not yet accrued and that she was seeking enforcement of her claim before the expiration of the limitations period. The court, Margaret M. S. Noe, J., permitted entry of the proposed QDROs as to both the annuity plan and defendant's pension. Defendant appealed the QDRO related to the annuity plan.

The Court of Appeals *held*:

1. Under 29 USC 1056(d)(3)(B)(i)(I) of the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq*., a QDRO creates or recognizes the existence of an alternate payee's right to—or assigns to an alternate payee the right to—receive all or a portion of the benefits payable with respect to a participant under an employee pension plan. MCL 600.5809(1) provides that a person shall not bring or maintain an action to enforce a noncontractual money obligation unless, after the claim first accrued to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time, and MCL 600.5809(3) provides, in pertinent part, that 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 from the time of the rendition of the judgment or decree. In this case, the entry of the proposed QDRO was not deemed an action to enforce a noncontractual money obligation, and therefore MCL 600.5809 did not control. When a judgment of divorce requires the entry of a QDRO, the QDRO is considered to be part of the divorce judgment; therefore, because a QDRO is part of the judgment, it necessarily cannot be viewed as enforcing that same judgment. Additionally, pursuant to 29 USC 1056(d)(3)(G)(i), after a court enters a proposed QDRO, the order is not enforceable until the plan administrator determines that the proposed QDRO is qualified under ERISA. Therefore, an alternate payee only becomes entitled to rights under an ERISA plan when the proposed QDRO becomes qualified, and a proposed QDRO becomes qualified after it is approved by the plan administrator. Consequently, plaintiff's motion to have the trial court enter the proposed QDRO was not an act to enforce a judgment or obligation; rather, the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself. When a party complies with the court's instructions, albeit late, as was the case here, the party is simply engaged in supplying documents and information to the court to comply with its ministerial obligations under the judgment—nothing more, nothing less. Accordingly, the 10-year period of limitations provided in MCL 600.5809(3) did not apply, and plaintiff's request to have the proposed QDRO entered by the trial court was not time-barred.

2. Defendant's argument that MCL 600.5809 should apply because the annuity plan was a defined-contribution plan as opposed to a defined-benefit plan failed because a proposed QDRO that is entered by a trial court is not enforceable until it is approved by the plan administrator and because defendant provided no citation to the record for his theory that plaintiff could have obtained her interest in the plan immediately after the judgment of divorce was entered despite the fact that defendant had yet to retire.

Affirmed.

JANSEN, J., dissenting, would have held that entry of a QDRO is an action to enforce a judgment of divorce and therefore is subject to the 10-year statutory period of limitations in MCL 600.5809. Because the determination of the date on which defendant's annuity funds accrued for purposes of MCL 600.5809 was an issue of first impression in Michigan, Judge JANSEN identified three distinct outcomes from courts of other states: (1) New York

courts have held that the limitations period accrues after the defendant has reached pay status in the retirement benefits; (2) Kansas courts have held that a judgment dividing a retirement account becomes absolutely extinguished and unenforceable if the plaintiff fails to file a QDRO or renewal affidavit within the applicable statutory period of limitations; and (3) Tennessee and Indiana courts have held, as the majority held here, that entry of a proposed QDRO is not an action to enforce a noncontractual money obligation. Judge JANSEN would have adopted the position and reasoning of the Kansas courts that the legal process for enforcing a judgment of divorce—the filing of a QDRO—is not stayed or prohibited until benefits become payable; instead, the filing of a QDRO is mandatory if the alternate beneficiary is to enforce his or her judgment because even though the plaintiff may not be able to receive money immediately, the necessary legal process—the QDRO—for enforcing the plaintiff's interest in the retirement accounts is fully available to the plaintiff. Because the right to entry of a proposed QDRO was at issue in this case, and because a party to a judgment of divorce can enforce his or her right to entry of a QDRO even before he or she is entitled to payment of benefits under a retirement plan, the 10-year statutory limitations period should have applied to bar plaintiff's attempt to obtain entry of the QDRO 12 years after entry of the judgment of divorce.

DIVORCE — PROPERTY SETTLEMENT — REQUEST FOR ENTRY OF PROPOSED QUALIFIED DOMESTIC RELATIONS ORDER — STATUTORY PERIOD OF LIMITATIONS IN MCL 600.5809 DOES NOT APPLY.

Under 29 USC 1056(d)(3)(B)(i)(I) of the Employee Retirement Income Security Act, 29 USC 1001 *et seq*., a qualified domestic relations order (QDRO) creates or recognizes the existence of an alternate payee's right to—or assigns to an alternate payee the right to—receive all or a portion of the benefits payable with respect to a participant under an employee pension plan; a plaintiff's motion to have the trial court enter a proposed QDRO is not an act to enforce a judgment or obligation; rather, the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself; accordingly, the 10-year statutory period of limitations in MCL 600.5809 does not apply to a plaintiff's request to have a proposed QDRO entered by a trial court.

Gentry Nalley, PLLC (by *Kevin S. Gentry*), for plaintiff.

Bailey, Smith & Bailey, PC (by *John J. Smith*), and *Catherine A. Sala* for defendant.

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

SAAD, J. In this postdivorce proceeding, defendant appeals[1] the entry of a proposed qualified domestic relations order (QDRO) in favor of plaintiff, which related to her interest in $23,823 of defendant's profit-sharing annuity plan (the annuity plan). For the reasons provided below, we affirm.

On April 28, 2003, the trial court entered a judgment of divorce that dissolved plaintiff and defendant's marriage. In the judgment of divorce, under the heading "PENSION, ANNUITY OR RETIREMENT BENEFITS," the trial court ordered the following:

> Plaintiff shall receive 50% of the sum of Defendant's accrued balance as of April 30, 2002, in the International Association of Bridge, Structural and Ornamental Iron Workers Local #55 Pension Plan. In addition, Plaintiff shall receive the sum of $23,823.00 from the Defendant's Iron Workers Local #55 Profit Sharing Annuity Plan and Trust. . . . The Plaintiff and Defendant shall cooperate in the execution of a Qualified Domestic Relations Order to transfer said interest to the Plaintiff. Both parties shall execute whatever documents may be necessary to complete the transfer.

However, for reasons not apparent from the record, plaintiff and defendant did not promptly file proposed QDROs[2] to transfer interest in defendant's retirement

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[1] This Court granted leave to appeal in *Joughin v Joughin*, unpublished order of the Court of Appeals, entered March 24, 2016 (Docket No. 329993).

[2] Technically, under the Employee Retirement Income Security Act, 29 USC 1001 *et seq*., these orders are domestic relation orders, 29 USC 1056(d)(3)(B)(ii). As discussed later in this opinion, they do not become

benefits to plaintiff. Instead, plaintiff submitted proposed QDROs[3] to the trial court on June 30, 2015, approximately 12 years after the judgment of divorce was entered. On July 6, 2015, defendant filed objections to plaintiff's proposed QDROs under MCR 2.602, and in his objections, defendant argued that plaintiff's submission of the proposed QDROs was an attempt to enforce the April 28, 2003 judgment of divorce and was barred by the statute of limitations found in MCL 600.5809(3) because more than 10 years had elapsed since the trial court entered the judgment of divorce.

Plaintiff filed a response to defendant's objections on August 11, 2015, and argued that under MCL 600.5809(1), the statutory period of limitations to bring an action to enforce a noncontractual money obligation does not begin to run until there is a triggering event, and a claim to retirement benefits accrues when a party subject to that claim retires. Thus, she argued that because defendant had not yet retired, her efforts to record her claim on defendant's retirement benefits had not yet accrued and, therefore, she was seeking enforcement of her claim before the expiration of the limitations period.

At the hearing on defendant's objections, defendant's counsel confirmed that defendant had not yet retired and that he had not yet received any funds from his retirement benefits. While recognizing that MCL 600.5809(3) provides for a 10-year limitations period,

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qualified domestic relation orders, i.e., QDROs, until approved by the plan administrator. Therefore, we will refer to domestic relation orders that have not been approved by a plan administrator as "proposed QDROs."

[3] The trial court entered a proposed QDRO as to both the annuity plan and defendant's pension; however, defendant has only appealed the one related to the annuity plan.

the trial court ultimately concluded that it would permit entry of the proposed QDROs because they had not "been reduced to the same." The trial court entered the orders on the same day.

On appeal, defendant argues that the trial court erred when it entered the proposed QDRO affecting the annuity plan because plaintiff's effort to pursue the entry was time-barred by the statute of limitations. We disagree.

Whether a "claim is statutorily time-barred is a question of law for this Court to decide de novo." *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 47; 631 NW2d 59 (2001). We also review de novo questions of statutory interpretation. *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

"Congress passed the Employee Retirement Income Security Act (ERISA) of 1974 in order to provide better protection for beneficiaries of private employee pension plans." *Roth v Roth*, 201 Mich App 563, 567; 506 NW2d 900 (1993); see also 29 USC 1001 *et seq*. "ERISA contained an anti-alienation provision which precluded plan participants from assigning or alienating their benefits under pension plans subject to the act." *Roth*, 201 Mich App at 567. However,

> [t]he Retirement Equity Act of 1984 provides an exception to this restriction. A qualified domestic relations order (QDRO) "creates or recognizes the existence of an alternative payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan . . . ." 29 USC 1056(d)(3)(B)(i)(I). Thus, a QDRO is exempted from ERISA's preemption provisions and may be used to distribute funds to a payee who was not a named beneficiary. 29 USC 1144(b)(7). [*Moore v Moore*, 266 Mich App 96, 100 n 5; 700 NW2d 414 (2005).]

Both parties contend that MCL 600.5809 provides the applicable statute of limitations in this matter. MCL 600.5809 states, in pertinent part:

> (1) A person shall not bring or maintain an action to enforce a noncontractual money obligation unless, after the claim first accrued to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by this section.
>
> * * *
>
> (3) Except as provided in subsection (4),[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.

Plaintiff argues that her claim has not accrued because she has no right to the funds until defendant retires and, as defense counsel confirmed, defendant has not yet done so. Thus, plaintiff reasons that because her claim has not accrued, it is impossible for her action to have been brought 10 years after it accrued and, consequently, the statute of limitations cannot act as a bar. Defendant, on the other hand, argues that plaintiff's claim accrued once the judgment of divorce was entered on April 28, 2003, which means that plaintiff's motion to enter the QDRO over 12 years later is time-barred.

We disagree with the parties' premise that MCL 600.5809 controls in this situation. The statute applies only to "action[s] to enforce . . . noncontractual money obligation[s]." And here, we hold that the entry of the proposed QDRO is not an action to enforce a noncon-

[4] Subsection (4) applies to child support and is not applicable here.

tractual money obligation. This Court has held that when a judgment of divorce requires a QDRO to be entered, the QDRO is to be considered "as *part of* the divorce judgment." *Neville v Neville*, 295 Mich App 460, 467; 812 NW2d 816 (2012). Thus, because a QDRO is *part* of the judgment, it necessarily cannot be viewed as *enforcing* that same judgment. As our sister court in Tennessee noted, "[T]he approval of the proposed QDRO is adjunct to the entry of the judgment of divorce and not an attempt to 'enforce' the judgment." *Jordan v Jordan*, 147 SW3d 255, 262 (Tenn App, 2004).

Additionally, to further demonstrate that the entry of the proposed QDRO is not equivalent to the enforcement of a noncontractual money obligation, the entry of the order here did not compel the payment of any money to plaintiff. Indeed, after a court enters a proposed QDRO, as the trial court did here, the order is not enforceable until the plan administrator determines that the proposed QDRO is "qualified" under ERISA. 29 USC 1056(d)(3)(G)(i). As the Tennessee Court of Appeals aptly explained:

> Under ERISA, a QDRO "creates or recognizes the existence of an alternate payee's right to . . . receive all or a portion of the benefits payable with respect to a participant under a plan . . . ." 29 U.S.C. § 1056(d)(3)(B)(i)(I) (1999). A proposed QDRO under ERISA, on the other hand, is "any judgment, decree, or order" entered by a trial court that "relates to the provision of . . . marital property rights to a . . . former spouse . . . , and . . . is made pursuant to a State domestic relations law . . . ." 29 U.S.C. § 1056(d)(3)(B)(ii). Typically, . . . a proposed QDRO is prepared by the parties' attorneys and submitted to the trial court for approval and entry, after which, it is submitted to the administrator who administers the pension plan in question. The plan administrator must then determine if the proposed QDRO is "qualified" under ERISA. [*Jordan*, 147 SW3d at 259-260 (footnotes omitted; final ellipsis added).]

Therefore, an alternate payee only becomes entitled to rights under an ERISA plan when the proposed QDRO becomes *qualified*. And a proposed QDRO becomes qualified *after it is approved by the plan administrator*. See 29 USC 1056(d)(3)(G)(i); *Jordan*, 147 SW3d at 260; *In re Marriage of Cray*, 18 Kan App 2d 15, 21; 846 P2d 944 (1993), rev'd in part on other grounds 254 Kan 376 (1994). Consequently, plaintiff's motion to have the trial court enter the proposed QDRO was not an act to enforce a judgment or obligation.

Instead, we hold that under these circumstances, the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself. Indeed, the judgment established the distribution of the couple's assets and expressly requested this particular task (obtain entry of a proposed QDRO) to be accomplished. See *Duhamel v Duhamel*, 194 Misc 2d 100, 101; 753 NYS2d 673 (2002). In its judgment of divorce, the trial court gave specific instructions to the parties to "cooperate" and "execute . . . documents" as part of an established routine in divorce cases to ultimately get a QDRO entered. Accordingly, when a party complies with the court's instructions, albeit late, as is the case here, the party is simply engaged in supplying documents and information to the court to comply with its ministerial obligations under the judgment—nothing more, nothing less. Though such actions ultimately will have the effect of allowing one party to share in the retirement benefits of the other, this procedure is not an enforcement of a money judgment in the sense covered by the statute. Indeed, unlike the standard enforcement case, neither party here is or has been prejudiced by the passage of time because no party has changed any position relative to the annuity, nor has any party triggered the necessary preconditions for the application of the QDRO.

Therefore, we hold that because the entry of the proposed QDRO is not an enforcement of a noncontractual money obligation, the 10-year period of limitations provided in MCL 600.5809(3) does not apply, and plaintiff's request to have the proposed QDRO entered by the trial court was not time-barred.

In his reply brief on appeal, defendant suggests for the first time that the statute of limitations in MCL 600.5809 applies because the annuity plan at issue is a "defined contribution plan," as opposed to a "defined benefit plan." Without supplying any authority, defendant claims that because the fund at issue is a defined-contribution plan, plaintiff could have received the funds immediately with the entry of the proposed QDRO, which makes it distinguishable from cases like *Jordan*. First, this assertion is without merit because, as we have already explained, a proposed QDRO that is entered by a trial court is not enforceable until it is approved by the plan administrator. Second, defendant provides no citation to the record[5] or other authority for his theory that plaintiff could have obtained her $23,823 immediately after the judgment of divorce was entered despite the fact that defendant had yet to retire. Indeed, 401(k)s, which defendant acknowledges are a common type of defined-contribution plan, have strict limits on when money can be disbursed without incurring substantial tax penalties. See 26 USC 72(t); Internal Revenue Service, *401(k) Resource Guide - Plan Participants - General Distribution Rules* <https://www.irs.gov/retirement-plans/plan-participant-employee/401k-resource-guide-

[5] Indeed, when specifically asked at oral argument if there was anything in the record to show that plaintiff could have received any of the benefits immediately after the entry of the QDRO, defense counsel conceded that there was nothing.

plan-participants-general-distribution-rules> (accessed May 17, 2017) [https://perma.cc/6TYU-WAG7] (stating that, generally, distributions from 401(k)s "cannot be made" unless certain conditions happen). Accordingly, defendant has failed to properly present this theory to the Court for our consideration. See *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

HOEKSTRA, P.J., concurred with SAAD, J.

JANSEN, J. (*dissenting*). Because I believe that entry of a qualified domestic relations order (QDRO) is an action to enforce a judgment of divorce and subject to the applicable statute of limitations, I respectfully dissent.

This Court has held that MCL 600.5809 provides the applicable statute of limitations for the enforcement of a divorce settlement agreement. See *Peabody v DiMeglio*, 306 Mich App 397, 406; 856 NW2d 245 (2014) (holding that the 10-year statutory period of limitations in MCL 600.5809(3) applied to a divorce settlement agreement that was incorporated by reference into a divorce judgment). As noted by the majority, both parties agree that MCL 600.5809 provides the statute of limitations applicable in this matter. The parties dispute only the date upon which plaintiff's "claim" to her share of defendant's retirement funds under the judgment of divorce accrues for purposes of MCL 600.5809. Plaintiff asks this Court to determine that her claim to defendant's annuity funds will not accrue for purposes of MCL 600.5809 until defendant retires

and she is able to receive benefits pursuant to his policy. Defendant argues to the contrary, insisting that plaintiff's claim accrued when the judgment of divorce entered on April 28, 2003.

This is a matter of first impression in this state. However, a number of our sister states have addressed the situation now before us. A review of their opinions reveals three distinct outcomes. First, courts in New York have adopted the reasoning advanced by plaintiff in this case, holding in *Duhamel v Duhamel*, 188 Misc 2d 754, 756; 729 NYS2d 601 (2001), that "the limitations period relating to the defendant's action seeking to preclude the entry of a QDRO, and thus subjecting defendant's retirement benefits to equitable distribution, accrued after he reached pay status in the retirement benefits." The *Duhamel* court provided little in the way of reasoning but reiterated that "since plaintiff's right to receive a distribution under the defendant's retirement plan did not accrue until after her former husband reached pay status, the six-year limitation period [applicable in New York] did not begin to run until his retirement date." *Id*.

The *Duhamel* court's adopted outcome is fraught with possible procedural complications. Adoption of the *Duhamel* rule would require our courts to employ a different statute of limitations in each case involving an action to enforce an award of retirement benefits found in a judgment of divorce. This is because the date upon which a defendant may reach "pay status" for purposes of a QDRO varies widely from plan to plan. For example, an alternate payee's right to early withdrawal may depend on whether the plan is a defined contribution plan or a defined benefit plan. Under some plans, an alternate payee may be entitled to a lump sum payment upon entry of the QDRO or to an

immediate transfer into the alternate payee's own retirement account. As the United States Department of Labor (the Department) explains in its 2014 handbook, *QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders* (2014), pp 32-33:

> Understanding the type of retirement plan is important because the order cannot be a QDRO unless its assignment of rights or division of retirement benefits complies with the terms of the plan. Parties drafting a QDRO should read the plan's summary plan description and other plan documents to understand what retirement benefits are provided under the plan.
>
> Retirement plans may be divided generally into two types: defined benefit plans and defined contribution plans.
>
> A defined benefit plan promises to pay each participant a specific benefit at retirement. This basic retirement benefit is usually based on a formula that takes into account factors like the number of years a participant works for the employer and the participant's salary. . . .
>
> *Defined benefit plans may promise to pay benefits at various times, under certain circumstances, or in alternative forms*. Benefits paid at those times or in those forms may have a greater actuarial value than the basic retirement benefit payable by the plan at the participant's normal retirement age. . . .
>
> A defined contribution plan, by contrast, is a type of retirement plan that provides for an individual account for each participant. The participant's benefits are based solely on the amount contributed to the participant's account and any income, expenses, gains or losses, and any forfeitures of accounts of other participants that may be allocated to such participant's account. . . . *Defined contribution plans commonly provide for retirement benefits to be paid in the form of a lump sum payment of the*

> *participant's entire account balance*. Defined contribution plans by their nature do not offer subsidies.
>
> *It should be noted, however, that some defined benefit plans provide for lump sum payments, and some defined contribution plans provide for annuities*. [Citation omitted; emphasis added.][1]

Although the benefits awarded in a judgment of divorce must be consistent with the planholder's rights under his or her particular plan, drafters of a QDRO have wide discretion in determining how benefits are received. See 29 USC 1056(d)(3)(C)(i) through (iv) (setting forth the requirements for entry of a QDRO, which include specifying the amount and manner of payments to be received as well as the number of payments requested); 29 USC 1056(d)(3)(D)(i) through (iii) (setting forth limitations on acceptable QDROs and explaining that a QDRO may not "require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan," or "require the plan to provide increased benefits"). A QDRO may adopt a "separate interest" approach, a "shared payment" approach, or some combination of the two. *QDROs*, pp 36-38.

> Orders that provide the alternate payee with a separate interest, either by assigning to the alternate payee a percentage or a dollar amount of the account balance as of a certain date, often also provide that the separate interest will be held in a separate account under the plan with respect to which the alternate payee is entitled to exercise the rights of a participant. [*Id*. at 36.]

Under a "shared payment" approach, an alternate payee typically receives a set percentage of payments received by the planholder pursuant to the plan. *Id*.

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[1] Available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf> [https://perma.cc/3AEH-J32B].

The limits on when and in what form an alternate payee may receive benefits pursuant to a retirement plan are as varied as the plans themselves:

> [A] QDRO may . . . give the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment. For example, if a participant would have the right to elect a life annuity, the alternate payee may exercise that right and choose to have the assigned benefit paid over the alternate payee's life. However, the QDRO must permit the plan to determine the amount payable to the alternate payee under any form of payment in a manner that does not require the plan to pay increased benefits (determined on an actuarial basis).
>
> A plan may by its own terms provide alternate payees with additional types or forms of benefit, or options, not otherwise provided to participants, such as a lump-sum payment option, but the plan cannot prevent a QDRO from assigning to an alternate payee any type or form of benefit, or option, provided generally under the plan to the participant. [*Id*. at 39, citing 29 USC 1056(d)(3)(A), (d)(3)(D), and (d)(3)(E)(i)(III).]

I believe it is important to note that our record in this case is inadequate to support a determination of when plaintiff was first entitled to payment of benefits under the terms of defendant's annuity plan. However, defendant contends that plaintiff could have received payment pursuant to the terms of the annuity as early as the judgment of divorce. Were we to accept plaintiff's argument and adopt the *Duhamel* rule, it would be necessary for us to remand this case to the trial court for a determination of whether and when plaintiff's claim for payment of benefits under the annuity actually accrued. If, pursuant to the terms of defendant's annuity plan, plaintiff was entitled to early payment or transfer of funds upon entry of the judgment of divorce, her claim would still be barred by the 10-year statutory period of limitations under *Duhamel*.

I believe the *Duhamel* rule erroneously conflates the right to entry of a QDRO pursuant to the judgment of divorce with the right to payment of benefits granted by an approved QDRO. Typically, a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. The *Duhamel* court, and now plaintiff on appeal, seemingly rely on this maxim in support of their proposed outcome, assuming that a plaintiff can suffer no "wrong" until he or she is denied the payment of benefits under a retirement plan. By way of example, plaintiff contends that her attempt to enter a QDRO is analogous to an action to enforce a payment of alimony or child support. In *Torakis v Torakis*, 194 Mich App 201, 203; 486 NW2d 107 (1992), this Court explained that the 10-year statutory period of limitations under MCL 600.5809(3) begins to run against each alimony installment when that installment becomes due. However, entry of a QDRO is easily distinguishable. If monthly alimony and child support payments are due, a recipient has no right of enforcement until the installment payment has come due and gone unpaid. A plaintiff's right to entry of a QDRO is different. A plaintiff can suffer such wrongs as a refusal by the other party to cooperate in the pursuit of a QDRO or a plan administrator's denial of a QDRO immediately upon entry of the judgment of divorce. A plaintiff is entitled to entry of a QDRO at any time after the entry of the judgment of divorce to secure his or her *interest* in the annuity plan, not his or her payment of benefits, and a plaintiff is not required to wait for a specific event before seeking enforcement of that term of the judgment of divorce. Therefore, plaintiff's "claim" under MCL 600.5809(1) accrued when she became entitled to initiate proceedings to secure her right to enter a QDRO. Once a QDRO is entered, a new

right of enforcement arises for violations of the terms of the QDRO. A claim under this *new* right accrues when benefits are available and payment is denied.

This distinction between a plaintiff's right of enforcement and a plaintiff's right to receive money, the second possible solution for the issue presented, was considered and adopted by the Kansas Court of Appeals in *Larimore v Larimore*, 52 Kan App 2d 31; 362 P3d 843 (Kan App, 2015).[2] The circumstances presented in *Larimore* are nearly identical to the circumstances presented here. The *Larimore* plaintiff sought an order compelling the defendant, the plaintiff's ex-husband, to cooperate in the preparation and execution of a QDRO 12 years after the parties' judgment of divorce had been entered. *Id*. at 32. The *Larimore* court held that "the judgment dividing [the defendant's] retirement accounts had become absolutely extin-

[2] Similarly, the United States Bankruptcy Court for the Northern District of Ohio recently distinguished an alternate payee's rights under a domestic relations order (DRO) from the alternate payee's rights under a QDRO:

> A domestic relations order is a sufficient independent basis for a spouse to obtain a vested beneficial interest in an ERISA-qualified plan. A person awarded a lump-sum distribution from an ERISA plan pursuant to a divorce decree has a direct interest in plan funds while the plan reviews the DRO to determine whether it constitutes a QDRO. A domestic relations order, therefore, vests the spouse with rights protected by ERISA. The QDRO, by contrast, is necessary to take the next step of transferring the assets into the spouse's name in her own qualified plan or individual retirement account. . . .
>
> For this reason, regardless of other facts or circumstances, *the Debtor in this case became an ERISA-qualified beneficiary of the Plan no later than January 8, 2015, when the State Court entered its Judgment Entry, which constitutes a domestic relations order directing the equal division of the Plan assets that are marital property of the Debtor and her ex-husband* . . . . [*In re Lawson*, 570 BR 563, 572 (Bankr ND Ohio, 2017) (quotation marks and citations omitted; emphasis added).]

guished and unenforceable due to [the plaintiff's] failure to file a QDRO or a renewal affidavit" within the applicable statutory period of limitations. *Id*. at 44. The *Larimore* court explained:

> A former spouse's right to receive pension benefits deemed marital property, however, does not arise under ERISA. That right or interest is based on a state court judgment ordered under state domestic relations law. Indeed, a "QDRO only renders enforceable an already-existing interest." " '[T]he QDRO provisions of ERISA do not suggest that [the alternate payee] has no interest in the plan[ ] until she obtains a QDRO, they merely prevent her from enforcing that interest until the QDRO is obtained.' " As a result, in this case, while federal law did not provide a statute of limitation for the filing of a QDRO, [the plaintiff] could only obtain a QDRO if she had a valid right or interest created under Kansas domestic relations law to enforce. [*Id*. at 39 (citations omitted; fourth alteration added).]

The Kansas court then determined that the plaintiff no longer had a right to enforce the domestic order:

> Although the divorce decree established [the plaintiff's] right to receive a portion of [the defendant's] retirement accounts, ERISA's anti-alienation provision preempts the divorce court's [domestic relations order] because it does not comply with ERISA's requirements for QDROs. As a consequence, [the plaintiff] was required to execute upon the judgment by filing a QDRO in order to enforce her right to receive benefits under [the defendant's] retirement accounts. [*Id*. at 41.]

The court reasoned that the plaintiff's 12-year delay in bringing an action for entry of a QDRO "left her without a judgment to enforce." *Id*. at 42. Ultimately, the *Larimore* court concluded:

> Upon a plain reading of the dormancy statute, we hold that [the statute] does not toll the running of the dor-

> mancy period for a judgment in a divorce decree which divides retirement plans governed by ERISA. We arrive at this conclusion because the legal process for enforcing such a judgment—the filing of a QDRO—is not stayed or prohibited until the benefits become payable. On the contrary, the filing of a QDRO is mandatory if the alternative beneficiary is to enforce his or her judgment. Although [the plaintiff] may not have been able to *receive money* from [the defendant's] retirement accounts during the ensuing 12 years, the necessary *legal process*—a QDRO—for enforcing [the plaintiff's] interest in the retirement accounts was fully available to her. [*Id*. at 44.]

For the reasons discussed, I find the *Larimore* court's outcome highly persuasive and consistent with the goals of efficiency and commonsense application.

However, it is the third outcome offered by our sister courts that is set forth and adopted by the majority here. Courts in states such as Tennessee and Indiana have avoided the question of claim accrual for purposes of the statute of limitations by holding that entry of a proposed QDRO is simply not an action to enforce a noncontractual money obligation. See, e.g., *Ryan v Janovsky*, 999 NE2d 895, 898 (Ind App, 2013) ("[The plaintiff's] right to part of [the defendant's] pension benefits arises from the settlement agreement; the QDRO only creates her right to be paid directly from the pension plan. And neither of these rights is yet enforceable because [the defendant's] pension benefits are not yet payable to anyone."); *Jordan v Jordan*, 147 SW3d 255, 262 (Tenn App, 2004) ("[T]he approval of the proposed QDRO is adjunct to the entry of the judgment of divorce and not an attempt to 'enforce' the judgment."). In *Jordan*, on which the majority relies, the Tennessee court explained that "[u]ntil the proposed QDRO is approved by the plan administrator and entered by the trial court, the act of the trial court in dividing the pension plan *is not complete and hence*

not enforceable. It can be accurately described as inchoate in nature." *Jordan*, 147 SW3d at 263.

I am not persuaded that this Court should adopt the Tennessee court's reasoning. It is true that an alternate payee only becomes entitled to rights under an ERISA-covered plan when a plan administrator approves the QDRO. But it is the right *to entry of a proposed QDRO* that is at issue here. As previously discussed, a party to a judgment of divorce can enforce his or her right to entry of a QDRO even before he or she is entitled to payment of benefits under a retirement plan. Such a right is not properly described as "inchoate." Rather, the right indisputably arises on entry of the judgment of divorce, to which the 10-year period of limitations applies.

In adopting *Jordan*'s outcome, the majority circumvents the application of MCL 600.5809 in cases requiring a QDRO and, by extension, any other "ministerial task done in conjunction with the divorce judgment itself." Parties to a divorce judgment in Michigan are now given an unlimited amount of time to obtain entry of a QDRO. This outcome neglects the purpose of statutes of limitations. As our Supreme Court stated in *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982):

> Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages, they penalize plaintiffs who have not been industrious in pursuing their claims, they "afford security against stale demands when the circumstances would be unfavorable to a just examination and decision," . . . they prevent fraudulent claims from being asserted, and they " 'remedy . . . the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.' " [Citations omitted.]

Despite the majority's assertion to the contrary, these considerations are not irrelevant in situations involving delayed entry of a QDRO.

The passage of time may substantially affect the parties' situations and the availability of funds under a retirement plan. While the rights of an alternate payee under a QDRO are protected in the event of plan amendments, mergers, or sponsor changes, 29 USC 1056(d)(3)(A), an alternate payee has no such rights before entry of a QDRO. A planholder may pass away, leaving no beneficiary or a beneficiary other than the prospective alternate payee, or the planholder's retirement plan may be terminated. Although the Department recommends that, in these situations, "a QDRO must be taken into account in the termination of a plan as if the terms of the QDRO were part of the plan," a plan administrator would have no knowledge of a plaintiff's rights under a judgment of divorce before a QDRO is in place. *QDROs*, p 25. A plan administrator's review of a proposed QDRO can itself take more than 18 months and can be denied several times before it is ultimately accepted. 29 USC 1056(d)(3)(H); *QDROs*, pp 20-22. If a QDRO is not entered and approved within 18 months after the first payment is due under a plan, "the plan administrator must pay out the segregated amounts to the person or persons who would have been entitled to such amounts if there had been no order," and even if the QDRO is later accepted, it will apply only prospectively. *QDROs*, p 22, citing 29 USC 1056(d)(3)(H). It is clear that both parties, as well as the general goal of efficient administration of payments under a retirement plan, benefit from the protections of a timely entered QDRO. Further, there is no unnecessary prejudice in the imposition of a 10-year period of limitations on parties seeking entry of a QDRO. The statute of limitations should therefore apply.

It is worth noting that in this case, entry of the QDRO was itself ordered per the terms of the judgment of divorce and therefore should not be considered a "ministerial task" left to completion at the parties' discretion. The judgment of divorce specifically ordered plaintiff and defendant to "cooperate in the execution of a [QDRO] to transfer said interest to the Plaintiff" and "execute whatever documents may be necessary to complete the transfer." Plaintiff could have moved at any time after the entry of the judgment of divorce to enter a QDRO to transfer her interest in the annuity plan, and if defendant refused to cooperate, then she could have sought relief from the trial court. However, plaintiff did not attempt to enforce the entry of a QDRO until 12 years after the judgment of divorce had been entered.

For the reasons set forth in this opinion, I would adopt the reasoning set forth in *Larimore*, 52 Kan App 2d at 41-42, and hold that plaintiff's attempt to obtain entry of the QDRO 12 years after entry of the judgment of divorce was barred by the statute of limitations.

MATOUK v MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL

Docket No. 332482. Submitted July 6, 2017, at Detroit. Decided July 11, 2017, at 9:20 a.m. Leave to appeal denied 501 Mich 952.

Plaintiff, Timothy Matouk, brought a complaint for declaratory judgment in the Macomb Circuit Court against the Michigan Municipal League Liability and Property Pool, seeking to compel defendant to pay for plaintiff's defense in a previous federal lawsuit brought against plaintiff and a number of other individually named police officers after the January 2010 disappearance and death of plaintiff's cousin, JoAnn Matouk Romain. On the day of her disappearance, Romain allegedly drove from her home in Grosse Pointe Woods to attend church services in Grosse Pointe Farms. She never returned home, and some evidence revealed that she had walked out onto the frozen lake across the street from the church and fell through the ice. Her body was not found until three months later, and her death was deemed a suicide. However, members of Romain's family believed that she had been murdered and that the Grosse Pointe Woods and Grosse Pointe Farms police departments conspired to conceal the crime. The family also believed that plaintiff, who is Romain's cousin as well as a police officer for Harper Woods, either murdered Romain or participated in the cover-up conspiracy. The family brought an action in the United States District Court for the Eastern District of Michigan against plaintiff and others, naming plaintiff as a defendant "individually and in his official capacity as a public safety officer for the City of Harper Woods" and alleging violations of Romain's civil rights under 42 USC 1985 and 42 USC 1983. Defendant, as a liability insurer for the cities of Grosse Pointe Woods and Grosse Pointe Farms, refused to provide for plaintiff's defense in the federal action, asserting that the specific allegations of misconduct against plaintiff fell outside defendant's municipal liability insurance policy. Plaintiff then brought the instant action seeking to compel defendant to pay for his defense in the federal action. Defendant moved for summary disposition, and plaintiff moved for partial summary disposition. The court, Edward A. Servitto, Jr., J., granted plaintiff's motion, concluding

that defendant had a contractual obligation to provide a defense for plaintiff pursuant to the terms of defendant's policy. Defendant appealed.

The Court of Appeals *held*:

1. An insurer has a duty to defend an insured as long as the allegations against the insured even arguably come within the policy coverage. An insurance policy's terms are given their commonly used meaning if not defined in the policy, and unambiguous insurance policy language must be enforced as written. In this case, neither of the parties contended that the language of defendant's policy was ambiguous; therefore, the policy was applied according to its terms. Pursuant to defendant's policy, defendant is required to provide coverage for (1) an insured (2) who has committed any wrongful act, as defined by the policy, arising out of the discharge of public duties (3) within the scope of the insured's employment by or duties on behalf of the city of Harper Woods. The parties did not dispute that plaintiff, in his capacity as a police officer for the city of Harper Woods, was an "insured" under the policy or that the misconduct in which plaintiff allegedly engaged comprised a number of wrongful acts as defined in the policy. At issue was the third requirement: whether plaintiff's alleged misconduct fell within the scope of his employment by or duties on behalf of the city of Harper Woods.

2. The issue whether an employee was acting within the scope of his or her employment may be decided as a matter of law when it is clear that the employee was acting to accomplish some purpose of his or her own. "Scope of employment" was not defined in the policy, but the Supreme Court has held that there is no liability on the part of an employer for torts intentionally or recklessly committed by an employee beyond the scope of the employer's business. While plaintiff argued that the federal district court judge had already determined that the civil rights violations alleged in the federal complaint were plausibly alleged against plaintiff, those findings were not submitted to the trial court and therefore were not part of the record on appeal. Additionally, those alleged findings were inconsistent with established Michigan law because it was not dispositive that plaintiff could not have become involved with the conspiracy supporting the allegations of civil rights violations if plaintiff did not have the authority to act in his capacity as a police officer. To impose liability on employers for acts of an employee outside the scope of employment that could not be accomplished without the authority of the employee's office would defy common sense. Such a rule would result in the imposition of liability on employers for

wrongful actions of police officers, doctors, teachers, and countless other professionals who, solely by nature of their employment, possess the necessary access and authority to engage in conduct, criminal or otherwise, that an average person could not, regardless of whether those wrongful actions arose within the scope of employment.

3. It was not dispositive that plaintiff was on duty during the hours surrounding Romain's disappearance because the typical work period or shift does not determine whether a plaintiff acts within the scope of his or her employment. Although plaintiff was on duty for the city of Harper Woods on the date of Romain's disappearance, plaintiff was not involved in Romain's investigation on that day, and the investigation of Romain's death was in no way related to plaintiff's employment by or duties on behalf of the city of Harper Woods on that day or any other. The fact that plaintiff was on duty in another jurisdiction on the date of Romain's disappearance was irrelevant.

4. Neither the doctrine of collateral estoppel nor the doctrine of equitable estoppel supported plaintiff's argument that defendant should be estopped from denying plaintiff a defense because defendant had agreed to defend a number of other police officers under identical policies and for what plaintiff suggested were identical claims raised in the federal complaint. It was irrelevant that defendant had agreed to defend police officers employed by the cities of Grosse Pointe Woods and Grosse Pointe Farms under separate liability policies held by those municipalities; it was plaintiff's coverage under a policy held by the city of Harper Woods that was at issue.

5. The duty to defend and indemnify is not based solely on the terminology used in the pleadings in the underlying action. The gravamen of an action is determined by reading the complaint as a whole and by looking beyond mere procedural labels to determine the exact nature of the claim. In this case, while the federal complaint labeled its counts "as to all defendants," it was clear that the allegations against plaintiff were very different from the allegations raised against the individually named police officers: the allegations against plaintiff included that plaintiff allegedly threatened Romain's life shortly before her disappearance, was observed near the church parking lot by a witness near the time of Romain's disappearance, and was the last known person to be seen with Romain on the night of her disappearance. None of the specific allegations against plaintiff related to activities falling within the scope of his employment, nor could they arguably be attributed to any purpose to serve the city of Harper Woods;

therefore, defendant did not have a duty under the policy to provide a defense for plaintiff in the federal lawsuit. Accordingly, the trial court erred when it granted partial summary disposition in favor of plaintiff.

Reversed.

Howard & Howard Attorneys PLLC (by *Mark W. Peyser* and *Jonathan F. Karmo*) for Timothy Matouk.

Pear Sperling Eggan & Daniels, PC (by *Thomas E. Daniels*), for the Michigan Municipal League Liability and Property Pool.

Before: O'BRIEN, P.J., and JANSEN and STEPHENS, JJ.

JANSEN, J. Defendant appeals by leave granted[1] an order granting partial summary disposition in favor of plaintiff entered after the trial court determined that defendant was contractually obligated to defend plaintiff, a police officer for the city of Harper Woods, in a federal civil rights action wherein plaintiff is a named defendant. We reverse.

This case arises from a federal lawsuit brought against plaintiff and a number of other individually named police officers and related defendants after the January 2010 disappearance and death of plaintiff's cousin, JoAnn Matouk Romain. On the day of her disappearance, Romain allegedly drove from her home in Grosse Pointe Woods to attend church services in Grosse Pointe Farms. Romain never returned home, and her vehicle was later found in the parking lot of her church, across the street from the shore of Lake St. Clair. An investigation by the Grosse Pointe Woods and Grosse Pointe Farms police departments revealed

[1] *Matouk v Mich Muni League Liability & Prop Pool*, unpublished order of the Court of Appeals, entered August 4, 2016 (Docket No. 332482).

some evidence that Romain walked out onto the frozen lake and fell through the ice. Although a search ensued, Romain's body was not found until three months later. Romain's death was deemed a suicide. However, members of Romain's family believe that Romain was murdered and that the Grosse Pointe Woods and Grosse Pointe Farms police departments conspired to conceal the crime. Romain's family members also believe that plaintiff, who is Romain's cousin as well as a police officer for Harper Woods, either murdered Romain or participated in the cover-up conspiracy.

Romain's family, on behalf of Romain's estate, brought a complaint in the United States District Court for the Eastern District of Michigan against the city of Grosse Pointe Farms, the city of Grosse Pointe Woods, 19 individual police officers, and an individual identified as "Suspect One." Although plaintiff was not named in the original complaint, a second amended complaint in the federal lawsuit names plaintiff "individually and in his official capacity as a public safety officer for the City of Harper Woods" among the defendants, which include all of the municipal and police defendants named in the original complaint as well as individuals identified as "John Doe" and "Killer John Doe." As to "all defendants," the complaint alleges (1) violation of Romain's civil rights under 42 USC 1985 for conspiracy to deny Romain equal protection of the law by covering up her murder and (2) violation of Romain's civil rights under 42 USC 1983 for "state-created danger" in the defendants' acts of informing Romain's killer that they would cover up the murder and rule it a suicide. A third count, for violation of Romain's civil rights under 42 USC 1983 for "failure to implement appropriate policies, customs and practices," is labeled "as to all defendants" but clearly applies only to the city of Grosse Pointe Woods and the

city of Grosse Pointe Farms. The fourth count is brought against 17 of the named defendants, including plaintiff, and alleges violations of Romain's civil rights under 42 USC 1983 for wrongful death.

Defendant, as a liability insurer, provides liability coverage for the city of Grosse Pointe Woods and the city of Grosse Pointe Farms. Pursuant to their municipal liability policies, defendant agreed to provide a defense to the federal action for the two municipalities and all of their police officers. The city of Harper Woods, where plaintiff was employed at the time of the alleged misconduct, also has a municipal liability insurance policy (the Policy) with defendant. However, defendant refused to provide for plaintiff's defense in the federal action, asserting that the specific allegations of misconduct against plaintiff fell outside defendant's Policy.

Plaintiff brought a complaint for declaratory judgment in the Macomb Circuit Court, seeking to compel defendant to pay for his defense in the federal court action. Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that coverage under the Policy only extends to a Harper Woods employee for damages arising from conduct "within the scope of their employment by or duties on behalf of" Harper Woods. The trial court denied defendant's motion as premature because discovery had not yet closed. However, less than a month later, plaintiff brought his own motion under MCR 2.116(C)(10) for partial summary disposition, limited to the subject of defendant's duty to defend. This time, the trial court granted the motion, concluding that "the Defendant has a contractual obligation to provide a defense to Plaintiff for the *Romain* case pursuant to the terms of the Defendant's subject insurance policy[.]"

On appeal, defendant argues that the trial court erred when it determined that defendant was contractually obligated to provide plaintiff with a defense in the federal lawsuit under the Policy because the misconduct alleged in the federal complaint was not undertaken within the scope of plaintiff's employment. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). "In reviewing a motion brought under MCR 2.116(C)(10), we review the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013).

Whether defendant is contractually obligated under the Policy to defend or indemnify certain claims is a question of law that requires interpretation of the insurance policy. *American Bumper & Mfg Co v Nat'l Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004). "[T]he proper construction and application of an insurance policy presents a question of law that is reviewed de novo." *Pioneer State Mut Ins Co*, 301 Mich App at 376-377. "While the issue of whether the

employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own." *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989).

"It is well established that an insurer has a duty to defend an insured and that such duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured *even arguably* come within the policy coverage." *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 480-481; 642 NW2d 406 (2001) (quotation marks and citation omitted). Additionally, "[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *Detroit Edison Co v Mich Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980). "In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Id*.

"In determining whether an insurer has a duty to defend its insured, we are required to look at the language of the insurance policy and construe its terms." *Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997). An insurance policy's terms are given their "commonly used meaning" if not defined in the policy. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112; 595 NW2d 832 (1999) (quotation marks and citation omitted). Unambiguous insurance policy language must be enforced as written. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 570; 596 NW2d 915 (1999). If the policy is ambiguous, it will be

construed in favor of the insured to require coverage. *Royce v Citizens Ins Co*, 219 Mich App 537, 542-543; 557 NW2d 144 (1996).

Insurers are free to limit the scope of their liability by excluding particular conduct from coverage. *Auto Club Group Ins Co v Daniel*, 254 Mich App 1, 4; 658 NW2d 193 (2002). And while "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured," *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998), "[c]overage under a policy is lost if *any* exclusion in the policy applies to an insured's particular claims," *id*. (emphasis added). Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

Neither of the parties contends that the language of the Policy is ambiguous. Therefore, we will simply apply the Policy according to its terms. Notably, in the absence of any ambiguity in the Policy's language, we need not construe the Policy against the insurer. Defendant's obligation to defend an insured against wrongful acts is defined under Coverage D of Section I of the Policy. In pertinent part, that section provides:

> **COVERAGE D — PUBLIC OFFICIALS LIABILITY**
>
> ***1. Coverage Agreement.***
>
> We will pay those sums which the **insured** becomes legally obligated to pay as **Damages** by reason of a **Wrongful Act** to which this coverage applies committed in and arising out of discharge of public duties. . . .
>
> * * *
>
> c. Our right and duty to defend end when we have used up the applicable Limit of Liability in payment of **Dam-**

> **ages** or **Loss Adjustment Expense** as described in *SECTION III — LIMITS OF COVERAGE*.

"Wrongful Act" is defined under Section VI of the Policy as follows:

> **Wrongful Act** means any actual or alleged error or misstatement or act of omission or neglect or breach of duty including misfeasance, malfeasance or nonfeasance including violation of civil rights, discrimination (unless coverage thereof is prohibited by law), but only with respect to liability other than for fines and penalties imposed by law and improper service of process, by the **Member** in their official capacity, individually or collectively, or any matter claimed against them solely by reason of their having served or acted in an official capacity. All **Claims** and **Damages** arising out of the same or substantially same or continuous or repeated Wrongful Act shall be considered as arising out of one Wrongful Act.

Importantly, even for an insured, the Policy's protections are clearly limited. Section II of the policy, entitled "Who is Covered," states that the Policy provides coverage for an insured, "but only for acts within the scope of [the insured's] employment by or duties on behalf of the **Member**[.]" This limitation applies to all coverages under the Policy, including the coverage for public officials liability in Section I. "Member" refers to the "governmental agency named on the Declarations page," in this case, the city of Harper Woods. In sum, pursuant to the Policy, defendant is required to provide coverage for (1) an insured (2) who has committed any wrongful act, according to the Policy's definition, arising out of the discharge of public duties (3) "within the scope of their employment by or duties on behalf of the **Member**[.]"

The parties do not dispute that plaintiff, in his capacity as a police officer for the city of Harper Woods,

was an "insured" under the Policy at all times relevant to these proceedings. It is also undisputed that the misconduct in which plaintiff allegedly engaged, as delineated in the federal complaint, comprised a number of wrongful acts as defined in Section VI of the Policy. Indeed, the federal complaint specifically alleges various forms of misfeasance and malfeasance, including "violation of [Romain's] civil rights," against all named defendants, including plaintiff. It is the third requirement of coverage at issue here. Namely, whether plaintiff's alleged misconduct fell "within the scope of [his] employment by or duties on behalf of" the city of Harper Woods.[2]

"Scope of employment" is not a term that is specifically defined in the policy. However, as with any other contract, we give the terms of an insurance policy their plain and ordinary meaning. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Our Supreme Court has defined "within the scope of employment" to mean "engaged in the service

[2] Throughout his appellate brief, plaintiff suggests that the misconduct alleged in the federal complaint constituted wrongful acts falling within the scope of his employment because it was "committed in and arising out of [his] discharge of public duties" or "solely by reason of [plaintiff's] having served or acted in an official capacity." Plaintiff misinterprets the Policy. These phrases, while contained within Sections I and VI of the Policy, do not define the "scope of employment" for purposes of Section II, which blanketly applies to all stated coverages under the Policy. Plaintiff does not argue that the presence of these phrases within the Policy creates any ambiguity in the plain language of Section II, and we reject any attempt by plaintiff to expand the meaning of "scope of employment" beyond its accepted meaning. To the extent the trial court relied on these phrases to define "scope of employment" for purposes of Section II, we find that it erred. Under the plain language of the contract, plaintiff is entitled to a defense only for a wrongful act "committed in and arising out of his discharge of public duties" *and* within the "scope of employment." Failure to meet either of these requirements defeats liability for defense coverage.

of his master, or while about his master's business." *Hamed v Wayne Co*, 490 Mich 1, 11; 803 NW2d 237 (2011) (quotation marks and citation omitted); see also *Rogers v J B Hunt Transp, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002) ("An employer is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control."). "Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment." *Hamed*, 490 Mich at 11. As our Supreme Court explained in *Rogers*, 466 Mich at 651:

> [I]t is well established that an employee's negligence committed while on a frolic or detour, or after hours, is not imputed to the employer. In addition, even where an employee is working, vicarious liability is not without its limits. For example, we have held that "there is no liability on the part of an employer for torts intentionally or recklessly committed by an employee beyond the scope of his master's business." [Citations omitted.]

However, "[a]lthough an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business." *Hamed*, 490 Mich at 11.

Consistent with these principles, the Second Restatement of Agency, 2d, § 228, p 504, provides:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and

> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

This section of the Restatement provides a useful outline for our consideration of whether plaintiff's conduct, as alleged in the federal complaint, fell within the scope of plaintiff's employment. See *Zsigo v Hurley Med Ctr*, 475 Mich 215, 221; 716 NW2d 220 (2006).

Plaintiff suggests that we need not reach a determination on the matter. According to plaintiff, the federal district court has already determined that the civil rights violations alleged in the federal complaint "are plausibly alleged against [plaintiff]" because "if [plaintiff] in fact participated in the investigation [of Romain's death], he could *not* have 'behaved as he did without the authority of his office.' " (Emphasis omitted.) No such findings were submitted to the trial court, and they are not part of the record on appeal. MCR 7.210(A); see also *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989) ("This Court's review is limited to the record developed by the trial court and we will not consider references to facts outside the record."). In any case, we are not bound by the alleged findings of the federal district court judge, which we find inconsistent with established Michigan law. It is not dispositive that plaintiff could not have become involved with the conspiracy supporting the allegations of civil rights violations if plaintiff did not have the authority to act in his capacity as a police officer. In a closely related context, our Supreme Court declined to adopt an exception to the general rule of respondeat superior—that an employer is not

liable for the torts of its employees who act outside the scope of employment—when "the employee is aided in accomplishing the tort by the existence of an agency relation" between the employee and the employer. *Zsigo*, 475 Mich at 217-218 (quotation marks and citation omitted). The Court explained:

> [I]t is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always "aided in accomplishing" the tort. *Because the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of respondeat superior employer nonliability*. [*Id*. at 226 (emphasis added).]

The same reasoning applies in this context. To impose liability on an employer, such that a liability policy like the one at issue here would be required, for acts of an employee outside the scope of employment that could not be accomplished without the authority of the employee's office would defy common sense. Such a rule would result in the imposition of liability on employers for wrongful actions of police officers, doctors, teachers, and countless other professionals who, solely by nature of their employment, possess the necessary access and authority to engage in conduct, criminal or otherwise, that an average person could not, regardless of whether those wrongful actions arose within the scope of employment.

Plaintiff suggests that his alleged misconduct was arguably within the scope of his employment because "on the date [Romain] allegedly disappeared, [plaintiff] was on duty for Harper Woods." Plaintiff's argument lacks merit. It is not dispositive that plaintiff was "on duty" during the hours surrounding Romain's disappearance because the typical work period or shift does

not determine whether a plaintiff acts within the scope of his or her employment. An employee may easily engage in activities outside the scope of his or her employment during regular work hours. As previously discussed, "it is well established that an employee's negligence committed while on a frolic or detour . . . is not imputed to the employer," and "even where an employee is working, vicarious liability is not without its limits." *Rogers*, 466 Mich at 651. In *Riley v Roach*, 168 Mich 294, 307-308; 134 NW 14 (1912), our Supreme Court explained: "The phrase 'in the course or scope of his employment or authority,' when used relative to the acts of a servant, means while engaged in the service of his master, or while about his master's business. It is not synonymous with 'during the period covered by his employment.' "

More importantly, although it is undisputed that plaintiff was on duty for the city of Harper Woods on the date of Romain's disappearance, it is *also* undisputed that plaintiff was not involved in Romain's investigation on that day and that the investigation of Romain's death was in no way related to plaintiff's "employment by or duties on behalf of" the city of Harper Woods on that day or any other. On the date of Romain's disappearance and from that time forward, until plaintiff's retirement, plaintiff was assigned to the County of Macomb Enforcement Team (COMET), a Macomb County narcotics investigation team, and worked out of an office in Clinton Township. On that particular date, plaintiff was on assignment in the city of Warren. Romain's disappearance and death allegedly occurred in the city of Grosse Pointe Woods, and the resultant investigation was undertaken by the cities of Grosse Pointe Woods and Grosse Pointe Farms. Plaintiff has set forth no evidence to suggest that he was asked, by his employer or anyone else, to

assist in the investigation of Romain's death. Based on the unrebutted affidavit of Randolph Skotarczyk, city manager for the city of Harper Woods, plaintiff's duties on behalf of COMET did not include investigating Romain's disappearance or death, events which occurred outside the parameters of COMET, outside the jurisdiction of COMET, within another county, and within the jurisdiction of another police department. The fact that plaintiff was on duty in another jurisdiction on the date of Romain's disappearance is therefore irrelevant. Additionally, plaintiff has not alleged that he was on duty during any alleged participation in the ongoing investigation. It is telling that the city of Harper Woods is not a named defendant in the federal lawsuit. Had any alleged participation in Romain's death been authorized by or undertaken on behalf of the city of Harper Woods, the city would also be open to liability.

Plaintiff also argues that based on defendant's agreement to defend a number of other police officers under identical policies and for what plaintiff suggests are identical claims raised in the federal complaint, defendant is estopped from denying plaintiff a defense. However, we find no merit in plaintiff's argument. Neither the doctrine of collateral estoppel, which "precludes relitigation of an issue in a subsequent, different cause of action between the same parties," *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 528; 866 NW2d 817 (2014) (citations omitted), nor the doctrine of equitable estoppel, which provides "an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract," *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998), supports plaintiff's argument here. It is irrelevant that defendant has agreed to defend police officers employed by

the cities of Grosse Pointe Woods and Grosse Pointe Farms under separate liability policies held by those municipalities. Plaintiff seeks defense coverage under a policy held by the city of Harper Woods, and it is his coverage under that particular policy that we consider here. Moreover, the federal complaint alleges misconduct arising from the investigation of Romain's death, an activity in which the officers in Grosse Pointe Woods and Grosse Pointe Farms were involved in their official capacity. This fact supports a determination that the alleged misconduct of the other individually named police officers, at least arguably, occurred within the scope of their employment.

Finally, it is not dispositive, as plaintiff argues, that the federal complaint includes the general allegation: "All individually named Defendants, with the exceptions of John Doe and Killer John Doe, were acting within the scope of their employment, under their authority as law enforcement officers and under color of law at all times relevant to this Complaint." That plaintiff was acting within the scope of employment is a legal conclusion, not a fact, and we need not defer to it in determining potential for liability coverage. "The duty to defend and indemnify is not based solely on the terminology used in the pleadings in the underlying action." *Fitch v State Farm Fire & Cas Co*, 211 Mich App 468, 471; 536 NW2d 273 (1995). "The court must focus also on the cause of the injury to determine whether coverage exists." *Id*. And while the federal complaint labels its counts "as to all defendants," this Court "is not bound by a party's choice of labels." *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 9; 807 NW2d 343 (2011). "[T]he gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v*

Adams (On Reconsideration), 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

Reading the federal complaint as a whole, it is clear that the allegations against plaintiff are very different from the allegations raised against the individually named police officers. Specifically, the federal complaint alleges that plaintiff (1) threatened Romain's life shortly before her disappearance, (2) was one of two men observed in the church parking lot by a witness near the time of Romain's disappearance, (3) was the last known person to be seen with Romain on the night of her disappearance, (4) provided a false, anonymous tip to the police regarding Romain's mental instability, and (5) should have been a person of interest in the investigation of Romain's disappearance and death. The federal complaint also alleges that willful, reckless, or malicious acts of "at least some of the Defendants," including plaintiff, directly caused Romain's death. Plaintiff does not suggest that any of these specific allegations relate to activities falling within the scope of his employment. None of these activities are the kind plaintiff is employed to perform on behalf of the city of Harper Woods, nor could they arguably be attributed to any purpose to serve the city of Harper Woods. Intentional and reckless acts outside the scope of an employer's business do not fall within the scope of employment. See *Rogers*, 466 Mich at 651.

Although allegations of civil rights violations under § 1983 and § 1985 are described in the federal complaint as applicable to all "individually named Defendants," it is clear that these violations arise from conduct that, if engaged in by plaintiff, was outside the scope of plaintiff's employment. These claims allege a conspiracy by law enforcement officers involved in the investigation of Romain's death to cover up her murder

by (1) failing to obtain DNA and fingerprint evidence, (2) falsifying police reports, (3) failing to investigate witnesses or take witness statements, (4) intentionally covering up or "losing" evidence that would incriminate the killer "or [plaintiff]," and (5) promising Romain's killer that they would "cover up [her] murder and rule it as a suicide." Notably, allegations of conspiracy to support civil rights violations in the federal complaint include the failure of the municipalities and individually named police officers to investigate plaintiff. This accusation in particular demonstrates the distinction between plaintiff's alleged participation in the cover-up conspiracy and the participation, through the course of their employment, of the other individually named police officers. The city of Harper Woods was not involved in the investigation of Romain's disappearance and death, which was conducted by the cities of Grosse Pointe Farms and Grosse Pointe Woods. Plaintiff's supervisor in the city of Harper Woods confirmed that plaintiff had no authority to aid in the investigation on behalf of COMET or the city of Harper Woods. Any involvement in the investigation would therefore have been outside the temporal and spatial limits of his employment and intended solely for plaintiff's individual interest rather than the interest of his employer.

The alleged misconduct was not "arguably" within the scope of plaintiff's employment, and there is therefore no doubt to resolve in plaintiff's favor. Because none of the theories of liability asserted against plaintiff are covered under the Policy, defendant has no duty under the Policy to provide a defense for plaintiff in the federal lawsuit. See *Detroit Edison Co*, 102 Mich App at 142. Accordingly, the trial court erred when it granted partial summary disposition in favor of plain-

tiff and entered a declaratory judgment obligating defendant to provide plaintiff with a defense in the federal action.

Reversed.

O'BRIEN, P.J., and STEPHENS, J., concurred with JANSEN, J.

LAWRENCE v MICHIGAN UNEMPLOYMENT INSURANCE AGENCY

Docket No. 332398. Submitted July 6, 2017, at Detroit. Decided July 11, 2017, at 9:25 a.m.

Suzanne Lawrence filed an action in the Oakland Circuit Court, seeking to reverse a judgment of the Michigan Compensation Appellate Commission (MCAC) in which the MCAC concluded that Lawrence had received unemployment benefits during a period of ineligibility and ordered Lawrence to remit reimbursement to the Michigan Unemployment Insurance Agency (UIA). Lawrence was temporarily laid off in winter 2013 from her seasonal job at a country club. Lawrence's last day of work was January 4, 2013, and she received vacation pay for the weeks ending January 16, 2013, and February 2, 2013. Lawrence asserted that she had received her first unemployment check on February 20, 2013, for the previous two weeks she was unemployed. Lawrence received a notice of determination from the UIA in April 2015 stating that because she had received unemployment benefits for the weeks ending January 26, 2013, and February 2, 2013, during which she had also received vacation pay, she was not eligible to receive the benefits; the UIA ordered Lawrence to repay the $158 in unemployment benefits she had received for that period. Lawrence disputed the determination and the redetermination, arguing that she had not received unemployment benefits for those weeks, but the UIA denied her disputes. Following a hearing at which only Lawrence and a country club representative testified, the administrative law judge (ALJ) affirmed the UIA's determination, concluding that Lawrence had been ineligible to receive the unemployment benefits because she had received vacation pay for those weeks; the ALJ made no findings of fact regarding Lawrence's assertion that she had never actually received the disputed benefits during the disputed weeks. Lawrence appealed, and the MCAC affirmed the ALJ order. The circuit court, Leo Bowman, J., reviewed the certified record from the MCAC and affirmed the MCAC decision. The circuit court acknowledged Lawrence's argument that she had never received a payment during the contested period but reasoned that the ALJ's and the MCAC's decisions were sup-

ported by competent, material, and substantial evidence because the determination and redetermination letters stated that Lawrence had received the benefits during the disputed period and she had not been eligible for the benefits because of the vacation pay she had received. Thereafter, the circuit court denied Lawrence's motion for reconsideration. The Court of Appeals granted Lawrence's application for leave to appeal.

The Court of Appeals *held*:

1. MCL 421.38(1) of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*., provides that a circuit court may review questions of fact and law on the record made before the ALJ and the MCAC that are involved in a final order or decision of the MCAC; the circuit court may reverse an order or decision if it finds that it is contrary to law or that it is not supported by competent, material, and substantial evidence on the whole record. A circuit court must review the entire record when reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record. MCR 7.109(A)(2) states that a "record on appeal" from an agency decision to a circuit court is set forth in MCL 7.210(A)(2), which provides that the record includes all documents, files, pleadings, testimony, and opinions and orders of the tribunal, agency, or officer, except those summarized or omitted in whole or in part by stipulation of the parties. However, MCR 7.116(A) governs appeals to the circuit court under the MESA, and unless MCR 7.116 provides otherwise, the appellate rules in MCR 7.101 through MCR 7.115 apply to appeals under the MESA. In that regard, MCR 7.116(F) directs that within 42 days after a claim of appeal from an order or decision of the MCAC is served, the MCAC must transmit to the circuit court clerk a certified copy of the record of the proceedings before the ALJ and the MCAC and that the MCAC must notify the parties that the record was transmitted. MCR 7.116(F) does not limit the scope or content of the record on appeal to the circuit court; instead, Subrule (F) simply requires that a certified copy of the MCAC's record be transmitted to the circuit court. Any conflict between this expansive definition and the limited scope of the record described in MCL 421.34 and MCL 421.38 for cases brought under the MESA is resolved in favor of the court rule because the rule governs purely procedural matters. In this case, because MCR 7.116 does not otherwise limit the scope of the record on appeal, the MCR 7.109(A)(2) general definition of "record on appeal" from an agency decision applied to Lawrence's appeal from the MCAC's order. Accordingly, the

circuit court correctly considered the entire certified record transmitted by the MCAC, even though it contained UIA documents not considered by the ALJ.

2. The ALJ, the MCAC, and the circuit court orders and decisions lacked legal grounds because the question of Lawrence's eligibility for payments—which formed the basis for each of the decisions to affirm the UIA's order to reimburse the agency—was not at issue but, rather, whether Lawrence actually received the payments. The circuit court also clearly erred in its factual determinations and misapplied the substantial-evidence test when it affirmed the MCAC decision. The burden was on the UIA to prove that it had paid the disputed benefits to Lawrence, but the UIA failed to offer any evidence to support its conclusion that Lawrence had received the alleged benefits during the disputed period; the notice of determination, restitution document, and notice of redetermination were insufficient to establish that the UIA had issued an overpayment.

3. Although the circuit court violated MCR 7.113(A)(3) when it entered a scheduling order stating that Lawrence was not entitled to file a reply brief, Lawrence was not entitled to relief on that basis; the issue was unpreserved because she raised it for the first time in her motion for reconsideration, and she failed to demonstrate that the circuit court's order had affected the outcome of the proceedings.

Reversed and remanded.

ADMINISTRATIVE LAW — MICHIGAN COMPENSATION APPELLATE COMMISSION — RECORD ON APPEAL.

MCR 7.116(F), which governs appeals to the circuit court under the Michigan Employment Security Act, MCL 421.1 *et seq*., does not limit the scope or content of the record on appeal to the circuit court from the Michigan Compensation Appellate Commission (MCAC); instead, Subrule (F) only requires that a certified copy of the MCAC's record be transmitted to the circuit court for its review of the MCAC's order; the MCR 7.109(A)(2) general definition of "record on appeal"—in other words, the record reviewed by the circuit court from an appeal of an agency decision—applies to appeals from the MCAC.

Suzanne Lawrence, *in propria persona*, and *Essex Park Law Office, PC* (by *Dennis B. Dubuc*), for claimant.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Debbie K. Taylor*, Assistant Attorney General, for respondent.

Before: O'BRIEN, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM. Claimant, Suzanne Lawrence, appeals by leave granted[1] an opinion and order of the Oakland Circuit Court affirming a judgment of the Michigan Compensation Appellate Commission (MCAC) finding that Lawrence was paid unemployment benefits during a period of ineligibility and was required to remit reimbursement to respondent, the Michigan Unemployment Insurance Agency (MUIA). We reverse.

I. FACTS AND PROCEDURAL HISTORY

This case arises from a dispute over $158, an amount the MUIA alleges it overpaid Lawrence during a period for which Lawrence was ineligible to receive benefits. The underlying facts of this case are undisputed. At all times relevant to this appeal, Lawrence was seasonally employed by the Bloomfield Hills Country Club (BHCC). During the winter of 2013, like any other winter, Lawrence was temporarily laid off from her position. Upon her layoff, BHCC required Lawrence to use her vacation time. Lawrence's last day of work was January 4, 2013, and Lawrence received $820 in vacation pay for the weeks ending January 16, 2013, and February 2, 2013. At some point in early 2013, Lawrence applied for and was deemed eligible to receive unemployment benefits. According to Law-

[1] *Lawrence v Mich Unemployment Ins Agency*, unpublished order of the Court of Appeals, entered October 20, 2016 (Docket No. 332398).

rence, she received her first unemployment check on February 20, 2013, which provided payment for the previous two weeks.

Two years later, on April 7, 2015, the MUIA mailed Lawrence a Notice of Determination, indicating that because Lawrence received vacation pay during the benefit weeks ending on January 26, 2013, and February 2, 2013, she had been ineligible to receive unemployment benefits during that period. The Notice of Determination further indicated that Lawrence had been paid $79 in unemployment benefits for each week, for a total overpayment of $158. Lawrence was directed to "pay to the Agency in cash, by check, money order, EFT or MiWAM or deduction from benefits, restitution in the amount of $158.00 under [the Michigan Employment Security Act, MCL 421.1 *et seq*.], Section 62(a) as itemized above." Lawrence disputed the determination:

> I protest the determination. It is May of 2015 and your determination concerns something that occurred in January of 2013, over two years ago. Under the doctrine of laches, waiver and estoppel, your determination is barred. A statute of limitations may also be applicable here. I have been prejudiced by the passage of time because I have been unable to find necessary records applicable to this time period, when I would have had access to those records years ago. My employer recently told me that I received vacation pay from 1/6/13 through 2/2/13 and that I was first paid by the [MUIA] on 2/20/13, for the prior two weeks. Therefore, the available records do not support your conclusion.

The MUIA issued a redetermination on May 6, 2015, restating its previous findings and decision without additional explanation. Lawrence disputed the redetermination, and a telephone hearing was scheduled.

The hearing occurred before an administrative law judge (ALJ) of the Michigan Administrative Hearing System (MAHS), without MUIA participation, on June 4, 2015. No exhibits were submitted or received before or during the hearing, and only Lawrence and a representative of BHCC, Cheryl Brennan, testified. The ALJ initially characterized the dispute as an appeal from the May 2015 redetermination "that [Lawrence] was ineligible for two weeks under the remuneration provision of the Michigan Employment Security Act . . . for the benefit weeks of January 26th, 2013 and February 2nd, 2013." He therefore indicated that Lawrence would bear the burden of proving eligibility during those weeks. However, Lawrence conceded that she was ineligible to receive benefits during those two weeks—the two weeks she received vacation pay from BHCC. In an attempt to clarify the issue, Lawrence again denied receiving any unemployment payments until February 20, 2013. Lawrence offered to "fax" the ALJ her bank statements, but the ALJ declined the offer, acknowledging that he had received her testimony on the matter. Thereafter, Brennan testified to confirm that Lawrence was paid for vacation time until February 2, 2013. Perhaps unconventionally, Brennan questioned the ALJ regarding Lawrence's alleged receipt of benefits during that same time period:

> [*ALJ*]: The -- the Agency has found that [Lawrence] was ineligible for the time period of January 20th, 2013 through February 2nd, 2013.
>
> [*Brennan*]: Okay, and -- and you show that [Lawrence] actually received pay for that time period?
>
> [*ALJ*]: That she received vacation pay is what -- is what the Agency found. This is a hearing -- (multiple speakers) -- this is a hearing to just provide an answer as the claimant had -- has Ms. Lawrence has disputed that.

[*Brennan*]: Okay, so she did receive vacation pay for that time period, what, did she receive benefits for that time period?

[*ALJ*]: I -- I don't know, Ma'am, I -- I -- this hearing is -- I work for -- don't work for the Agency. I work for the Michigan Administrative Hearing System.

[*Brennan*]: I see.

[*ALJ*]: Which -- which provides -- so if someone appeals a decision made by the Agency, they would appeal it to a separate body.

[*Brennan*]: Mm-hmm.

[*ALJ*]: I don't [sic] information that the Agency has as to when she was paid her benefits.

The ALJ issued a written determination on June 10, 2015, summarizing the facts and issue presented as follows:

The Claimant works for the Employer [BHCC], a country club, whose main work is seasonal in nature. Each winter the Claimant is temporarily laid off. In 2013, the Claimant was laid off for the winter, but received vacation pay in the amount of $820.00 for the weeks ending January 16, 2013 and February 2, 2013. The Claimant does not dispute that she received the vacation pay, but does not believe that she received any unemployment benefits for those weeks and that no restitution is owed.

However, the ALJ proceeded to consider the issue as one regarding Lawrence's eligibility, stating that "[t]he burden of proof is on the claimant to prove his/her eligibility for benefits." The ALJ affirmed the MUIA's May 2015 redetermination with the following explanation:

If the Claimant receives vacation pay, it is considered income for the purposes of a benefit claim. Therefore, based on the Findings of Fact and in accordance with the

> relevant law . . . , I find that the Claimant is ineligible for benefits for the period that she was laid off and received vacation pay.

The ALJ made no finding regarding whether Lawrence did, in fact, receive benefit payments during the weeks she received vacation pay from her employer.

Lawrence appealed the ALJ's decision to the MCAC on July 6, 2015, in a letter requesting oral argument and briefing and explaining:

> [T]he "issue presented" in the ALJ's decision is far off the mark. The issue is not whether I was eligible for benefits, but rather whether I actually received benefits for the week in question. I challenged the Agency's finding that I was overpaid. Conspicuously absent from the ALJ's hearing was any proof that I received an overpayment. The burden certainly was not on me. No one appeared to contest my testimony.

The MCAC declined Lawrence's request for an oral hearing, finding it "not necessary for us to reach a decision." On October 29, 2015, the MCAC issued a written order affirming the ALJ's decision with the following three-sentence explanation:

> After reviewing the record, we find the ALJ's findings of fact accurately reflect the evidence introduced during the hearing. The ALJ properly applied the law to those facts. It is our opinion that the ALJ's decision should be affirmed.

Lawrence appealed the decision of the MCAC to the Oakland Circuit Court on November 23, 2015, and the county clerk filed the certified record as received from the MCAC with the circuit court on December 22, 2015. Without holding a hearing, the circuit court issued a written opinion and order affirming the decision of the MCAC on February 29, 2016. The circuit court acknowledged that, again, Lawrence insisted that her

case was not about eligibility, specifically agreeing that she was ineligible for benefit payments during the contested period but arguing that the center of the dispute was whether she had actually received an overpayment during the contested period. However, the circuit court concluded that the decisions of the ALJ and the MCAC were supported by competent, material, and substantial evidence:

> Specifically, this Court finds that [Lawrence] had the burden of proof to establish that she was eligible for unemployment benefits at the time that the Agency paid her benefits. At the ALJ Hearing, the record contained the Agency's determination and redetermination letters, which clearly stated that it paid appellant $158 in unemployment benefits during a time period that her employer communicated that it paid her vacation pay. [Lawrence] testified that she did not receive payment; however, she failed to support her testimony with any documentation (e.g., bank records). The ALJ made a finding of fact that he believed the documentation contained in the record over [Lawrence's] mere denial and admission that she was ineligible to receive unemployment benefits at the time in question. Accordingly, this Court finds that the ALJ's and MCAC's decisions are authorized by law and supported by competent, material, and substantial evidence.

On appeal, Lawrence contends that the ALJ, MCAC, and circuit court misconstrued this case as one pertaining to eligibility, rather than focusing on the actual dispute regarding whether Lawrence received the payment of unemployment benefits from the MUIA during the period of her admitted ineligibility. We agree.

II. STANDARD OF REVIEW

"[T]he Michigan Employment Security Act [MESA], MCL 421.1 *et seq*., expressly provides for the direct review of unemployment benefit claims." *Hodge v US*

Security Assoc, Inc, 497 Mich 189, 193; 859 NW2d 683 (2015). In pertinent part, MCL 421.38(1) provides:

> The circuit court . . . may review questions of fact and law on the record made before the [ALJ] and the [MCAC] involved in a final order or decision of the [MCAC], and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.

"Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *VanZandt v State Employees Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2005) (quotation marks and citation omitted). "Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion." *City of Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 63; 678 NW2d 444 (2003). The circuit court may not substitute its own judgment for that of the MCAC when the MCAC's decision is properly supported. *Hodge*, 497 Mich at 193-194.

"This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clear-error standard of review." *Braska v Challenge Mfg Co*, 307 Mich App 340, 351-352; 861 NW2d 289 (2014) (quotation marks and citation omitted). "A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been

made." *VanZandt*, 266 Mich App at 585. "Great deference is accorded to the circuit court's review of the [administrative] agency's factual findings; however, substantially less deference, if any, is accorded to the circuit court's determinations on matters of law." *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009) (quotation marks and citation omitted; alteration in original). "[A] decision of the [MCAC] is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *Omian v Chrysler Group LLC*, 309 Mich App 297, 306; 869 NW2d 625 (2015) (quotation marks and citations omitted).

III. SCOPE OF THE RECORD ON APPEAL TO THE CIRCUIT COURT

"In reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record." *VanZandt*, 266 Mich App at 588. In this case, the parties dispute the scope of the "entire record" before the circuit court on review. At the outset, we must therefore address Lawrence's assertion that the circuit court, in reviewing the decision of the MCAC, improperly relied on an "overly-expansive" record, which, contrary to MCR 7.116(F), included files of the MUIA that were not presented to the ALJ. According to Lawrence, the record before the circuit court should have been limited to the transcript of the original hearing before the ALJ and the ALJ's written order, because neither Lawrence nor the MUIA submitted any documentary evidence for the ALJ's consideration.

Although Lawrence did not object to the scope of the record presented to the circuit court by the MCAC before the court's consideration on the merits, we "may overlook preservation requirements . . . if consider-

ation [of an issue] 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." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010). Both exceptions are applicable here. We review de novo questions concerning the proper application of statutes and court rules. *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007).

The general definition of "record on appeal" from an agency decision to a circuit court is found in MCR 7.109(A)(2). That rule directs that the content of the "original record" on appeal to the circuit court from an agency is "defined in MCR 7.210(A)(2)," which states:

> Appeal from Tribunal or Agency. In an appeal from an administrative tribunal or agency, the record includes all documents, files, pleadings, testimony, and opinions and orders of the tribunal, agency, or officer (or a certified copy), except those summarized or omitted in whole or in part by stipulation of the parties.

However, MCR 7.116, regarding appeals under the MESA, specifically provides:

> (A) Scope. This rule governs appeals to the circuit court under the [MESA], MCL 421.1 *et seq*. *Unless this rule provides otherwise*, MCR 7.101 through 7.115 apply.
>
> * * *
>
> (F) Record on Appeal. Within 42 days after the claim of appeal is served on the [MCAC], or within further time as the circuit court allows, the [MCAC] must transmit to the clerk of the circuit court a certified copy of *the record of proceedings before the* [*ALJ*] *and the* [*MCAC*]. The [MCAC] must notify the parties that the record was transmitted. [Emphasis added.]

Lawrence contends that MCR 7.116(F) limits the record on appeal to "the record of proceedings before the [ALJ] and the [MCAC]." And because MCR 7.116(F) "provides otherwise," Lawrence argues, the general definition of "record on appeal" from an agency decision in MCR 7.109(2) does not apply.

Lawrence's proposed interpretation of MCR 7.116(F) is consistent with the relevant provisions of the MESA. Notably, under MCL 421.34, the section of the MESA governing appeals to the MCAC, review of an ALJ's decision is expressly limited to "the case on the record before the [ALJ]." MCL 421.34(4). Further, under MCL 421.38(1), on appeal from the MCAC, the circuit court "may review questions of fact and law *on the record made before the* [*ALJ*] *and the* [*MCAC*] involved in a final order or decision of the [MCAC] . . . ." (Emphasis added.)

However, we cannot agree that the language of MCR 7.116(F) is intended to limit the scope of the record on appeal to the circuit court. Instead, we agree with the MUIA's assertion that MCR 7.116(F) does not define the content of the record, but simply requires that the record be sent to the circuit court. Because MCR 7.116 does not otherwise limit the scope of the record on appeal, the general definition of "record on appeal" from an agency decision in MCR 7.109(A)(2) applies. While this expansive definition seemingly conflicts with the limited scope of the record described in MCL 421.34 and MCL 421.38, "[t]he authority to promulgate rules governing practice and procedure in Michigan courts rests exclusively with our Supreme Court." *Donkers*, 277 Mich App at 373. Accordingly, "[w]hen resolving a conflict between a statute and a court rule, the court rule prevails if it governs purely procedural matters." *Id*. Under the court rules, the record before

the circuit court properly included "all documents, files, pleadings, testimony, and opinions and orders" of the tribunal and the agency. MCR 7.210(A)(2). The circuit court therefore did not err when it considered the certified record presented by the MCAC in its entirety.

IV. COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE

Even though we find that the circuit court did not err when it considered the certified record of the MCAC in its entirety, we hold that the circuit court clearly erred in its factual determinations and misapplied the substantial evidence test when it affirmed the decision of the MCAC.

The circuit court was tasked with determining whether the decision of the MCAC—that "the ALJ's findings of fact accurately reflect the evidence introduced at the hearing" and "[t]he ALJ properly applied the law to those facts"—was supported by "competent, material, and substantial evidence on the whole record," MCL 421.38(1), and whether the MCAC operated within the correct legal framework, *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). As previously discussed, our consideration is limited to whether the circuit court applied the correct legal principles and properly applied the substantial evidence test to the findings and conclusions of the MCAC. *Braska*, 307 Mich App at 351-352. We will not reverse a circuit court's decision unless we are left with a definite and firm conviction that a mistake has been made. *VanZandt*, 266 Mich App at 585. On the record before us, we are left with no doubt that the circuit court clearly erred by affirming the decision of the MCAC.

As noted in the MCAC's opinion, the ALJ's written findings of fact accurately reflect the evidence presented at the June 4, 2015 hearing. The evidence consisted only of testimony from Lawrence and Brennan, a representative of BHCC. Both witnesses testified that Lawrence received vacation pay during the weeks ending January 16, 2013, and February 2, 2013. Lawrence testified that she did not receive any benefit payments until February 20, 2013, when she received a check covering the preceding two-week period.

If the issue were one of eligibility, the MCAC's conclusion that the ALJ properly applied the law would be without question. Indeed, Lawrence has consistently admitted that she was not eligible to receive employment benefits during the two weeks she admits she received vacation pay. However, as the ALJ acknowledged, both orally and in his written opinion, Lawrence disputed only her actual, physical receipt of benefit payments during the two weeks she received vacation pay. Bewilderingly, the ALJ nevertheless limited his consideration to the issue of Lawrence's eligibility during the two weeks *she conceded she was ineligible*, ultimately affirming the MUIA's redetermination because: "Claimant is ineligible for benefits for the period that she was laid off and received vacation pay."

The ALJ's decision to affirm the MUIA's redetermination and order Lawrence to reimburse the MUIA for overpayment lacked legal ground[2] because *the question of Lawrence's eligibility for payments was not at issue*,

[2] We note that the ALJ's conclusion that "[t]he burden of proof is on the claimant to prove his/her eligibility for benefits," while legally accurate, is completely irrelevant in this case. It makes no sense that Lawrence, who conceded her ineligibility and raised a completely different issue, is now required to prove her eligibility for benefits in order to obtain relief on an unrelated ground.

either during the hearing before the ALJ or on appeal to the MCAC. The MCAC was aware that the issue before it was whether the ALJ addressed the appropriate issue. In her request for review, Lawrence clearly argued that the ALJ failed to consider the question of payment and inexplicably focused on Lawrence's uncontested ineligibility. Like the ALJ, the MCAC completely missed the mark. The circuit court, in its course, followed suit, acknowledging that Lawrence disputed only her actual receipt of payments but, consistent with the lower tribunals, addressing only the issue of eligibility. The MCAC failed to operate within the correct legal framework, and the circuit court clearly erred when it concluded that the MCAC's decision should be affirmed.

Although our conclusion that the decisions of the circuit court, the MCAC, and the ALJ were legally unsound is sufficient to order reversal, we proceed with our examination of the record and further conclude that the circuit court clearly erred when it determined that the MCAC's decision was supported by competent, material, and substantial evidence on the whole record.

Even considering the entire record before the circuit court, rather than the limited evidence before the ALJ, we are puzzled by the circuit court's decision to affirm the MCAC. The circuit court clearly indicated its awareness that the issue before the ALJ was not one of eligibility, but one of actual receipt of benefits. Although the circuit court ultimately decided that Lawrence failed to meet her "burden of proof to establish that she was eligible for unemployment benefits," it articulated some limited findings regarding Lawrence's receipt of payments in its written order and opinion. Taken together, these findings, several of

which are unsupported by the record, do not establish by competent, material, and substantial evidence that Lawrence received payments during the weeks of her conceded ineligibility.

First, the circuit court noted that "[a]t the ALJ Hearing, the record contained the Agency's determination and redetermination letters, which clearly stated that it paid [Lawrence] $158 in unemployment benefits during a time period that her employer communicated that it paid her vacation pay." This statement is not supported by the record because neither the determination nor the redetermination letter was before the ALJ at the June hearing. In fact, the ALJ, who was unaffiliated with the MUIA and received no exhibits before the telephone hearing, clearly indicated that he had no information regarding whether the MUIA actually made benefit payments to Lawrence during the weeks ending January 16, 2013, and February 2, 2013.

Further, although the letters were before the circuit court and properly considered on review of the MCAC's decision, the circuit court clearly erred in relying on these letters as "competent, material, and substantial" proof that the MUIA actually paid Lawrence $158 in unemployment benefits during the period of Lawrence's ineligibility. The Notice of Determination reads as follows:

> You received vacation pay for the week(s) and amount(s) shown.
>
> Your vacation pay is greater than or equal to 1.6 times your weekly benefit amount of $362.00.
>
> You are ineligible for benefits . . . beginning January 20, 2013 through February 02, 2013. You will not receive benefit payments during this period.

Attached is a separate document labeled "Restitution (List of Overpayments)," ordering Lawrence to pay $158 in restitution—$79 for each week. The Notice of Redetermination restates the same information. These two notices represent nothing more than requests for payment. They are not proof that the MUIA issued an overpayment, in any amount, to Lawrence, and to accept them as such would defy common sense. See *RG Moeller Co v Van Kampen Constr Co*, 57 Mich App 308, 311-312; 225 NW2d 742 (1975) (declining to consider the plaintiff's billing and accounts receivable ledger as "proof" of the defendant's liability on an account).

There is simply no evidence in the record to prove that the MUIA issued two benefit payments of $79, or any other amount, to Lawrence for the weeks of her conceded ineligibility. Such evidence might consist of a cancelled check, a check stub, a notice of electronic funds transfer, or a bank statement. The MUIA has failed to offer even an agency accounting indicating that it issued the contested payment(s) to Lawrence. Without even a scintilla of evidence on the record to support the payment of benefits, the trial court clearly erred when it determined that the MCAC's decision was supported by competent, material, and substantial evidence.

Contrary to the MUIA's assertion on appeal, the burden was not on Lawrence to establish that she did *not* receive benefit payments as alleged.[3] The MUIA suggests that Lawrence "is the one who possessed the particularized knowledge and control of information

[3] The MUIA insists that Lawrence could simply have turned over her bank statements as proof that she did not receive payment. However, we note that Lawrence did, in fact, attempt to admit copies of her bank statements at the June 4, 2015 hearing before the ALJ. The ALJ declined to accept the statements, assuring Lawrence that they were unnecessary in light of her undisputed testimony on the matter.

she claimed established she was not paid for the weeks in question . . . ." However, we conclude that the opposite is true. Requiring Lawrence to prove that she never received payments would be requiring her to prove a negative—a near impossibility. It is the party who has rendered payment that possesses the particularized knowledge and control of information necessary to prove that it undertook the affirmative action of issuing a payment. Although, depending on the method of payment, Lawrence may have been required to prove that she did not *receive* payments after the MUIA proved that it *issued* payments, the MUIA offered no such proof here and Lawrence could not reasonably be expected to prove that the MUIA issued benefit payments. "[I]t is an elementary principle of law . . . that the burden of proving payment rests upon the party who claims to have made it." *Taylor v Taylor's Estate*, 138 Mich 658, 662-663; 101 NW 832 (1904).

Finally, the circuit court clearly erred when it based its decision, even in part, on its conclusion that "[t]he ALJ made a finding of fact that he believed the documentation contained in the record over [Lawrence's] mere denial and admission that she was ineligible to receive unemployment benefits at the time in question." This conclusion is directly contradicted by the record. The ALJ addressed the issue of eligibility only and made no findings of fact regarding the issue at hand. At no point during the hearing or in his written order did the ALJ state or imply that he made a credibility determination. As previously mentioned, the ALJ had no documentary evidence before him on which to base such a determination.

On appeal, the MUIA adopts the circuit court's erroneous conclusion as fact, and argues that "[t]he ALJ properly chose the documentary evidence over

Lawrence's unsupported denial." The MUIA relies on our Supreme Court's decision in *Hodge*, 497 Mich at 194-195, for the proposition that this Court may not contradict the ALJ's findings or credibility determinations, and must therefore affirm its ultimate conclusion regarding payment of benefits. Even if the MUIA's argument was factually supported—and it clearly is not—the MUIA's argument would fail on its merits.

In *White v Revere Copper & Brass, Inc*, 383 Mich 457, 461-463; 175 NW2d 774 (1970), a case factually similar to the one before us, our Supreme Court stated:

> A careful review of the record reveals that the only evidence relating to the question of notice was that positively averred and testified to by plaintiff. Not an iota of evidence is presented in this record denying or rebutting plaintiff's proofs.
>
> Although the appeal board could have expressly rejected plaintiff's testimony going to the question of notice, it could not properly deduce from the only evidence in the record that no notice was given. The appeal board cannot draw inferences contrary to undisputed evidence.
>
> We conclude that there is no competent evidence to support the appeal board's finding of fact that notice was not given. [Citations omitted.]

Although the appeal board in *White* was the Worker's Compensation Appellate Commission (WCAC) and the issue was lack of notice, rather than lack of payment, we find the *White* Court's reasoning equally applicable under the circumstances presented. The ALJ unquestionably possessed the authority and the position to make credibility determinations on the evidence before it. However, the ALJ had no documents before him, and clearly stated on the record that he possessed no information regarding payments issued by the MUIA. As was the case in *White*, the only

evidence before the ALJ regarding the subject at issue was Lawrence's undisputed testimony that she had not received any benefit payments for the contested period. Had the ALJ possessed contradictory evidence, the ALJ could have rejected Lawrence's statements outright. However, on the evidence before him, the ALJ could not have inferred that the MUIA issued benefit payments, or that Lawrence received them, during the contested period.

Our conclusion in this regard is consistent with the rule announced in *Hodge*, 497 Mich at 196, because it does not require this Court to substitute any factual findings of the ALJ with factual findings of its own. Unlike the ALJ mentioned in *Hodge*, who considered an actual conflict in evidence and made a clear factual finding on the issue of credibility, *id*. at 194-195, the ALJ here simply did not make a factual finding. We are not required to defer to a farcical or unsupported credibility determination.

V. CIRCUIT COURT'S DENIAL OF LAWRENCE'S REPLY BRIEF

Lawrence also contends that the circuit court violated MCR 7.111(A)(3) when it entered a scheduling order stating that Lawrence "is not entitled to a reply brief." We agree, but we hold that the error does not entitle Lawrence to additional relief.

Lawrence did not challenge the circuit court's denial of her right to file a reply brief until she filed a motion for reconsideration after the contested order. Issues first presented in a motion for reconsideration are not properly preserved. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). We review the unpreserved issue for plain error affecting substantial rights. *Nat'l Wildlife Federation v Dep't of Environmental Quality (No 2)*, 306 Mich App 369,

373; 856 NW2d 394 (2014). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). Again, the proper interpretation of a court rule is an issue we review de novo. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 504; 844 NW2d 470 (2014).

MCR 7.111(A)(3) governs briefs on appeal to the circuit court and provides, in relevant part, "Within 14 days after the appellee's brief is served on appellant, the appellant may file a reply brief." However, the circuit court's January 7, 2016 scheduling order indicates that "[a]ppellant is not entitled to a reply brief." A circuit court has the authority to control its own docket. See *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006) (explaining that trial courts possess the inherent authority to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). But, a circuit court must follow the court rules. The circuit court's scheduling order clearly violated Lawrence's right to file a reply brief under the plain and unambiguous language of MCR 7.111(A)(3).

However, Lawrence is not entitled to relief in this matter because she has not shown that the circuit court's violation of MCR 7.111(A)(3) affected the outcome of the proceedings. Lawrence suggests that the violation was not harmless error because "the points made in her timely filed Motion for Reconsideration" were subjected to a heightened "palpable error" standard of review under MCR 2.119(F)(3). But Lawrence fails to indicate what arguments or additional information she would have submitted in her reply brief, or how submission of a reply brief would have affected her subsequent motion for reconsideration. "Reply briefs

must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007), citing MCR 7.212(G). Therefore, even if Lawrence had been permitted to file a reply brief, she could not have raised the issues she later raised in her motion for reconsideration, and MCR 2.119(F)(3) would still have applied. Without a demonstration of prejudice, Lawrence is not entitled to relief on this ground.

VI. CONCLUSION

We reverse the order of the circuit court and remand with instructions to the circuit court to enter an order reversing the decision of the MCAC. Lawrence, as the prevailing party, is awarded taxable costs under MCR 7.219. We do not retain jurisdiction.

O'BRIEN, P.J., and JANSEN and STEPHENS, JJ., concurred.

ANDRUSZ v ANDRUSZ

Docket No. 331339. Submitted May 10, 2017, at Detroit. Decided July 13, 2017, at 9:00 a.m. Leave to appeal denied 501 Mich 1032.

Plaintiff, Thaddeus Andrusz, and defendant, Jacqueline R. Andrusz, were divorced in 2009. In 2015, defendant moved in the Oakland Circuit Court to compel plaintiff to pay spousal support in accordance with the terms of their consent judgment of divorce. At the time of the divorce, plaintiff's total income was $565,000, which included a $204,000 base salary with the additional income earned from commissions and bonuses. On the basis of plaintiff's base salary and the fact that defendant had no other income, the consent judgment required plaintiff to pay defendant $6,000 a month in spousal support. In the event plaintiff's salary from employment was greater than $204,000 in a given year, he was required to pay 25% of that amount as additional spousal support. The consent judgment further required plaintiff to secure his spousal support obligation with existing life insurance on his life or in a life insurance trust naming defendant as an irrevocable beneficiary; plaintiff was required to provide proof of the security. Although the consent judgment did not require the parties to do so, plaintiff had also voluntarily paid the living and college expenses of the parties' adult children. Defendant asserted that plaintiff had underpaid spousal support because he calculated the additional 25% for income over $204,000 by using his taxable income above that amount—which did not include the money plaintiff had deferred into his 401(k)—rather than using the total income he had earned above that amount. Plaintiff moved to reduce the spousal support obligation, arguing that his total compensation had decreased by 50% since 2009. The court, Cheryl A. Matthews, J., interpreted the phrase "salary from employment" in the consent judgment to mean that plaintiff was required to pay 25% of any earned income over $204,000, which included taxable and nontaxable income. Using that definition, the court recalculated plaintiff's spousal support obligation and ordered him to pay certain additional support for the years 2012 through 2014; the court also ordered plaintiff to maintain a life insurance policy in favor of defendant as security for the spousal support. The court denied plaintiff's motion to reduce his support

obligation, noting that plaintiff was not legally obligated to support the parties' college-aged children; the court did not address plaintiff's reduction in income. The court thereafter denied plaintiff's motion for reconsideration but clarified that because the consent judgment provided that spousal support would terminate upon defendant's death or remarriage, plaintiff could structure the insurance policy to ensure that defendant's vested interest in the policy or as an irrevocable beneficiary would terminate upon her death. The Court of Appeals granted plaintiff's application for leave to appeal.

The Court of Appeals *held*:

1. The circuit court's order requiring plaintiff to obtain a life insurance policy did not grant defendant a potentially posthumous award because, as the court clarified on reconsideration, plaintiff could structure the insurance policy to make sure that defendant's vested interest in the policy or as an irrevocable beneficiary would terminate upon her death.

2. A consent judgment of divorce is a contract, and the judgment may only be modified with the consent of the parties in the absence of fraud, mistake, illegality, or unconscionability. A contract that is ambiguous is subject to interpretation by a court through the use of extrinsic evidence if the provisions irreconcilably conflict or if a contract term can be understood as meaning different things. The consent judgment was ambiguous as a matter of law because the term "salary" in the phrase "salary from employment" could be interpreted as either referring to plaintiff's base salary or to his total income. Plaintiff's past practice of paying defendant 25% of his total compensation above $204,000 was evidence that the parties intended the consent judgment to be interpreted in that way. The circuit court correctly determined that the consent judgment required plaintiff to pay 25% of his total income above $204,000, but the court clearly erred by determining that the additional amount had to be calculated on the basis of plaintiff's earned income rather than on the basis of his taxable income.

3. The main objective of spousal support is to balance the incomes and needs of the parties to ensure that neither party is impoverished. A court must balance all equitable considerations when deciding whether to modify a spousal support order, including (1) whether the party responsible for paying spousal support had a reduction in income and (2) whether that party is responsible for the support of others, such as a party's voluntary payment of an adult child's living and college expenses. Because a court must balance the equities in a spousal support order, it

must consider not only the one party's responsibilities but the other party's needs. The circuit court abused its discretion when it denied plaintiff's motion to modify the spousal support order because it refused to consider an equitable consideration—plaintiff's support of the parties' college-aged children—when it made the determination. The circuit court had to consider all equitable considerations on remand when deciding whether to modify the spousal support order.

Order affirmed with regard to the life insurance policy as security for the spousal support obligation, reversed with regard to how spousal support is calculated, and vacated with regard to plaintiff's motion to modify support; case remanded.

DIVORCE — SPOUSAL SUPPORT — EQUITABLE CONSIDERATIONS — SUPPORT OF OTHERS — ADULT CHILDREN.

Whether a party is responsible for the support of others is one equitable consideration a circuit court must consider when deciding whether to modify a spousal support order; support of others includes a party's voluntary payment of an adult child's college and living expenses.

Hertz Schram PC (by *Gerald P. Cavellier* and *Matthew J. Turchyn*) for plaintiff.

Eisenberg, Middleditch & Spilman, PLLC (by *Amy Spilman* and *Keri Middleditch*), for defendant.

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

RONAYNE KRAUSE, J. Plaintiff, Thaddeus J. Andrusz, appeals by leave granted the trial court's order clarifying the terms of the parties' consent judgment of divorce. In relevant part, the court ordered plaintiff to pay defendant, Jacqueline R. Andrusz, a sum of money that the court concluded he had underpaid, ordered plaintiff to obtain a life insurance policy in favor of defendant, and declined to reduce the spousal support award. On reconsideration, the trial court clarified that plaintiff may craft the life insurance policy to

avoid making potentially posthumous payments to defendant. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

The parties were married in 1984 and had two children, twins born in 1995. Defendant did not work outside the home after the children were born, and she apparently has worked "very little" since the consent judgment of divorce was entered in 2009. At issue in the instant proceedings is primarily the interpretation of certain of plaintiff's obligations thereunder.

In relevant part, the consent judgment provides as follows:

> 3. Defendant is awarded modifiable spousal support that shall terminate upon the death or remarriage of the Defendant. Commencing January 1, 2009, Plaintiff shall pay $6,000 per month from Plaintiff's salary directly to Defendant on the first of each month based on Plaintiff's base income of $204,000 annually and Defendant having no income. Additionally, in the event Plaintiff's salary from employment is greater than $204,000 in a given year (January 1 through December 31), he shall pay 25% of said amount from employment-related bonus or commission via electronic fund transfer to Defendant as additional spousal support within 7 (seven) days of receiving same. This shall not include any NBC retention bonus Plaintiff may receive in 2009. Regarding any potential NBC retention bonus Plaintiff may receive, 33.3% of any gross amount of this retention bonus shall be paid to Defendant immediately as it is received by Plaintiff, as a one-time additional spousal support payment by Plaintiff to Defendant. All spousal support paid by plaintiff shall be taxable as income to Defendant and tax deductible from Plaintiff's income for purposes of income taxes in accordance with IRS regulations. Plaintiff shall secure his spousal support obligation with existing life insurance on Plaintiff's life or in a life insurance trust naming Defendant as an irrevocable beneficiary of said life insurance. Plaintiff shall provide proof of said security/insurance in

> compliance with this provision on a yearly basis to Defendant. A Uniform Spousal Support Order shall enter in accordance with this provision.

As the trial court recognized, the center of the instant controversy is the phrase "salary from employment."

The instant dispute began when defendant reviewed plaintiff's W-2 forms and concluded that plaintiff had "shortchanged" her because he consistently earned more than $204,000 but calculated the additional 25% he owed from the excess on the basis of reported taxable income instead of "Medicare income,"[1] "thereby not accounting for his earned income that he deferred into his 401K [sic]." She also contended that he had not properly verified the existence of the required life insurance policy or the life insurance trust securing his spousal support obligations. Plaintiff contended that defendant was misrepresenting or misunderstanding the terms of the consent judgment because his actual "salary from employment," as specified in the consent judgment, was considerably less than $204,000 and the language regarding excess payment pertained to his base salary rather than total earned income.

At the time of the parties' divorce, plaintiff had a total income of "$565,000.00 and change," consisting of a base salary of $203,894 and the remainder from commissions. He was laid off shortly thereafter, and his substitute employment initially provided a base salary of $143,000 plus eligibility for commissions and bonuses. By the time of the instant proceedings, defendant's base salary had increased to $187,455.84, with an additional car allowance, a company credit card for

[1] In the lower court, defendant consistently referred to "Medicare income" with the apparent intent to refer to plaintiff's total earned income rather than his taxable income; defendant's use of this terminology generated some confusion.

certain business expenses, up to 30% beyond his base salary in possible commission bonuses, and a "speculative" possible additional bonus. Plaintiff put 6% of his total compensation into a 401(k) account, but because of the fluctuation in his total compensation, he did not know the exact amount. There has been no suggestion that plaintiff is not in good faith endeavoring to maximize his earning capacity.

It appears that defendant testified, but for unexplained reasons her testimony was not transcribed. Plaintiff does not dispute the trial court's summary that defendant testified that she would like to work but currently has health problems and is fearful that working would exacerbate other health issues. Nor did plaintiff dispute that defendant has approximately $6,100 in monthly expenses. The consent judgment did not require either parent to contribute to the support of their children after they reached the age of majority, but plaintiff nevertheless continued paying the entirety of the children's substantial college expenses and unspecified other expenses. Plaintiff testified that he had asked defendant to help, but she did not.

Plaintiff testified that he understood the consent judgment required him to pay defendant $6,000 a month if his salary was $204,000 a year and that the phrase "salary from employment" referred to his "base salary." He noted that he had paid the $6,000 even though his base salary was below that amount every year other than in 2009, and that he had also voluntarily overpaid her an additional amount calculated on the basis of 25% of his entire compensation above $204,000 "because [he] wanted to address some of the issues with [defendant] and the kids." The trial court found, accurately insofar as we can determine, that plaintiff's total income had been reduced by more than

half since the consent judgment was entered. Plaintiff asked the trial court to reduce his spousal support obligations accordingly and "uphold the original divorce decree which states clearly that it is based on my salary," but he sought no reimbursement.

The trial court concluded that "the plain language of the [judgment of divorce], and the intent and actions of the parties commands that the Plaintiff pay the Defendant 25% of any earned income over $204,000.00 as a result of his employment" and that amount included "taxable and non-taxable income." The trial court did not deem plaintiff's car allowance or expense account to be "income," but it did conclude that between 2012 and 2014, the years for which tax information had been provided, plaintiff had underpaid defendant by a total of $15,591.67. Despite observing that plaintiff's total income had decreased by more than half and that plaintiff was solely paying for the parties' children's expenses, the trial court declined to reduce plaintiff's spousal support obligation, noting in particular that plaintiff was not legally obligated to support the adult children. The trial court finally ordered plaintiff to maintain a life insurance policy in favor of defendant, the value of which plaintiff does not appeal.

As an initial matter, plaintiff inexplicably contends that the trial court's order requiring him to obtain a life insurance policy would effectively grant defendant a potentially posthumous award. This issue was rendered moot by the trial court's order denying reconsideration; the trial court expressly clarified that because the consent judgment unambiguously terminated any of plaintiff's obligations in the event of defendant's death, plaintiff was free to craft the life insurance policy such that it would also terminate upon her death. The only way for defendant to receive a posthu-

mous award would be if plaintiff crafts the life insurance policy to do so, which is now entirely optional, as defendant accurately concedes.

Primarily, plaintiff argues that the trial court inappropriately rewrote the parties' consent judgment, a contract, by replacing the word "salary" with "income." We disagree, but we do conclude that the trial court erred by including the entirety of plaintiff's earned income—not just his taxable income—when calculating his spousal support obligations.

A trial court's award of spousal support is reviewed for an abuse of discretion, but any underlying factual findings are reviewed for clear error, and the award "must be affirmed unless [this Court is] firmly convinced that it was inequitable." *Gates v Gates*, 256 Mich App 420, 432-433; 664 NW2d 231 (2003). "In reviewing de novo equity cases, this Court may modify otherwise final judgments to rectify mistakes, clarify and interpret ambiguities, and alleviate inequities." *Hagen v Hagen*, 202 Mich App 254, 258; 508 NW2d 196 (1993). Consent judgments of divorce are contracts and treated as such. *In re Lobaina Estate*, 267 Mich App 415, 417-418; 705 NW2d 34 (2005). We review de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Defendant's position is that trial courts have the authority to modify judgments of divorce to reach equitable results. This is true to a certain extent and in certain contexts; however, this rule does not apply in this case. Specifically, this Court has applied this rule in previous cases, but in the context of a divorce judgment entered by the court after a contested action,

not in the context of tampering with the parties' consent judgment. *Hagen*, 202 Mich App at 256-258. Rather, a consent judgment can only be modified with the consent of the parties, at least in the absence of fraud, mistake, illegality, or unconscionability. *Blaske v Blaske*, 33 Mich App 210, 212; 189 NW2d 713 (1971); *Greaves v Greaves*, 148 Mich App 643, 646; 384 NW2d 830 (1986). The trial court may, however, fill voids in an incomplete consent judgment, and in so doing must balance the equities insofar as is possible under the circumstances. See *Greaves*, 148 Mich App at 646-647. The consent judgment at issue in this matter is a contract and must be treated as such pursuant to ordinary principles of contract interpretation. *Lobaina*, 267 Mich App at 417-418.

Unambiguous contracts must simply be enforced as they are written, absent a handful of extremely unusual circumstances like fraud, duress, or illegality. *Rory v Continental Ins Co*, 473 Mich 457, 470 & n 23; 703 NW2d 23 (2005). However, if provisions of a contract irreconcilably conflict or can be reasonably understood as meaning different things, the contract is ambiguous as a matter of law, and its proper meaning therefore becomes a question of fact. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007). The courts may in that event consider extrinsic evidence to resolve the ambiguity, but the overarching goal, to which any rule of interpretation must bow, is to determine the intent of the parties. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). The trial court's finding that the consent judgment was not ambiguous is incompatible with its reliance on extrinsic evidence. However, because we conclude that the consent judgment is, in fact, ambiguous, the trial court's reliance on extrinsic evidence was ultimately proper.

The second sentence of the relevant paragraph in the consent judgment appears to treat "salary" and "base income" as synonymous. The third sentence appears to treat "salary from employment" and "employment-related bonus or commission" as being at least related. If the phrase "salary from employment" is intended to refer exclusively to plaintiff's base salary, explicitly requiring the additional 25% to come from his "employment-related bonus or commission" is nonsensical. Plaintiff's "base income" ostensibly appears to be a reference to what he described as his "base salary." However, plaintiff is correct in stating that as a general matter, when words are undefined, a dictionary should be consulted, and not only do the various words have distinct meanings, but different words are presumed to have distinct meanings in any event. See *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007); *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 306; 636 NW2d 272 (2001). Accordingly, the use of different words makes it unclear from the four corners of the contract whether the word "salary" in the third sentence of the paragraph is intended to be a reference to his "base salary" or his "income," and both understandings would be reasonable. On the facts of this case, the parties' consent judgment is therefore ambiguous as a matter of law. *Coates*, 276 Mich App at 503-504.

Having so found, the trial court's consideration of the parties' conduct was a proper way of determining the parties' intent. The trial court accurately observed that, in practice, plaintiff had been consistently paying defendant 25% of everything he brought home over $204,000, strongly suggesting that the parties always intended "salary from employment" to refer to "total income," not to plaintiff's base pay. Plaintiff contends that he voluntarily overpaid and that his voluntary overpayment

should not be held against him. "[W]hile generally a course of performance is highly persuasive evidence of proper contract interpretation when introduced against the party so performing, the law also recognizes that a party may undertake a wrong interpretation of the words of a contract and the other party should never be permitted to profit by such mistake in the absence of an estoppel arising from a prejudicial change of position in good-faith reliance on such performance." *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 191-192; 565 NW2d 887 (1997). The trial court did not explicitly express any views about the credibility of either party, but by inference it did not believe plaintiff's contention that he had voluntarily overpaid. To the extent a factual determination turns on the credibility of a witness, this Court generally defers to the trial court. *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). We have no reason not to do so here.

Therefore, we conclude that the trial court correctly determined that plaintiff was obligated by the parties' consent judgment to pay 25% of his income over $204,000 to defendant as his spousal support obligation. However, the trial court's determination that he was obligated to pay an amount calculated on the basis of his total earned income, rather than on the basis of his taxable income, is clearly erroneous. That finding conflicts with its reliance on course of performance, creates a potential double-dipping problem with computing spousal support upon plaintiff's presumed eventual retirement, would seem to discourage financial responsibility, and is inconsistent with balancing the monies actually available to the parties. There is nothing in the record from which we could infer bad faith on plaintiff's part. The trial court's order lays out no analysis explaining how it arrived at the conclusion that the parties' actions and intentions reflected the

inclusion of all earned income in addition to taxable income in computing plaintiff's spousal support obligations. We therefore conclude that the trial court clearly erred by including the portion of plaintiff's earned income above his taxable income when calculating his spousal support obligations, and we reverse the trial court's order to that extent.

Plaintiff also contends that the trial court should have reduced his spousal support obligation in recognition of his significantly reduced income. We conclude that the trial court erred by failing to recognize that plaintiff's support of the parties' children was a fact that it could consider, and consequently we decline to resolve this issue specifically in either party's favor; instead, we remand for reconsideration by the trial court.

Although the trial court correctly observed that plaintiff was under neither a legal nor a contractual obligation to support the parties' adult children's college expenses, the trial court erroneously regarded that support as something it could not consider as an equitable concern. See *Elahham v Al-Jabban*, 319 Mich App 112, 134; 899 NW2d 768 (2017). A trial court necessarily abuses its discretion when it fails to recognize that it has discretion to exercise and so does not exercise it. *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976); *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998). The trial court therefore committed an abuse of discretion by disregarding plaintiff's support of the parties' children as per se irrelevant.

The case defendant relies on to the contrary, *Lesko v Lesko*, 184 Mich App 395, 405; 457 NW2d 695 (1990), overruled in part on other grounds by *Booth v Booth*, 194 Mich App 284, 291; 486 NW2d 116 (1992), was

decided before November 1, 1990, and the opinion is therefore not strictly binding pursuant to the "first-out rule." See MCR 7.215(J)(1).[2] Furthermore, *Lesko* involved a situation in which the trial court's order effectively required the plaintiff to support the children through the defendant, contrary to the law prohibiting courts from ordering payment of child support for adult children. *Lesko*, 184 Mich App at 403-405. We think the *Lesko* Court disregarded its own citation of authority, which explicitly listed "whether either [party] is responsible for the support of others" as a factor to consider. *Id*. at 404. "Responsibility for the support of others" appears to have originally been derived from *Bialy v Bialy*, 167 Mich 559, 566; 133 NW 496 (1911), which did not obviously distinguish be-

[2] The precedential nature of Court of Appeals opinions has a potentially confusing history. Published opinions of the Court of Appeals have always been binding on trial courts, but they were not originally binding on other panels of the Court of Appeals—except in "law of the case" situations—or, obviously, on our Supreme Court. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454-455; 302 NW2d 164 (1981); *In re Hague*, 412 Mich 532, 552-553; 315 NW2d 524 (1982); *Tebo v Havlik*, 418 Mich 350, 362-363; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.); *id*. at 379-381 (LEVIN, J., dissenting); *Hackett v Ferndale City Clerk*, 1 Mich App 6, 11; 133 NW2d 221 (1965). In 1987, MCR 7.215(C)(2) was added to the Michigan Court Rules, 428 Mich clx (1987), but it was understood by the courts that the amendment only affected whether an opinion of the Court of Appeals had *immediate* effect while an appeal was pending before our Supreme Court, not whether any such opinion bound another panel of the Court of Appeals. See *Johnson v White*, 261 Mich App 332, 348-349; 682 NW2d 505 (2004). Accordingly, an opinion of the Court of Appeals was still regarded as imposing binding precedent on trial courts only. *People v Doyle*, 451 Mich 93, 111; 545 NW2d 627 (1996). It was not until the Supreme Court adopted the "first-out rule," now MCR 7.215(J)(1), that Court of Appeals opinions became binding on subsequent Court of Appeals panels. See Administrative Order No. 1990-6, 436 Mich lxxxiv (1990); *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). Therefore, although *Lesko* might have been binding on the trial court in the absence of *Elahham*, it is not binding on us, and the *Elahham* panel was not obligated to follow it.

tween voluntarily assumed responsibility and legally obligated responsibility. *Lesko* is not binding on us, but we conclude that it was, in any event, wrongly decided. Whether a party—either party, in an appropriate case—has "responsibility for the support of others," irrespective of why, is a proper equitable consideration.

Defendant contends that so concluding raises the possibility that a party could somehow evade spousal support obligations altogether by choosing to support someone else instead. Such a concern is patently ridiculous: support of another is *an* equitable concern, not a dispositive one. Furthermore, we fully expect trial courts to consider the extent to which such support is either legally or morally obligatory, the extent to which it might be naturally expected by longstanding ties of friendship or family, whether it is a sham or otherwise in bad faith, and any other appurtenant factor. In any event, a court sitting in equity is expected to balance the equities; the fact that it should consider one party's responsibilities does not exclude it from considering the other party's needs.[3] And although we are not impressed by defendant's implied argument that she is impoverished despite receiving at least $72,000 a year and, as the trial court noted, having nontrivial cash reserves, there is no dispute that her expenses, presumably largely medical in nature, are quite substantial. Balancing the equities necessarily involves declining to ignore any of them.

Furthermore, we decline to address whether the trial court should have reduced plaintiff's spousal

[3] Additionally, we find it somewhat disingenuous that defendant urges us to consider equity to rewrite the parties' contract, but then urges us to focus narrowly on strict legal obligations in evaluating what is fundamentally an equitable matter. Likewise, we find it very difficult to accept the implication that supporting *the parties' children* is somehow inappropriate.

support obligations, although we do conclude that the trial court's stated reasoning is insufficient. Plaintiff accurately cites caselaw to the effect that a reduction in income *can* support a reduction in a spousal support obligation, and there may not be "an absolute duty to support the wife regardless of the circumstances of the husband." *Pohl v Pohl*, 13 Mich App 662, 665-666; 164 NW2d 768 (1968). However, *Pohl* is no more binding on us than *Lesko*, and even at face value would merely *permit*, not mandate, a reduction in spousal support. "The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that would not impoverish either party." *Ackerman v Ackerman*, 197 Mich App 300, 302; 495 NW2d 173 (1992). The trial court's largely unsupported conclusion, and defendant's contention, that a more-than-half reduction in total income was essentially a triviality defies sense in isolation. However, because "*all* the circumstances of the case" must be considered when deciding whether to modify a spousal support order, *McCallister v McCallister*, 205 Mich App 84, 87-88; 517 NW2d 268 (1994), plaintiff's equally unsupported contention that the trial court abused its discretion by failing to reduce his spousal support obligation *just* because his income had been reduced also fails.

Nothing in this opinion should be construed as any manner of dictation to the trial court as to how it should balance the parties' equities beyond the following: the trial court's disregard of the substantial reduction in plaintiff's total income warrants some articulation of the trial court's reasoning, and the trial court abused its discretion by deeming plaintiff's support of the parties' children to be an impermissible or improper equitable consideration. Furthermore, we note that plaintiff's income has increased every year since

he changed his employment, so on remand, it would be proper for the trial court, should it and the parties so desire, to take new evidence and evaluate the situation as it presently stands.

The trial court's order is reversed to the extent it includes the entirety of plaintiff's earned income beyond his taxable income in calculating his spousal support obligations. The trial court's order is vacated to the extent it denied plaintiff's request to reduce his spousal support obligations. In all other respects, we affirm. This matter is remanded for further proceedings consistent with this opinion. No costs, neither party having prevailed in full.[4] MCR 7.219(A). We do not retain jurisdiction.

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

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[4] Defendant requests attorney fees from plaintiff, contending that she is unable to bear the expense of the appeal. In light of defendant's substantial income and our perception that her arguments on appeal are no more or less disingenuous or misplaced than plaintiff's, we decline.

YOCHES v CITY OF DEARBORN

LUBECK v CITY OF DEARBORN

GIBSON v CITY OF DEARBORN

CALVIN v CITY OF DEARBORN

BADER v CITY OF DEARBORN

CIALONE v CITY OF DEARBORN

Docket Nos. 330998, 331137, 331139, 331144, 331147, 331149, and 331630. Submitted July 7, 2017, at Detroit. Decided July 13, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 1074.

In Docket Nos. 330998, 331137, 331139, 331144, 331147, and 331149, plaintiffs, who are members of the Henry Ford Community College Support Staff Association (the Association), brought a series of lawsuits in the Oakland Circuit Court against the city of Dearborn (the City) and Adam Forehand following a hayride accident that occurred at Camp Dearborn, a recreational facility located in Milford Township that is owned and operated by the City. Plaintiff Cynthia Cialone, a volunteer member of the Association's social committee, acted as liaison in coordinating the "Fall Festival," an event that was held for the Association's members and their families at Camp Dearborn in October 2013. At the request of a City employee, Cialone signed a hold-harmless agreement providing that the Association would hold the City harmless "from and against any and all claims and causes of action of any kind arising out of or in connection with" the hayrides. During the rides, one of the hay wagons tipped over, and several participants were injured as a result. According to plaintiffs, defendant Forehand, the City employee who drove the tractor that pulled the hay wagon that tipped over, was intoxicated and driving recklessly at the time of the accident. Plaintiffs brought the lawsuits, alleging negligence, gross negligence, and intentional and negligent infliction of emotional distress. Plaintiffs also alleged that the City was vicariously liable for Forehand's negligence. The City moved for summary disposition, arguing that governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., barred plaintiffs' claims. The court, Phyllis C. McMillen, J., concluded that the tractor that pulled the hay wagon constituted a motor vehicle

for purposes of the motor vehicle exception to governmental immunity, MCL 691.1405, and therefore the court denied the City's motion for summary disposition on plaintiffs' claims.

In Docket No. 331630, the City filed a third-party complaint and counterclaim against the Association and Cialone, claiming that the Association was bound by the hold-harmless agreement or, alternatively, that the agreement was nevertheless binding against Cialone in her individual capacity. The City and the Association filed cross-motions for summary disposition regarding enforcement of the hold-harmless agreement. The court concluded that the agreement was unenforceable as a matter of law due to a lack of consideration. The court therefore denied the City's motion for summary disposition and granted the Association's motion for summary disposition. The City appealed both orders.

The Court of Appeals *held*:

1. MCL 691.1407(1) provides, in relevant part, that a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. However, MCL 691.1405 provides that a governmental agency shall be liable for bodily injury and property damage resulting from the negligent operation of a motor vehicle of which the governmental agency is owner. The term "motor vehicle" is not statutorily defined, but the Supreme Court has previously determined that the following dictionary definition of "motor vehicle" applies for purposes of MCL 691.1405: "an automobile, truck, bus, or similar motor-driven conveyance." Michigan caselaw applying this definition has held that a forklift is not a motor vehicle but that a broom tractor and tractor mower are motor vehicles for purposes of MCL 691.1405. In this case, the tractor pulling the hay wagon at issue was deemed more comparable to the broom tractor and tractor mower than the forklift because the record reflected that the tractor and hay wagon were being used to carry numerous passengers on a roadway used by campers and patrolled by law enforcement, which, unlike equipment such as a forklift, rendered the tractor and hay wagon invariably connected to the roadway itself. Accordingly, the trial court correctly denied defendant's motion for summary disposition because the tractor that pulled the hay wagon was a motor vehicle for purposes of MCL 691.1405.

2. Because the motor vehicle exception applied, the trial court determined that the City was not entitled to summary disposition on plaintiffs' vicarious-liability claims. However, the trial court also stated that gross negligence "defeats governmental immu-

nity." Under the doctrine of vicarious liability, an employer is generally liable for the torts its employees commit so long as those torts are within the scope of their employment. MCL 691.1407(2) provides immunity for governmental employees, but MCL 691.1407(2)(c) provides an exception to that immunity when the employee's conduct constitutes gross negligence. Although MCL 691.1407(2)(c) establishes an exception to the grant of immunity to an officer or employee of a governmental agency, it does not provide that a governmental agency otherwise entitled to immunity can be vicariously liable for the officer's or employee's gross negligence. Consequently, if an exception to the City's governmental immunity does not apply, the City would not be vicariously liable for Forehand's negligence, regardless of whether it rose to the level of gross negligence.

3. Contrary to plaintiffs' argument on appeal, MCL 691.1408, which provides that a governmental agency may indemnify an employee for liability or may cover the cost of the employee's legal defense, did not require imposition of vicarious liability against a governmental agency for an employee's gross negligence because the word "may" indicates that a governmental agency's decision is discretionary, not mandatory. Furthermore, MCL 691.1408(3) specifically provides that MCL 691.1408 "does not impose liability on a governmental agency." Accordingly, MCL 691.1408 did not provide a basis for imposing vicarious liability on a governmental agency for its employee's gross negligence.

4. A hold-harmless agreement is an indemnity contract, which is, in essence, a release of liability. Before a contract can be completed, there must be an offer and acceptance. A contract also requires mutual assent or a meeting of the minds on all the essential terms. Legal consideration is required for a binding contract. Consideration is some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Under the preexisting-duty rule, what one is legally bound to do is not consideration for a new promise. However, all consideration paid by a defendant in exchange for a plaintiff's multiple promises must be viewed as consideration as to each promise. In this case, the City was already contractually obligated to provide the hayrides at the time Cialone signed the hold-harmless agreement, and therefore the City had a preexisting duty to provide the hayrides. The record included multiple rental sales receipts, and each of those receipts repeatedly referred to a flyer for the applicable rules and regulations. Neither the receipts nor the flyer mentioned the necessity of a hold-harmless agreement or

mentioned that additional agreements were contemplated as part of the parties' agreement. Between the receipts and the flyer, it was apparent that the parties' contract, which included an agreement to provide hayrides, extensively covered all the essential terms of the agreement. Nothing in the record supported a conclusion that the hold-harmless agreement was part of a larger contract involving multiple promises. Accordingly, the trial court did not err by concluding that the hold-harmless agreement was unenforceable as a matter of law due to a lack of consideration.

Affirmed.

1. GOVERNMENTAL IMMUNITY — MOTOR VEHICLE EXCEPTION — DEFINITION OF "MOTOR VEHICLE" — A TRACTOR PULLING A HAY WAGON IS A MOTOR VEHICLE FOR PURPOSES OF THE MOTOR VEHICLE EXCEPTION.

MCL 691.1405 provides that a governmental agency shall be liable for bodily injury and property damage resulting from the negligent operation of a motor vehicle of which the governmental agency is owner; for purposes of MCL 691.1405, a motor vehicle is an automobile, truck, bus, or similar motor-driven conveyance; a tractor pulling a hay wagon is a motor vehicle for purposes of MCL 691.1405.

2. GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — GROSS NEGLIGENCE — VICARIOUS LIABILITY.

MCL 691.1407(2) provides immunity for governmental employees, but MCL 691.1407(2)(c) provides an exception to that immunity when the employee's conduct constitutes gross negligence; although MCL 691.1407(2)(c) establishes an exception to the grant of immunity to an officer or employee of a governmental agency, it does not provide that a governmental agency otherwise entitled to immunity can be vicariously liable for the officer's or employee's gross negligence; consequently, if an exception to governmental immunity does not apply for a governmental agency as otherwise provided in the governmental tort liability act, MCL 691.1401 *et seq*., the governmental agency would not be vicariously liable for its employee's negligence, regardless of whether that conduct rose to the level of gross negligence.

William H. Irving and *Debra A. Walling* for the city of Dearborn.

Kecskes, Silver & Gadd, PC (by *Keith J. Kecskes*, *Lawrence S. Gadd*, and *Theresa A. Pinch*), for Adrienne Yoches and Laura and Ronald Lubeck.

Fieger, Fieger, Kenney, Giroux & Harrington (by *Sima A. Patel*) for Troy Gibson and Jodi and Steve Jergovich.

Turner & Turner, PC (by *Lee I. Turner* and *Devlin K. Scarber*), for Cynthia Cialone and Emmanuelle Soufane.

Patrick A. Rooney for Lauren Calvin and Troy Gibson.

James A. Scieszka for Charlotte Bader.

Allen Brothers, PLLC (by *Charles S. Rudy*), for the Henry Ford Community College Support Staff Association.

Before: O'BRIEN, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM. These consolidated cases arise from a hayride accident at Camp Dearborn in Milford Township. In Docket Nos. 330998, 331137, 331139, 331144, 331147, and 331149, defendant the city of Dearborn (the City) appeals as of right the trial court's opinion and order denying its motion for summary disposition pursuant to MCR 2.116(C)(7). The City argues that the trial court erred by concluding that the motor vehicle exception, MCL 691.1405, to governmental immunity under the governmental tort liability Act (GTLA), MCL 691.1401 *et seq*., applied. In Docket No. 331630, the City appeals by leave granted the trial court's opinion and order dismissing the City's third-party complaint against Henry Ford Community College Support Staff Association (the Association) pursuant to MCR 2.116(C)(10). *Yoches v City of Dearborn*, unpublished order of the Court of Appeals, entered July 27, 2016 (Docket No. 331630). The City argues that the trial

court erred by concluding that a "hold harmless agreement" was unenforceable as a matter of law due to a lack of consideration. For the reasons set forth in this opinion, we affirm.

The City owns and operates Camp Dearborn, a recreational facility located in Milford Township. The Association is a labor organization representing employees of Henry Ford Community College. Plaintiffs are members of the Association. Plaintiff Cynthia Cialone is a volunteer member of the Association's social committee. Cialone acted as liaison in coordinating the "Fall Festival," an event that was held for the Association's members and their families at Camp Dearborn on October 27, 2013. As liaison, Cialone reserved a chalet at the facility, contracted with vendors to provide goods and services during the festival, and reserved two wagons for hayrides. Immediately before the hayrides were to begin on October 27, Scott Schier, the City employee who drove one of the tractors pulling the hay wagons, approached the group and asked who was "in charge." Cialone identified herself as that person. At Schier's request, Cialone signed what was referred to as a hold-harmless agreement apparently on behalf of the Association. The agreement provided, in relevant part, as follows:

> In consideration for permission to participate in the Fall Hayrides at Camp Dearborn, the below-listed organization agrees to RELEASE AND FOREVER DISCHARGE the City of Dearborn, a municipal corporation, and its officers, departments, employees, and agents, from any and all claims, liabilities, or lawsuits, including legal costs and attorney fees, resulting from the use of any City property or in any connection with the hayrides at Camp Dearborn.
>
> The below-listed organization hereby agrees to defend, indemnify and hold harmless the City of Dearborn, its

> officers, agents, departments and employees from and against any and all claims and causes of action of any kind arising out of or in connection with the organization's or any of the organization's participants' involvement in the hayrides at Camp Dearborn.
>
> Knowing, understanding, and fully appreciating all possible risks, the below-listed organization does hereby expressly, voluntarily, and willingly assume all risk of dangers associated with its participation or any of its participants' involvement in the hayrides at Camp Dearborn. These risks could result in damage to property, personal and/or bodily injury or death to the organization's individual participants.
>
> The organization acknowledges that if it has minor participants, the minors' parents or guardians have granted specific permission for the minors to participate in the hayrides at Camp Dearborn.
>
> The authorized signor acknowledges that he/she has advised the organization's participants of this agreement, the risks involved in the activity, and has the authority to enter into this agreement on behalf of the organization and the organization's participants.

Below these paragraphs, the agreement warned as follows: "THIS IS A RELEASE READ BEFORE SIGNING." In a section of the form designated for the organization's name, Cialone signed her name and then wrote the Association's address and phone number. In a section for the "[a]uthorized signor's name, address and telephone number," Cialone signed her name and printed her name and home address.

After Cialone completed the agreement, the hayrides began. During the rides, one of the hay wagons tipped over, and several participants were injured as a result. According to plaintiffs, defendant Adam Forehand, the City employee who drove the tractor that pulled the hay wagon that tipped over, was intoxicated and driving recklessly at the time of the accident.

Consequently, plaintiffs brought a series of lawsuits against the City and Forehand. Plaintiffs' lawsuits alleged claims for negligence, gross negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiffs also alleged that the City was vicariously liable for Forehand's negligence. In response to plaintiffs' lawsuit, the City moved for summary disposition on the ground that governmental immunity under the GTLA barred plaintiffs' claims. The City also filed a third-party complaint and counterclaim against the Association and Cialone, claiming that the Association was bound by the hold-harmless agreement. Alternatively, the City argued that, in the event the Association was not bound by the agreement, the agreement was nevertheless binding against Cialone in her individual capacity. The City and the Association also filed cross-motions for summary disposition regarding enforcement of the hold-harmless agreement. With respect to the City's motion for summary disposition on plaintiffs' claims, the trial court concluded that the tractor that pulled the hay wagon constituted a motor vehicle for purposes of the motor vehicle exception to governmental immunity. It therefore denied the City's motion for summary disposition on plaintiffs' claims. With respect to the City's and the Association's cross-motions for summary disposition regarding enforcement of the hold-harmless agreement, the trial court concluded that the agreement was unenforceable as a matter of law due to a lack of consideration. It therefore denied the City's motion for summary disposition and granted the Association's motion for summary disposition. As indicated earlier, the City challenges both orders on appeal.

In Docket Nos. 330998, 331137, 331139, 331144, 331147, and 331149, the City argues that the trial court erred by concluding that the tractor that pulled

the hay wagon was a motor vehicle for purposes of the motor vehicle exception to governmental immunity. We disagree.

The application of governmental immunity is a question of law subject to de novo review. *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 433; 824 NW2d 318 (2012). A court may grant summary disposition pursuant to MCR 2.116(C)(7) if the moving party is entitled to "immunity granted by law." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (quotation marks and citation omitted). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). "If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact." *Id*. at 429. "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Id*. "[I]f a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Id*. This issue also involves the interpretation and application of a statute. "Issues concerning the proper interpretation of statutes are questions of law that we review de novo." *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "It is the cardinal principle of statutory construction that courts must give effect to legislative intent. When reviewing a statute, courts must first examine the language of the statute. If the intent of the Legisla-

ture is clearly expressed by the language, no further construction is warranted." *Id*. at 562 (citation omitted).

Generally, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There are, however, exceptions to this general rule. Specifically, the trial court held that the motor vehicle exception set forth in MCL 691.1405 applied in this case. That statutory provision provides as follows:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949 [the Michigan Vehicle Code], as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

The term "motor vehicle" is not statutorily defined for purposes of this provision. When a statutory term is not statutorily defined, this Court turns to its dictionary definition to determine the term's plain and ordinary meaning. See *Weaver v Giffels*, 317 Mich App 671, 678; 895 NW2d 555 (2016). With respect to the term "motor vehicle," this Court and our Supreme Court have done precisely that on several occasions.

For example, in *Stanton v City of Battle Creek*, 466 Mich 611, 613; 647 NW2d 508 (2002), the plaintiff truck driver delivered hardware to a location owned by the defendant city. A city employee used a forklift owned by the city to unload the truck. *Id*. The plaintiff was injured when the forklift's brakes failed, causing the forklift to roll forward and strike the plaintiff. *Id*. The defendant argued that the motor vehicle exception to governmen-

tal immunity did not apply because a forklift was not a motor vehicle within the meaning of the statute. *Id*. To begin its analysis, the Supreme Court first clarified that the definitional phrase in MCL 691.1405 "sends the reader to the Michigan Vehicle Code only for the definition of 'owner,' " "not 'motor vehicle,' and nothing in the statute demands a different interpretation." *Stanton*, 466 Mich at 616. Consequently, because the term "motor vehicle" was not statutorily defined, the Supreme Court turned to the term's dictionary definition. *Id*. at 617. It explained as follows:

> It is possible to find varying dictionary definitions of the term "motor vehicle." For example, the *Random House Webster's College Dictionary* (2001) defines a "motor vehicle" as "an automobile, truck, bus, *or similar* motor-driven conveyance," a definition that does not include a forklift. In our view, this definition appropriately reflects the commonly understood meaning of the term. *The American Heritage Dictionary* (2d College ed), on the other hand, defines "motor vehicle" as "self-propelled, wheeled conveyance that does not run on rails," a definition, which would arguably include a forklift. Given these divergent definitions, we must choose one that most closely effectuates the Legislature's intent. Fortunately, our jurisprudence under the governmental tort liability act provides an answer regarding which definition should be selected. As previously noted, it is a basic principle of our state's jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). Thus, this Court must apply a narrow definition to the undefined term "motor vehicle."
>
> The definition of a "motor vehicle" as "an automobile, truck, bus, or similar motor-driven conveyance" is the narrower of the two common dictionary definitions. Therefore, we apply it to the present case. A forklift—which is a

> piece of industrial construction *equipment*—is not similar to an automobile, truck, or bus. Thus, the motor vehicle exception should not be construed to remove the broad veil of governmental immunity for the negligent operation of a forklift. [*Stanton*, 466 Mich at 617-618.]

Then, in *Regan v Washtenaw Co Bd of Co Rd Comm'rs (On Remand)*, 257 Mich App 39, 42-43; 667 NW2d 57 (2003), this Court reconsidered its decision in *Regan v Washtenaw Co Bd of Co Rd Comm'rs*, 249 Mich App 153, 155-156; 641 NW2d 285 (2002), on order from the Supreme Court, *Regan v Washtenaw Co Bd of Co Rd Comm'rs*, 468 Mich 851 (2003), in light of the Supreme Court's decision in *Stanton* as well as another somewhat related matter, *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002). *Regan* involved two cases: "the Regan case" and "the Zelanko case." In the Regan case, the plaintiff was driving a van when she collided with a city-owned and city-employee-operated broom tractor. *Regan (On Remand)*, 257 Mich App at 42. In the Zelanko case, the plaintiff's tractor-trailer rig was struck in the windshield by a piece of tire tread propelled by a mower operated by a city employee. *Id*. at 43. This Court, applying, in relevant part, the Supreme Court's interpretation and application of the term "motor vehicle" for purposes of the motor vehicle exception to governmental immunity in *Stanton*, concluded that the broom tractor and the tractor mower were both motor vehicles for purposes of MCL 691.1405:

> With respect to whether the broom tractor and tractor mower are "motor vehicles" for purposes of § 5, we find that both vehicles fit the definition enunciated in *Stanton*. Both vehicles are clearly motor-driven conveyances, in that they are motorized and carry or transport operators over the road, or alongside the road, while the operators are performing governmental duties. We respectfully dis-

> agree with the dissent's test that the "principal function" of the vehicle must be to transport or carry passengers or property in order to be considered a "motor vehicle" under § 5. Similar language is not found anywhere in the *Stanton* decision or the statute, and the dissent's use of a "principal function" test suggests that a vehicle must be used chiefly for the purpose of transporting persons or property and cannot be used, in any significant manner, for maintenance or other purposes to qualify under § 5. Limiting the definition in this manner would exclude numerous governmental vehicles that traverse Michigan roadways, including snowplows, utility and construction vehicles, and emergency vehicles that are used in a maintenance, improvement, or service capacity. This clearly was not the Legislature's intent in enacting MCL 691.1405. Surely, the Legislature did not intend to preclude liability for negligent actions associated with the operation of a governmental vehicle designed to be driven on or alongside roadways where the vehicle has maintenance and service capabilities. [*Id*. at 47-48.]

Finally, in *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274, 275-276; 705 NW2d 136 (2005), this Court addressed whether a Gradall hydraulic excavator driven by a city employee constituted a motor vehicle for purposes of MCL 691.1405 when it struck a stopped vehicle at a traffic light. This Court, relying, in relevant part, on the *Stanton* and *Regan (On Remand)* decisions, held that the Gradall was a motor vehicle for purposes of the statute:

> Applying these decisions to the case at hand, we conclude that the Gradall is a motor vehicle for the purposes of MCL 691.1405. The Gradall, a wheeled, motorized vehicle operated by a driver, generally resembles a truck and moves like a truck. The significant difference between it and a truck is that mounted on the back of the vehicle is a unit that operates a hydraulic excavation tool. Although defendant argues that the Gradall is not used primarily for transportation, none of the cases cited above

> requires the motor vehicle to be used primarily for transportation for MCL 691.1405 to apply. Moreover, when the Gradall is not being used for excavation, it can be driven along the roadways just like a truck and transports both its attached excavation unit and the driver. At the time of the accident in this case, the driver was returning the Gradall to defendant's garage from the project site. The Gradall was being driven on a public roadway when it struck the rear of [the plaintiff]'s vehicle. Under these circumstances, we conclude that the trial court did not err in ruling that the Gradall is a motor vehicle for the purposes of MCL 691.1405. [*Wesche*, 267 Mich App at 278.]

In light of this binding caselaw, MCR 7.215(J)(1), it is our conclusion that the trial court correctly held that the tractor pulling the hay wagon at issue in this case was a motor vehicle for purposes of the motor vehicle exception to governmental immunity. We are of the view that the tractor and hay wagon at issue in this case are more comparable to the broom tractor and the tractor mower at issue in *Regan (On Remand)* than the forklift at issue in *Stanton*. In fact, the record reflects that the tractor and hay wagon were being used to carry numerous passengers on a roadway used by campers and patrolled by law enforcement, which, unlike equipment such as a forklift, renders the tractor and hay wagon " 'invariably connected' " to the roadway itself. See *Wesche*, 267 Mich App at 278, quoting *Regan (On Remand)*, 257 Mich App at 48. While we agree with defendants that, generally, tractors can be used for purposes such as farming, binding caselaw is quite clear that the "primary function" of a vehicle does not control the analysis at issue in this case. See *Wesche*, 267 Mich App at 277. Accordingly, we conclude that the trial court correctly held that the tractor that pulled the hay wagon at issue in this case was a motor vehicle for purposes of the motor vehicle exception to

governmental immunity. Consequently, its decision to deny defendants' motion for summary disposition on that ground was correct.

On appeal, the City raises two other arguments with respect to the application of governmental immunity in this case. To the extent the City argues that the proprietary-function exception to governmental immunity, MCL 691.1413, does not apply, we decline to address the merits of the argument in light of our conclusion that the motor vehicle exception to governmental immunity applies. We do, however, choose to briefly address the City's arguments with respect to its vicarious liability for Forehand's conduct under the facts and circumstances of this case. Under the doctrine of vicarious liability, an employer is generally liable for the torts its employees commit so long as those torts are within the scope of their employment. *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 239; 859 NW2d 723 (2014). The trial court concluded that the City was not entitled to summary disposition on plaintiffs' vicarious-liability claims because the motor vehicle exception applied. The trial court additionally stated, however, that gross negligence "defeats governmental immunity." The City does not challenge the trial court's initial statement, i.e., that it can be held vicariously liable for Forehand's negligence if the motor vehicle exception to governmental immunity applies. However, the City does take issue with the trial court's suggestion that any gross negligence by Forehand would, by itself, prohibit it from asserting governmental immunity. We agree with the City in that regard.

The relevant statutory provision is MCL 691.1407, which provides, in relevant part, as follows:

> (1) 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. . . .
>
> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

This statutory language is unambiguous. MCL 691.1407(1) provides immunity to a governmental agency without regard to an employee's gross negligence. MCL 691.1407(2) provides immunity for governmental employees, but MCL 691.1407(2)(c) provides an exception to that immunity when the employee's conduct constitutes gross negligence. Although Subsection (2)(c) establishes an exception to the grant of immunity to an officer or employee of a governmental agency, it does not provide that a governmental agency otherwise entitled to immunity can be vicariously liable for the officer's or employee's gross negligence. Consequently, if an exception to governmental immunity does not apply "as otherwise provided in this act," e.g., pursuant to the motor vehicle exception, the City would not be vicariously liable for Forehand's negligence, regardless of

whether it rises to the level of gross negligence. See, e.g., *Hobrla v Glass*, 143 Mich App 616, 624; 372 NW2d 630 (1985) (providing that under MCL 691.1407(1), "[t]he department's immunity extends to allegations of vicarious liability, since the individual defendants, even if they acted negligently, were also engaged at the time the tort was committed [in] the exercise or discharge of a governmental function") (quotation marks and citation omitted; second alteration by the *Hobrla* Court).

Contrary to plaintiffs' argument on appeal, MCL 691.1408 does not require imposition of vicarious liability against a governmental agency for an employee's gross negligence. MCL 691.1408 provides the following in that regard:

> (1) Whenever a claim is made or a civil action is commenced against an officer, employee, or volunteer of a governmental agency for injuries to persons or property caused by negligence of the officer, employee, or volunteer while in the course of employment with or actions on behalf of the governmental agency and while acting within the scope of his or her authority, the governmental agency *may* pay for, engage, or furnish the services of an attorney to advise the officer, employee, or volunteer as to the claim and to appear for and represent the officer, employee, or volunteer in the action. The governmental agency *may* compromise, settle, and pay the claim before or after the commencement of a civil action. Whenever a judgment for damages is awarded against an officer, employee, or volunteer of a governmental agency as a result of a civil action for personal injuries or property damage caused by the officer, employee, or volunteer while in the course of employment and while acting within the scope of his or her authority, the governmental agency *may* indemnify the officer, employee, or volunteer or pay, settle, or compromise the judgment.
>
> (2) When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of

> employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency *may* pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. An officer or employee who has incurred legal expenses after December 31, 1975 for conduct prescribed in this subsection *may* obtain reimbursement for those expenses under this subsection.
>
> (3) This section does not impose liability on a governmental agency. [Emphasis added.]

The use of the word "may" in Subsections (1) and (2) indicates that a governmental employer's decision to indemnify an employee for liability or to cover the cost of the employee's legal defense is a discretionary, not mandatory, decision. See *Detroit Edison Co v Stenman*, 311 Mich App 367, 384 n 8; 875 NW2d 767 (2015). Moreover, MCL 691.1408(3) makes clear that "[t]his section does not impose liability on a governmental agency." Therefore, MCL 691.1408 does not provide a basis for imposing vicarious liability on a governmental agency for its employee's gross negligence.

In Docket No. 331630, the City argues that the trial court erred by concluding that the hold-harmless agreement was unenforceable as a matter of law. We agree with the trial court's decision in this regard.

The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10) with respect to this issue. The trial court granted the Association's motion and denied the City's motion pursuant to that subrule, which provides for summary disposition when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." In deciding a motion for summary

disposition pursuant to MCR 2.116(C)(10) and reviewing that decision on appeal, courts must consider any evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record leaves open "an issue upon which reasonable minds might differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (quotation marks and citation omitted). A trial court's decision to grant a party's motion for summary disposition is reviewed de novo. *Maiden*, 461 Mich at 118. This Court also reviews a trial court's interpretation and application of a contract de novo. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002). "The goal of contract construction is to determine and enforce the parties' intent on the basis of the plain language of the contract itself." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006).

At issue in this case is a hold-harmless agreement. A hold-harmless agreement is an indemnity contract, which is, in essence, a release of liability. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 627 n 88; 886 NW2d 135 (2016). "An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 173; 848 NW2d 95 (2014). "Before a contract can be completed, there must be an offer and acceptance." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006) (quotation marks and citation omitted). "[A] contract requires mutual assent or a meeting of the minds on all the essential terms." *Id*. at 453. Legal consideration also is required for a binding contract. *Yerkovich v*

AAA, 461 Mich 732, 740-741; 610 NW2d 542 (2000). Consideration is "[s]ome right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000), quoting *Black's Law Dictionary* (6th ed), p 306. Consideration exists when there is "a benefit on one side, or a detriment suffered, or service done on the other." *Sands Appliance Servs*, 463 Mich at 242 (quotation marks and citation omitted). In this case, the trial court determined that there was no new consideration for the hold-harmless agreement because the City was already contractually obligated to provide the hayrides at the time the hold-harmless agreement was signed. That is, the trial court determined that the City had a preexisting duty to provide the hayrides. "Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich*, 461 Mich at 740-741.

In this case, the hold-harmless agreement purported to "release and forever discharge" the City from "any and all claims . . . resulting from the use of any City property or in any connection with the hayrides at Camp Dearborn." It additionally required the Association "to defend, indemnify and hold harmless" the City and its employees "from and against any and all claims and causes of action of any kind arising out of or in connection with the organization's or any of the organization's participants' involvement in the hayrides at Camp Dearborn." The City relies, in part, on this Court's decision in *Rowady v K Mart Corp*, 170 Mich App 54, 59; 428 NW2d 22 (1988), in which a panel of this Court, relying on 1 Restatement Contracts, 2d,

§ 80, p 204, stated as follows with respect to the interplay between releases and consideration in circumstances such as this:

> Where there is no specific recitation of separate consideration for the release, but it is part of a larger contract involving multiple promises, the basic rule of contract law is that whatever consideration is paid for all the promises is consideration for each one:
>
> (1) There is consideration for a set of promises if what is bargained for and given in exchange would have been consideration for each promise in the set if exchanged for that promise alone.
>
> (2) The fact that part of what is bargained for would not have been consideration if that part alone had been bargained for does not prevent the whole from being consideration.
>
> Comment:
>
> a. *One consideration for a number of promises*. Since consideration is not required to be adequate in value (see § 79), two or more promises may be binding even though made for the price of one. A single performance or return promise may thus furnish consideration for any number of promises.

Stated simply, "all consideration paid by [a] defendant in exchange for [a] plaintiff's multiple promises must be viewed as consideration as to each promise . . . ." *Rowady*, 170 Mich App at 59.

While we agree with the *Rowady* panel's statement in this regard, we cannot agree that it is dispositive in this matter. The record includes multiple "RENTAL SALES RECEIPT[s]," and each of those receipts repeatedly refers to a flyer for the applicable rules and regulations. Specifically, the receipts instruct readers to "SEE FLYER FOR DETAIL OF RULES & REGULATION" or to "SEE FLYER FOR DETAILED RULES

AND REGULATIONS." They do not, however, mention the necessity of a hold-harmless agreement. Similarly, the necessity of a hold-harmless agreement is not mentioned in the flyer either. While the flyer, which is entitled "Fall Hayrides at Camp Dearborn," does set forth various specific rules regarding reservations, the maximum capacity for hayrides, opening and closing hours, rental fees and damage deposits, the facility's hours of operation, rules providing "**FOR YOUR SAFETY DURING HAYRIDES**," and cancellations, it makes no mention that additional agreements, including, for example, a hold-harmless agreement, were contemplated as part of the parties' agreement. Between the receipts and the flyer, it is quite apparent that the parties' contract, which included an agreement to provide hayrides, extensively covered all the essential terms of the agreement. *Kloian*, 273 Mich App at 453. Stated differently, nothing in the record supports a conclusion that the hold-harmless agreement was "part of a larger contract involving multiple promises." *Rowady*, 170 Mich App at 59. As the trial court explained,

> Here, the only contract between the City and the Association was the contract for the hayride and chalet. The contract was finalized as of October 22, 2013, the date that the Association paid in full. At that point, there was an offer by Camp Dearborn, acceptance by the Association, and consideration, i.e., money paid by the Association in return for Camp Dearborn's obligation to provide the hayride and chalet. The Hold Harmless Agreement was not part of that contract. It was a separate agreement for which new consideration was required. There was no consideration. Camp Dearborn was already obligated to provide the hayride and chalet. The City did not incur any additional detriment, loss, forbearance, or responsibility under the Agreement. The Agreement fails for lack of consideration.

We discern no error with the trial court's conclusion in this regard.

Affirmed. Plaintiffs, as the prevailing parties, may tax costs pursuant to MCR 7.219.

O'BRIEN, P.J., and JANSEN and STEPHENS, JJ., concurred.

PEOPLE v DAVIS

Docket No. 332081. Submitted July 11, 2017, at Detroit. Decided July 13, 2017, at 9:10 a.m. Leave to appeal granted 501 Mich 1064.

Joel E. Davis was convicted after a jury trial in the Wayne Circuit Court of aggravated domestic assault (second offense), MCL 750.81a(3), and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a). The jury acquitted Davis of larceny and theft of the victim's vehicle. Davis and the victim were romantically involved and lived together. Davis woke the victim one night to ask where their ashtray was, the victim expressed her displeasure at being woken, and Davis pulled the victim to the floor and struck her face with his fist and his open hand. When the victim begged Davis to stop, he told her to shut up and threatened to kill her. Davis left the house in the victim's truck, and the victim ran to a neighbor's house and called 911. The victim's mother took the victim to the hospital where she was treated and photographs were taken of her injuries. The court, Thomas C. Cameron, J., permitted admission of the photographs at Davis's trial. Two of the photographs showed the victim wearing a neck brace. Davis appealed.

The Court of Appeals *held*:

1. According to MRE 402, relevant evidence is generally admissible at trial unless, among other reasons, its probative value is substantially outweighed by the danger of unfair prejudice as provided in MRE 403. Under MRE 401, evidence is relevant if it has any tendency to make the existence of any consequential fact more or less probable than it would be without the evidence. Davis argued that the photographs showing the victim in a neck brace were improperly admitted because the victim did not suffer a spinal injury, the brace was merely precautionary, and the prejudice to him caused by the photographs substantially outweighed the photographs' probative value. The trial court did not abuse its discretion by allowing the photographs to be admitted against Davis at trial because they corroborated the victim's testimony and depicted the seriousness of her injuries. And even if the neck brace was only precautionary, the precaution was necessary because of Davis's conduct.

2. "Mutually exclusive" convictions are not the equivalent of inconsistent verdicts, which juries sometimes reach on the basis of leniency or compromise. Inconsistent verdicts exist when a jury acquits a defendant of one offense that renders it seemingly impossible for the jury to have found the existence of all the elements necessary to support conviction of another offense, e.g., when a jury convicts a defendant of felony-firearm but acquits him or her of the underlying felony. This case, however, did not involve inconsistent verdicts. Rather, this case presented an exception to the inconsistent-verdicts situation because it involved a situation in which a guilty verdict on one count necessarily excluded a finding of guilt on another. Davis's conviction of aggravated domestic assault required the absence of intent to do great bodily harm, while his conviction of AWIGBH required that he acted with intent to do great bodily harm. Davis's conduct during a single event could not support both a finding that he acted *with the intent* to do great bodily harm and a finding that he acted *without the intent* to do great bodily harm. Although an aggravated domestic assault conviction expressly requires an assault *without* the intent to do great bodily harm, the lack of intent to do great bodily harm is not an element of the crime. That is, the lack of intent does not constitute a positive element; rather, the lack of intent is a negative element of the crime, which the prosecution was not required to prove beyond a reasonable doubt. Consequently, the trial court was not obligated to instruct the jury that it must find that Davis did not have the intent to do great bodily harm when he assaulted the victim. Davis's convictions of aggravated domestic assault and AWIGBH were mutually exclusive, and two mutually exclusive verdicts cannot stand. Because the jury's verdict on the AWIGBH charge indicated that it affirmatively found that Davis acted *with* the intent to do great bodily harm less than murder, Davis's conviction of aggravated domestic assault had to be vacated.

Affirmed in part and vacated in part.

CRIMINAL LAW — JURY — VERDICT — MUTUALLY EXCLUSIVE CONVICTIONS.

Convictions are mutually exclusive when conviction of one offense necessarily excludes conviction of another offense; for example, a conviction of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, and a conviction of aggravated domestic assault, MCL 750.81a, are mutually exclusive because AWIGBH affirmatively requires the jury to find that a defendant acted with an intent to do great bodily harm, while aggravated domestic assault expressly requires the absence of an intent to do great bodily harm.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amanda Morris Smith*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat*) for defendant.

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

PER CURIAM. A jury convicted defendant of aggravated domestic assault (second offense), MCL 750.81a(3), and assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a). Defendant raises a meritless challenge to the admission of certain photographic evidence. He also raises a legitimate concern over his convictions for two offenses with mutually exclusive provisions. We vacate defendant's domestic-assault conviction but otherwise affirm.

I. BACKGROUND

Defendant and SS were romantically involved and lived together in Dearborn Heights. At around 4:00 a.m. on June 10, 2015, defendant woke SS to ask her where their ashtray was. Defendant took offense at SS's displeasure over being roused. He pulled SS to the floor by her shirt collar and struck her about the face with his fist and open hand. SS begged defendant to stop, but he told her to "shut up" and threatened, "You're gonna make me have to kill you."

Defendant eventually terminated the beating, and SS escaped to the bathroom. She rinsed blood from her mouth but could not examine her injuries because her

eyes were swollen shut. In the meantime, defendant took SS's truck and left the house. He also carried away SS's purse containing her keys, phone, and $400 cash. Defendant did not stay gone long, however. When he pulled back into the driveway, SS fled the home through a back door. She ran to a neighbor's house and called 911.

The responding officer described SS's face as "almost unrecognizable" due to significant swelling, bruising, and bleeding. Defendant had left the couple's home again and could not be immediately arrested. SS's mother took her to the hospital, where she underwent X-rays and a CAT scan. A doctor prescribed pain medication and placed SS in a neck brace. Someone at the hospital took photographs to document her injuries.

The following day, SS and her mother drove past the house and saw her vehicle parked in the driveway. They summoned the police, who forcibly entered the house and arrested defendant. The prosecution charged defendant with larceny and theft of SS's vehicle, but the jury acquitted him of those charges. The jury convicted defendant of aggravated domestic assault and assault with intent to do great bodily harm less than murder (AWIGBH).

II. PHOTOGRAPHIC EVIDENCE

Defendant first contends that the trial court should not have admitted two photographs of SS lying in a hospital bed with a severely bruised face and wearing a neck brace. Defendant contends that although these photographs otherwise accurately depict SS's condition, they were overly prejudicial because SS did not actually suffer a spinal injury requiring a neck brace.

We review for an abuse of discretion a trial court's decision to admit evidence, including photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Evidence is generally admissible if it is relevant, MRE 402, i.e., 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. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. The "[g]ruesomeness" of a photograph standing alone is insufficient to merit its exclusion. *Mills*, 450 Mich at 76. The proper question is "whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id*.

The photographs of SS's bruised and swollen face were highly relevant and probative to establish an essential element of aggravated domestic assault—a "serious or aggravated injury." MCL 750.81a(2). The nature of SS's injuries also tended to establish that defendant acted with the intent to do great bodily harm as required by MCL 750.84(1)(a)—with the "intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks and citation omitted). Accordingly, this evidence was admissible under MRE 402.

And the photographs were not so prejudicial as to warrant exclusion under MRE 403. All relevant evidence "is prejudicial to some extent." *Mills*, 450 Mich at 75 (quotation marks omitted). In *Mills*, the Michigan Supreme Court ruled that photographs graphically depicting a burn victim were relevant, probative, and not overly prejudicial where "[t]he photographs [were] accurate factual representations of the injuries suffered by [the victim] and the harm the defendants caused her." *Id*. at 77. Here, the nature and placement of SS's bruises and lacerations corroborated her testimony about the assault and depicted the seriousness of her injuries. Even if the neck brace was "precautionary" only, as argued by defendant, this precaution was required by defendant's actions. It was part and parcel of the medical treatment SS received for injuries sustained after defendant repeatedly punched her in the face. We discern no error in the admission of these photographs.

III. MUTUALLY EXCLUSIVE VERDICTS

Next, defendant argues that his convictions for both AWIGBH and aggravated domestic assault violated his right to be free from multiple punishments for the same offense under double-jeopardy principles. We agree that defendant was improperly convicted for a single act under two statutes with contradictory and mutually exclusive provisions. However, the issue is more nuanced than expressed by the defense, and double jeopardy is not the proper initial focus.

The jury convicted defendant of aggravated domestic assault, which is proscribed, in relevant part, by MCL 750.81a:

> (2) Except as provided in subsection (3), an individual who assaults . . . an individual with whom he or she has or

> has had a dating relationship . . . without a weapon and inflicts serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm less than murder* is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.
>
> (3) An individual who commits an assault and battery in violation of subsection (2), and who has 1 or more previous convictions for assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household, in violation of any of the following,[1] is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both[.] [Emphasis added.]

The jury also convicted defendant of violating MCL 750.84(1)(a), which makes it a 10-year felony to "[a]ssault[] another person *with intent to do great bodily harm, less than the crime of murder*." (Emphasis added.)

Clearly, these two offenses are mutually exclusive from a legislative standpoint. One requires the defendant to act with the specific intent to do great bodily harm less than murder, *Brown*, 267 Mich App at 147; the other is committed without intent to do great bodily harm less than murder. We must give effect to the plain and unambiguous language selected by the Legislature. See *People v Miller*, 498 Mich 13, 22-23; 869 NW2d 204 (2015). And the plain language of the statutes reveals that a defendant cannot violate both statutes with one act as he or she cannot both intend and yet *not* intend to do great bodily harm less than murder.

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[1] MCL 750.81a(3)(a), (b), and (c) specify which offenses may be counted when determining the existence of previous convictions under MCL 750.81a(3).

But may this Court grant relief? As a general rule, juries are permitted to reach inconsistent verdicts, and appellate courts may not interfere with their judgments. The deliberative process of the jury is secret, and no court is privy to the rationale leading to inconsistent verdicts. Unlike a court's judgment following a bench trial, the jury is held to no rules of logic and is not required to explain its ruling. The verdicts may be the result of jury compromise or the jury's inclination to be lenient. See *Dunn v United States*, 284 US 390, 393-394; 52 S Ct 189; 76 L Ed 356 (1932); *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980).

This case does not fit the mold of inconsistent-verdict jurisprudence. Precedent regarding the jury's right to reach inconsistent verdicts focuses on situations in which acquittal of one charge renders it seemingly impossible for the jury to have found the existence of all elements of the charge on which it convicts. For example, appellate review is not permitted when the jury acquits a defendant of an underlying felony charge and yet convicts the defendant of felony-firearm or felony-murder. See *People v Goss (After Remand)*, 446 Mich 587, 599; 521 NW2d 312 (1994) (opinion by LEVIN, J.); *People v Lewis*, 415 Mich 443, 453; 330 NW2d 16 (1982). In these circumstances, it is easily surmised that the jury did its job but acted leniently or compromised.

This was just the case in *United States v Powell*, 469 US 57, 59-60; 105 S Ct 471; 83 L Ed 2d 461 (1984), in which a jury convicted the defendant of facilitating the sale of narcotics by phone but acquitted her of conspiring to possess with intent to deliver those same narcotics. Relying on *Dunn* and its progeny, the Supreme Court reasoned:

> [W]here truly inconsistent verdicts have been reached, "[the] most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Dunn*, [284 US] at 393. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause. . . .
>
> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. . . . [N]othing in the Constitution would require such a protection . . . . For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest. This possibility is a premise of *Dunn*'s alternative rationale—that such inconsistencies often are a product of jury lenity. Thus, *Dunn* has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch. . . . [*Powell*, 469 US at 64-66 (second alteration in original).]

"[T]he best course to take," the *Powell* Court concluded, "is simply to insulate jury verdicts from review on this ground." *Id*. at 69.

As noted, the issue now before this Court is not a typical inconsistent-verdict matter. Rather, it fits within an exception to this rule as "a situation 'where a guilty verdict on one count necessarily excludes a finding of guilt on another,' " rendering the two verdicts "mutually exclusive." *United States v Randolph*, 794 F3d 602, 610-611 (CA 6, 2015). Indeed, the United States Supreme Court specifically recognized this scenario in *Powell*, 469 US at 69 n 8, noting:

> Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other. Cf. *United States v Daigle*, 149 F Supp 409 (DC), aff'd per curiam, 101 US App DC 286; 248 F2d 608 (1957).

In *Daigle*, 149 F Supp at 411, the jury convicted the defendant of embezzlement and grand larceny of certain funds owned by Mrs. Thrasher, despite the trial court's instruction to reach the larceny charge only if it found the defendant not guilty of embezzlement. The offenses were mutually exclusive because the embezzlement statute proscribed the taking of another's funds that were lawfully in the defendant's possession while the larceny statute related to unlawfully taking funds from another's possession. *Id*. at 414. The guilty verdict on the embezzlement charge required a finding that the defendant initially lawfully possessed the funds; this finding "negative[d]" a "fact essential" to conviction of the second offense—that the defendant initially unlawfully possessed the funds. *Id*.

Our sister states have reached the same conclusion in similar circumstances. In *Dumas v State*, 266 Ga

797, 799; 471 SE2d 508 (1996), for example, the Georgia Supreme Court held that a jury could not convict a defendant of two offenses "that not only were inconsistent, but also were *mutually exclusive*." Dumas was convicted by a jury of "malice murder," which required "malice aforethought," and vehicular homicide, which was statutorily defined as a killing "without malice aforethought." *Id*. at 800. The Georgia Supreme Court held that "in its first verdict, the jury in this case convicted Dumas of killing with malice aforethought *and* without malice aforethought; of killing both with and without an intention to do so. Obviously, the two verdicts were mutually exclusive . . . ." *Id*.

Here, the statutory language clearly presents two mutually exclusive offenses: one cannot assault another with intent to do great bodily harm less than murder and at the same time assault another without the intent to do great bodily harm less than murder. However, a unique wrinkle exists in this case because the jury did not actually make contradictory findings in reaching two mutually exclusive guilty verdicts. The trial court did not instruct the jury that in order to convict defendant of aggravated domestic assault it had to find that defendant did not act with intent to do great bodily harm. The only intent mentioned by the court was "either to commit a battery, or to make [SS] reasonably fear an immediate battery."

The trial court did not instruct the jury regarding the lack of intent to do great bodily harm necessary to meet the statutory definition of aggravated domestic assault because the Michigan Supreme Court has directed that such provisions are not elements of an offense. *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979). The defendant in *Doss* was charged with manslaughter pursuant to MCL 750.239, which defined the

offense as causing death by certain acts done "intentionally but without malice." *Id*. at 97. " '[W]ithout malice' is the absence of an element . . . ." *Id*. at 99. Accordingly, the prosecution was not required to establish the lack of malice beyond a reasonable doubt. " 'Elements are, by definition, positive. A negative element of a crime is a contradiction in terms.' " *Id*., quoting *People v Chamblis*, 395 Mich 408, 424; 236 NW2d 473 (1975) (emphasis omitted), overruled on other grounds by *People v Cornell*, 466 Mich 335 (2002). Statutory language describing such negatives is a hallmark of lesser included offenses. The lack of malice cited in the manslaughter statute rendered the offense a cognate lesser offense of murder, the Court held. *Doss*, 406 Mich at 99.

MCL 750.81a includes a negative, just like the manslaughter statute in *Doss*. The lack of intent to commit great bodily harm less than murder is not an affirmative element. The prosecution was not required to prove this absence of intent, and the trial court was not required to instruct the jury in this regard. This does not nullify the error of convicting defendant of mutually exclusive offenses, however.

The error in this case stems from two sources. First, the prosecution should not have independently charged defendant under two statutes with irreconcilable provisions stemming from one assault. The prosecution should have levied the charges as alternative grounds for conviction. Second, after the jury reached mutually exclusive verdicts, the trial court should have either reinstructed the jury to elect conviction under one or the other or vacated one of the convictions.

We need not remand to remedy the error. The jury affirmatively found that defendant acted with the intent to do great bodily harm less than murder when

it convicted defendant of AWIGBH. As the court was not required to inform the jury that a lack of such intent accompanied the aggravated domestic assault charge, the jury never found a lack of intent on defendant's part. We therefore know which charge is supportable by jury-found facts and can affirm defendant's AWIGBH conviction. As an improperly entered mutually exclusive verdict, we vacate defendant's conviction and sentence for aggravated domestic assault.

We affirm in part and vacate in part.

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

ESCOTT v PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

Docket No. 333264. Submitted July 6, 2017, at Grand Rapids. Decided July 18, 2017, at 9:00 a.m.

Linda Escott filed an action in the Allegan Circuit Court against the Public School Employees' Retirement Board, challenging the retirement board's decision to deny her application for nonduty disability retirement benefits under MCL 38.1386(1) of the Public School Employees Retirement Act, MCL 38.1301 *et seq*. In 2013, Escott accepted a voluntary layoff from her position as a teacher for the Pontiac School District. She applied for nonduty disability benefits on the basis of her longstanding bilateral optic atrophy, which had reduced her peripheral vision and caused tunnel vision, although the condition had been stable throughout her teaching career. Escott argued that technological and pedagogical changes in the classroom rendered her unable to continue performing her teaching duties. The retirement board appointed an independent medical advisor, who sent Escott to an internist for a medical examination and disability determination. The internist concluded that Escott's medical condition did not prevent her from performing her duties as a teacher but deferred further evaluation to an ophthalmologist; according to Escott, she was never sent to an ophthalmologist. The medical advisor reviewed Escott's medical records and the internist's report and concluded that Escott was not totally and permanently disabled and that she was therefore not eligible for nonduty disability retirement benefits. A hearing officer subsequently agreed with the medical advisor's denial of benefits, and the retirement board upheld that determination. Escott appealed the decision in the circuit court. The court, Kevin W. Cronin, J., reversed the denial-of-benefits order, concluding that it was not supported by competent, material, and substantial evidence on the record and that the decision was arbitrary or capricious; the court remanded the case to the retirement board and ordered that Escott be examined by a specialist who had expertise in Escott's condition. On reconsideration, the circuit court affirmed its order reversing the retirement board's determination but concluded that it did not have

authority to require that Escott be seen by an expert. The Court of Appeals granted the retirement board's application for leave to appeal.

The Court of Appeals *held*:

1. Under MCL 38.1386(1), the retirement board must award nonduty disability retirement benefits to a member if: (1) the member meets certain age and service requirements, (2) the member has at least 10 years of credited service before termination of employment, (3) the member files a written application with the retirement board not more than 12 months after the date the member terminates his or her public school employment, and (4) the member is examined by physicians or medical officers—designated by the retirement board—who certify that the member is totally and permanently disabled from performing the duties of the member's position or a similar position for which the member is qualified by reason of training, experience, or both. Like the members who seek nonduty disability retirement benefits under the State Employees' Retirement Act, MCL 38.1 *et seq*.—which contains a disability certification requirement similar to MCL 38.1386(1)(d)—the retirement board cannot award nonduty disability retirement benefits to a member if a medical advisor designated by the retirement board does not certify that the member was totally and permanently disabled from performing his or her job duties.

2. It was undisputed that Escott met the age and service requirements for nonduty disability retirement benefits and that she had timely filed her application for the benefits. However, the medical advisor did not certify that Escott was totally and permanently disabled, and the retirement board therefore lacked authority to grant her application for benefits. The circuit court erred by reversing the retirement board's decision to deny Escott's application for benefits because there was competent, material, and substantial evidence on the record that Escott lacked the certification.

Reversed and remanded.

BECKERING, J., concurred in the result of the majority opinion only.

PUBLIC SCHOOL EMPLOYEES — NONDUTY DISABILITY RETIREMENT — MEDICAL EXAMINATIONS — MEDICAL ADVISOR CERTIFICATION — TOTAL AND PERMANENT DISABILITY.

MCL 38.1386(1) provides that the Public School Employees' Retirement Board must award nonduty disability retirement benefits to a member if: (1) the member meets certain age and service

> requirements, (2) the member has at least 10 years of credited service before termination of employment, (3) the member files a written application with the retirement board not more than 12 months after the date the member terminates his or her public school employment, and (4) the member is examined by physicians or medical officers—designated by the retirement board—who certify that the member is totally and permanently disabled for performing the duties for the member's position or a similar position for which the member is qualified by reason of training, experience, or both; the retirement board cannot award nonduty disability retirement benefits to a member if a medical advisor designated by the retirement board does not certify that the member was totally and permanently disabled from performing his or her job duties.

Tanis Schultz, PLLC (by *Steven D. Schultz* and *Elizabeth A. Yard*), for Linda Escott.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *James J. Kelly* and *Patrick Fitzgerald*, Assistant Attorneys General, for the Public School Employees' Retirement Board.

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

PER CURIAM. We are presented with the question whether respondent has the authority to grant a nonduty disability retirement pension in the absence of a certification by the independent medical advisor (IMA) that the applicant is totally and permanently disabled from the applicant's position as a school teacher. Respondent rejected petitioner's application on this basis, but the circuit court reversed. We agree with respondent, the Public School Employees' Retirement Board, that a certification by the IMA is a prerequisite for respondent to grant a nonduty disability retirement pension.

Petitioner, Linda Escott, was employed by the Pontiac School District until March 8, 2013, when she accepted a voluntary layoff. She applied for nonduty disability benefits because of her vision deficit known as bilateral optic atrophy. While she has corrected central vision of 20/25 when wearing glasses, her peripheral vision is reduced to a field of between five and seven degrees, causing a type of tunnel vision. She was first diagnosed with the condition as a child. It is undisputed that the condition is not correctable, but it has been stable throughout her teaching career.

While petitioner acknowledges that her condition has been present throughout her 21-year teaching career, she maintains that changes in the classroom render her unable to continue performing her teaching duties. Specifically, she refers to technological changes, as well as pedagogical changes and anticipated increases in class size.[1]

After petitioner applied for nonduty disability benefits, respondent designated Dr. R. S. Henderson as the IMA. Dr. Henderson sent petitioner for an independent medical examination and disability determination by Dr. Florence Thomas, an internist. Dr. Thomas's report stated: "Bilateral optic atrophy by history. No gross abnormalities on today's examination. Defer further evaluation to ophthalmology." Dr. Thomas concluded that, "[b]ased on findings of my exam today, I do not find limitations to prevent this examinee from being able to perform job duties." Petitioner testified in the trial court that the only vision test she was asked to

[1] Although our opinion focuses on the statutory requirement of the disability certification by the IMA, we note that petitioner's argument does reveal another flaw in her theory: she was able to work up until the day she took the voluntary layoff. That is, her argument is not so much that she is disabled and unable to perform her job duties but that she anticipates becoming so in the future.

perform was reading an eye chart with and without her glasses. She additionally testified that the Office of Retirement Services (ORS) never sent her for further evaluation by an ophthalmologist as suggested by Dr. Thomas.

The IMA, who specializes in physical medicine and rehabilitation, did not conduct a physical examination and based his conclusion on a review of the medical records. Dr. Henderson prepared an official IMA Statement of Disability and stated the following in the certification section:

> Although, the medical evidence shows that Ms. Escott has diagnoses of hyperthyroidism, mild hyperinflation of the lungs and a history of bilateral optic atrophy. Her condition for all symptoms and ailments are stable and controlled with medication. She also has diagnoses of chronic obstructive pulmonary disease diagnosis [sic]. However, even with her continued smoking, her recent pulmonary function test revealed mild obstructive lung disease. Ms. Escott is able to perform the duties of her past job as a teacher or any other similar position reasonably related to her education, training or experience. She is able to stand/walk six out of eight hours and lift up to twenty pounds both of which are requirements for being a teacher. Therefore, she does not have a total and permanent medical condition. Thus, she is not eligible for a non-duty disability retirement.

On the basis of this report, ORS notified petitioner that her request for nonduty disability benefits was denied. Petitioner requested a hearing, and the hearing officer concluded that petitioner was properly denied benefits. This determination was upheld by respondent.

Plaintiff appealed in the circuit court. The basis of her argument was that the eye examination was inadequate and, therefore, the determination was not sup-

ported by competent, material, and substantial evidence. She requested a remand to respondent to obtain an adequate evaluation of her vision condition. The circuit court concluded that respondent's decision was not supported by competent, material, and substantial evidence and that it was arbitrary and capricious or constituted an abuse of discretion. The circuit court remanded the matter to respondent with directions to have petitioner "examined by a specialist with expertise in bilateral optic atrophy or a certified ophthalmologist." On reconsideration, the circuit court agreed that it could not remand for an examination by an ophthalmologist. Otherwise, the court upheld its earlier determination. Respondent now appeals.

This case involves interpretation of the Public School Employees Retirement Act (PSERA), MCL 38.1301 *et seq*. We review de novo questions of statutory interpretation. *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424; 801 NW2d 889 (2010).

In pertinent part, MCL 38.1386, § 86 of PSERA, states:

> (1) A member whom the retirement board finds to have become totally and permanently disabled for purposes of employment by his or her reporting unit by reason of personal injury or mental or physical illness before termination of reporting unit service and employment shall receive a disability allowance if all of the following requirements are met:
>
> (a) The member has not met age and service requirements of section 81(1)(a) or (b) or, if the member first became a member on or after July 1, 2010, the member has not met age and service requirements of section 81c(1).
>
> (b) The member has at least 10 years of credited service in effect before termination of employment.

> (c) The member or reporting unit makes written application to the retirement board not more than 12 months after the date the member terminated public school employment.
>
> (d) The person undergoes an examination by 1 or more practicing physicians or medical officers designated by the retirement board who certify to the retirement board that the member is totally and permanently disabled for performing the duties for the member's position or similar position for which the member is qualified by reason of training, experience, or both.

There is no dispute that petitioner met the age and service requirements and that she had filed her application within the correct 12-month period after she left public school employment. The only requirement at issue is Subsection (1)(d).

While this presents a question of first impression with respect to PSERA, this Court has considered a similar provision in the State Employees' Retirement Act, MCL 38.1 *et seq*., in *Polania v State Employees' Retirement Sys*, 299 Mich App 322; 830 NW2d 773 (2013). Although the language at issue in *Polania* is slightly different than that in this case, it nevertheless creates the same requirement: specifically, certification of total and permanent disability by an IMA is required to receive a nonduty disability retirement benefit.

In *Polania*, this Court concluded that, in the absence of that certification, the retirement board had no authority to grant the nonduty disability retirement benefits and the circuit court was obligated to affirm that determination. This Court reasoned:

> The Board correctly understood that under the plain meaning of MCL 38.24(1)(b), Polania had to have such a certification before the Board could retire her. Because the record showed that both the medical advisors—one who evaluated her mental health and one who evaluated her

> physical health—refused to certify that Polania was totally and permanently disabled, the Board properly determined that it did not have the authority to grant Polania's request for retirement benefits and, on that basis, denied her claim. The Board did not have to examine the competing medical evidence to determine whether it should exercise its discretion—under the facts of this case, it had no discretion to grant Polania's request for benefits. For these reasons, the trial court erred when it determined that the Board's interpretation of MCL 38.24(1)(b) was incorrect. Moreover, there was no dispute that the medical advisors did not certify that Polania was totally and permanently disabled. As such, there was competent, material, and substantial evidence to support the Board's decision and the trial court erred when it determined otherwise. Consequently, the trial court had to affirm the Board's decision to deny Polania's request for benefits. [*Id.* at 333.]

We must reach the same conclusion here. Because there is no dispute regarding the lack of certification by the IMA, respondent was obligated to deny petitioner's application for nonduty disability retirement benefits. And, therefore, the circuit court was obligated to affirm that determination because there was competent, substantial, and material evidence of the lack of certification.

In conclusion, we reiterate the following observation made in *Polania*, 299 Mich App at 334, regarding the statutory scheme:

> This is not to say that we are unsympathetic to the trial court's concerns; there may be powerful incentives—whether conscious or subconscious—for a medical advisor in the Board's employ to refuse to certify employees with a total and permanent disability. And it seems inequitable that an employee who has substantial evidence that he or she is totally and permanently disabled is nevertheless precluded under MCL 38.24(1)(b) from seeking review of a medical advisor's refusal to certify his or her disability.

> This is especially true when, as here, the employee's evidence is founded on his or her long-time treating physicians' opinions and the Board's decision is dictated by the opinion of a medical advisor who had never examined the employee. But this Court—like the Board itself—is not at liberty to ignore the Legislature's policy choices simply because we might find them to be unjust or unwise. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012).

Reversed and remanded to the circuit court for entry of an order affirming respondent's decision. Respondent may tax costs. MCR 7.219(A). We do not retain jurisdiction.

SAWYER, P.J., and HOEKSTRA, J., concurred.

BECKERING, J. (*concurring*). I concur in the result only.

PEOPLE v WINTERS

Docket No. 333009. Submitted July 11, 2017, at Lansing. Decided July 18, 2017, at 9:05 a.m. Affirmed in part and vacated in part 501 Mich 321.

George W. Winters pleaded no contest in the Mason Circuit Court to charges of second-degree arson, MCL 750.73(1), and attempted arson, MCL 750.92, in connection with his burning and attempted burning of tents at a homeless campsite. The court, Susan K. Sniegowski, J., sentenced defendant as a third-offense habitual offender, MCL 769.11, to serve concurrent prison terms of 8 to 40 years for the arson conviction and 2 years and 10 months to 10 years for the attempted-arson conviction. The court denied defendant's subsequent motion to withdraw his plea. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by denying defendant's motion to withdraw his plea on the ground that the court had failed to comply with MCR 6.302(B)(2). MCR 6.302(B)(2) provides that the court must inform a defendant offering to plead guilty or *nolo contendere* of the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law. When a defendant is subject to an enhanced sentence as a habitual offender, that enhanced sentence is part of the maximum prison sentence described in MCR 6.302(B)(2). Although defendant was incorrectly informed that the maximum term of imprisonment for the attempted-arson charge was 20 years when the correct maximum was 10 years, because defendant was not told that he was facing a lesser sentence than he actually was, he cannot establish that he was prejudiced by the error and reversal is not required on that ground.

2. The trial court did not abuse its discretion by denying defendant's motion to withdraw his plea on the ground that the court had failed to comply with MCR 6.302(B)(3). MCR 6.302(B)(3) requires the court to advise a defendant offering to plead guilty or *nolo contendere* of the rights that he or she will give up by doing so and to determine that defendant has understood. MCR 6.302(B)(3) further provides that these requirements

may be satisfied by a writing on a form approved by the State Court Administrative Office, but only if the court addresses the defendant and obtains an oral statement from the defendant on the record that the rights were read and understood and that he or she waived those rights. Defendant signed an advice-of-rights form that recited the rights contained in MCR 6.302(B)(3) verbatim. Defendant affirmed that these rights were read to him, that he understood them, and that he understood he was relinquishing the listed rights by pleading guilty. The fact that defendant did not or was not able to personally read the advice-of-rights form did not render this procedure faulty because MCR 6.302(B) does not specify a reader; it requires only that the rights on the form have been read and understood. Defendant stated that the rights were read to him, that he understood them, and that he had no questions about them. Moreover, the trial court specifically asked defense counsel if he was satisfied that the requirements of MCR 6.302(B) had been met. Counsel stated that he was satisfied, and defendant voiced no disagreement.

3. Defendant cannot establish that he received ineffective assistance of counsel on the ground that trial counsel failed to object to both the error regarding the maximum sentence he was facing for attempted arson and the method the trial court used to satisfy MCR 6.302(B)(3). Although the trial court did incorrectly advise that the maximum sentence for attempted arson was 20 years, defendant could not show that he was prejudiced by the court's error or that the result of the proceeding would have been different had counsel objected. Additionally, because the court complied with the requirements of MCR 6.302(B)(3), counsel could not be faulted for not raising what would have been a futile objection.

Affirmed.

CRIMINAL LAW — PLEAS OF GUILTY OR NO CONTEST — PREREQUISITES — ADVICE-OF-RIGHTS FORM.

A defendant need not have personally read the advice-of-rights form referred to in MCR 6.302(B)(3) to effectively plead guilty or no contest to a criminal charge; MCR 6.302(B) requires only that the rights on the form have been read and understood.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Paul R. Spaniola*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for defendant.

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

PER CURIAM. Defendant, George W. Winters, appeals by leave granted[1] his plea-based convictions of second-degree arson, MCL 750.73(1) (willful or malicious burning of a dwelling), and attempted arson, MCL 750.92 (attempt to commit a crime). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to serve concurrent prison terms of 8 to 40 years for the arson conviction and 2 years and 10 months to 10 years for the attempted-arson conviction. Defendant's convictions stem from his burning and attempted burning of tents located at a homeless campsite. We affirm.

Defendant's appeal is focused on the circumstances surrounding his entry of a no-contest plea. MCR 6.302 governs guilty- and no-contest plea proceedings. *People v Blanton*, 317 Mich App 107, 118; 894 NW2d 613 (2016). Pursuant to the court rule, a "court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out [MCR 6.302(B) through (E)]." MCR 6.302(A). Defendant argues that he should have been allowed to withdraw his plea because the trial court did not comply with Subrules (B)(2) and (B)(3). Defendant raised these same arguments below in a motion to withdraw his plea,

[1] *People v Winters*, unpublished order of the Court of Appeals, entered July 1, 2016 (Docket No. 333009).

which the court denied. We review the court's decision for an abuse of discretion. *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012). A trial court abuses its discretion when its decision results in "an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

While strict compliance with MCR 6.302 is not essential, our Supreme Court has applied the doctrine of substantial compliance and held that whether a particular departure from MCR 6.302 requires reversal or remand for additional proceedings will depend on the nature of the noncompliance. *People v Plumaj*, 284 Mich App 645, 649; 773 NW2d 763 (2009). This Court considers the record as a whole to determine whether a guilty plea was made knowingly and voluntarily. *Id*.

MCR 6.302(B)(2) provides that a defendant offering to plead guilty or *nolo contendere* must be informed by the court of "the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c[.]" "[W]hen a defendant is subject to an enhanced sentence as an habitual offender, that enhanced sentence is part of the maximum prison sentence described in MCR 6.302(B)(2)." *People v Brown*, 492 Mich 684, 701; 822 NW2d 208 (2012). Defendant asserts, and the prosecution agrees, that he was misinformed by the court about the possible sentencing facing him if he entered a plea for attempted arson. Specifically, he was told that his maximum term of imprisonment for the attempted-arson charge was 20 years when the correct maximum was 10 years.[2]

[2] Under MCL 750.73(3), "[s]econd degree arson is a felony punishable by imprisonment for not more than 20 years . . . ." The attempt statute

Defendant argues that, given this error, he did not understand the consequences of his plea.

"[A] defendant entering a plea must be fully aware of the direct consequences of the plea." *Cole*, 491 Mich at 333 (quotation marks and citations omitted). "The most obvious direct consequence of a conviction is the penalty to be imposed. It is, therefore, well-recognized that the defendant must be apprised of the sentence that he will be forced to serve as the result of his guilty plea and conviction." *Id*. at 334 (quotation marks and citation omitted). This principle is embodied in MCR 6.302(B)(2).

But a misstatement of the maximum possible sentence does not require reversal if no prejudice is shown. *People v Broden*, 147 Mich App 470, 472; 382 NW2d 799 (1985) (involving a challenge under GCR 1963, 785.7(1)(b)[3] to a plea-based conviction), rev'd on other grounds 428 Mich 343 (1987). See also *Guilty Plea Cases*, 395 Mich 96, 113; 235 NW2d 132 (1975) ("Non-

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provides that if a person is convicted of attempting a crime punishable by more than five years' imprisonment, the maximum penalty is "imprisonment in the state prison not more than 5 years . . . ." MCL 750.92(2). A court may sentence a third-offense habitual offender "to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense . . . ." MCL 769.11(1)(a). Therefore, the maximum penalty defendant was facing for the attempted-arson charge was 10 years.

[3] At the time, GCR 1963, 785.7 provided as follows:

> A defendant may plead guilty or nolo contendere only with the court's consent. Prior to accepting the plea, the court shall personally carry out subrules 785.7(1)-(4).
>
> (1) An Understanding Plea. Speaking directly to the defendant, the court shall tell him:
>
> * * *
>
> (b) the maximum possible prison sentence for the offense[.]

compliance with a requirement of Rule 785.7[4] may but does not necessarily require reversal."). Because defendant was not told that he was facing a shorter sentence than he actually was, he cannot show that he was prejudiced. See *People v Shannon*, 134 Mich App 35, 38; 349 NW2d 813 (1984) (holding that there was no possibility the defendant was prejudiced when he was told the maximum possible penalty was greater than it actually was).

The Due Process Clause requires that pleas be knowing and voluntary because a "no-contest or a guilty plea constitutes a waiver of several constitutional rights . . . ." *Cole*, 491 Mich at 332. MCR 6.302(B) addresses what constitutionally protected trial rights a defendant must be told he or she will be relinquishing if his or her plea is accepted:

> Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
>
> * * *
>
> (3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:
>
> (a) to be tried by a jury;
>
> (b) to be presumed innocent until proved guilty;
>
> (c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;
>
> (d) to have the witnesses against the defendant appear at the trial;

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[4] At the time, GCR 1963, 785.7(1)(b) required the court to inform a defendant of "the maximum sentence and the mandatory minimum sentence, if any, for the offense to which the plea is offered[.]"

> (e) to question the witnesses against the defendant;
>
> (f) to have the court order any witnesses the defendant has for the defense to appear at the trial;
>
> (g) to remain silent during the trial;
>
> (h) to not have that silence used against the defendant; and
>
> (i) to testify at the trial if the defendant wants to testify.

MCR 6.302(B) goes on to provide a method for satisfying the rule:

> The requirements of subrule[] (B)(3) . . . may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

In this case, defendant signed an advice-of-rights form. It recites the rights contained in MCR 6.302(B)(3) verbatim. Defendant affirmed that these rights were read to him, that he understood them, and that he understood he was relinquishing these rights by pleading guilty.

Defendant argues that this procedure was faulty because MCR 6.302(B) requires that he personally read the advice-of-rights form, which he maintains was not possible given his limited ability to read. MCR 6.302(B) does not specify a reader—only that the rights on the form were read and understood.[5] Defendant stated that the rights "were read to me" and that he

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[5] The transitive verb "read" is defined to mean "to receive or take in the sense of (as letters or symbols)," "to become acquainted with," and "to learn from what one has seen or found in writing or printing[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed).

understood them and had no questions about them. Moreover, the trial court specifically asked defendant's counsel if he was satisfied that the requirements of MCR 6.302(B) had been met. Counsel stated that he was satisfied, and defendant voiced no disagreement.[6]

Additionally, defendant argues that he received ineffective assistance of counsel because trial counsel failed to object to both the error regarding the maximum sentence he was facing for attempted arson and the method the trial court used to satisfy MCR 6.302(B)(3). As discussed, although the trial court did incorrectly advise that the maximum sentence for attempted arson was 20 years, defendant cannot show that he was prejudiced by the court's error. He also cannot show that the result of the proceeding would have been different had counsel objected. Additionally, because the court complied with the requirements of MCR 6.302(B)(3), counsel cannot be faulted for not raising what would have been a futile objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

We affirm.

MARKEY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ., concurred.

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[6] Defendant also argues that a signature on a form does not make a plea knowing and understanding by itself. But the trial court did not indicate that it was relying on defendant's signature to determine that his plea was understandingly and knowingly made. Rather, the court relied on the signed waiver and defendant's oral assurances that the rights were read to him and that he understood them.

PEOPLE v JACKSON

Docket No. 332307. Submitted July 6, 2017, at Grand Rapids. Decided July 25, 2017, at 9:00 a.m. Leave to appeal sought.

Antjuan P. Jackson was charged in the Kalamazoo Circuit Court with two counts of armed robbery, MCL 750.529, and two counts of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1), in connection with the robbery of three women by multiple men at gunpoint. Following a jury trial, he was found not guilty of the two felony-firearm charges, and the court granted a mistrial on the armed-robbery charges when the jury was unable to reach a verdict. Defendant was thereafter convicted following his plea of guilty to one count of unarmed robbery, MCL 750.530, and was sentenced within the guidelines recommended minimum sentence range by the court, J. Richardson Johnson, J., to 8 to 22 years and 6 months' imprisonment. When scoring the sentencing guidelines, the circuit court assessed 15 points for Offense Variable (OV) 1 (aggravated use of a weapon), MCL 777.31; 5 points for OV 2 (lethal potential of weapon possessed or used), MCL 777.32; and 25 points for OV 13 (pattern of continuing criminal conduct), MCL 777.43. The Court of Appeals denied defendant's delayed application for leave to appeal his sentence, but the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted.

The Court of Appeals *held*:

1. A trial court must assess 25 points under OV 13 when a defendant's criminal conduct within five years of the sentencing offense establishes a continuing pattern of felonious criminal activity involving three or more crimes against a person; all crimes within a five-year period, including the sentencing offense, are counted regardless of whether the offense resulted in a conviction. For purposes of calculating the sentencing guidelines, MCL 777.19(2) provides that for an attempt to commit a felony enumerated in MCL 777.11 *et seq*. the offense category is the same as the attempted offense. Although it was unclear whether defendant's attempted resisting or obstructing convictions were for violating MCL 750.81d(1) or MCL 750.479(2), it made no difference with

regard to scoring the guidelines because both offenses are categorized as crimes against a person and are Class G felonies. Because they are both Class G felonies, MCL 777.19(3) requires that an attempt conviction for either offense be scored as a Class H felony. Accordingly, even though defendant's attempt convictions were misdemeanors, the circuit court correctly included those offenses as felonious criminal activity against a person when it scored OV 13, and it correctly assessed 25 points for OV 13.

2. A trial court may assess 15 points for OV 1 when a firearm was pointed at or toward a victim during the commission of a crime. In multiple-offender cases, if one offender is assessed points for the presence or use of a weapon, all the offenders must be assessed the same number of points. A trial court may assess 5 points for OV 2 when the offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon during the offense, and the trial court must assess all offenders the same number of points if one offender in a multiple-offender case is assessed points for possessing a weapon. The robbery at issue in this case involved multiple offenders. Defendant's codefendant pleaded guilty to two counts of armed robbery and at sentencing was assessed 15 points for OV 1 and 5 points for OV 2. Even though defendant was acquitted of the two felony-firearm charges, the trial court correctly assessed 15 points for OV 1 and 5 points for OV 2 because both offense-variable statutes contain multiple-offender provisions that required the court to assess the same number of points that defendant's codefendant received for those variables. And regardless of the statutes' requirements, the circuit court did not clearly err in its factual findings related to the offense variables, and the court's factual findings were supported by a preponderance of the evidence; when scoring OV 1 and OV 2, the court appropriately considered the facts underlying the felony-firearm charges of which defendant was acquitted.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — SCORING — OFFENSE VARIABLE 13 — ATTEMPTS TO COMMIT FELONIES.

A trial court must assess 25 points under Offense Variable 13 when a defendant's criminal conduct within five years of the sentencing offense establishes a continuing pattern of felonious criminal activity involving three or more crimes against a person; a misdemeanor attempt conviction may serve as the basis for a finding of felonious criminal activity against a person if the offense category of the attempted offense was a crime against a person and the class of the attempted offense was a felony under MCL 777.19 (MCL 777.43).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jeffrey S. Getting*, Prosecuting Attorney, and *Mark A. Holsomback*, Assistant Prosecuting Attorney, for the people.

Antjuan P. Jackson, *in propria persona*, and State Appellate Defender (by *Jacqueline Ouvry*) for defendant.

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

PER CURIAM. Defendant, Antjuan Pierre Jackson, appeals by delayed leave granted[1] the sentence imposed for his plea-based conviction of unarmed robbery in violation of MCL 750.530. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 8 to 22 years and 6 months' imprisonment. Defendant contends that he is entitled to resentencing on the ground that the trial court incorrectly scored Offense Variable (OV) 1 (aggravated use of a weapon), OV 2 (lethal potential of weapon possessed or used), and OV 13 (pattern of continuing criminal conduct). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arose from a robbery that took place on January 20, 2014. The victims of the robbery testified at defendant's initial trial. Alexis Graham testified that on the night of the robbery she

[1] Defendant filed a delayed application for leave to appeal challenging his sentence, which application this Court denied. *People v Jackson*, unpublished order of the Court of Appeals, entered June 6, 2016 (Docket No. 332307). Defendant then filed an application for leave to appeal in the Michigan Supreme Court; in lieu of granting the application, the Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Jackson*, 500 Mich 894 (2016).

was in her apartment at the Landings Apartments in Kalamazoo, Michigan, along with her roommate Janyce Mack and Madeleine Dirette. At 10:30 p.m., someone knocked on the door. Graham looked through the peephole and saw Tyrus Phillips, whom she recognized as someone who had visited Mack on occasion to buy marijuana. She opened the door and three gunmen rushed into the apartment. Graham fell backwards and was pulled by her shoulder and hair into Mack's bedroom down the hall. Complying with repeated orders to look only at the floor, she caught just a glimpse of the men. Nevertheless, she saw that the main gunman had a silver gun. When she heard the main gunman talking to Mack, she believed he was a man she knew as "Rico." Graham testified that she recognized Rico from his voice and clothes, and she made an in-court identification of defendant as the person she knew as Rico. Graham testified that she was confident that defendant was involved in the robbery. She also testified that one of the gunmen held a gun to her head and that she believed the gun was real because she could feel its weight and the coldness of the metal.

Dirette testified that when Graham opened the door on the night of the robbery, she could hear the sound of people barging through the door loudly and Graham being pushed against the wall. A man with a shiny silver gun came into the room and told her to get on the floor. Three men wearing ski masks came into the bedroom. All three men carried guns and threatened to shoot. Dirette did not recognize any of the men. On cross-examination, Dirette admitted that she could not be sure if the guns were real, but she assumed that they were. On redirect examination, Dirette explained that the man with the silver-looking gun was the leader, and she stated that Mack begged the man not to shoot her. The other men had black guns and pointed them at her and Graham.

Mack testified that she knew at the time of the incident that the first robber was defendant. Defendant was pointing a silver gun at her with his finger on the trigger. She recognized defendant by the jeans and boots he was wearing; he had worn them the night before the robbery when he came to the apartment and bought marijuana from her. She also recognized defendant during the robbery by the tone of his voice and his choice of words, by the way he walked, and by his mannerisms. Defendant held his pants up with one hand and held the gun in the other hand. Mack testified that she was quite certain that defendant had a real gun. She observed that the gun was metal and that defendant pointed it at her and ordered her onto the floor. Defendant ransacked the room and took her lockbox holding her marijuana and money, a prescription painkiller called Norco, her daughter's phone, her phone, and Graham's phone.

Defendant was arrested and charged with two counts of armed robbery and two counts of carrying a firearm during the commission of a felony (felony-firearm). He was tried by a jury in the summer of 2014. The jury acquitted him of the two felony-firearm counts, but it deadlocked on the armed-robbery counts, so the trial court declared a mistrial on the two armed-robbery counts. Before a second trial on those counts, defendant entered into the guilty plea already discussed. He now challenges the guidelines scoring used in determining his sentence.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review for clear error the trial court's factual determinations used for sentencing purposes, and those facts must be supported by a preponderance of

the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the facts, as found, are adequate to satisfy the statutory scoring conditions. *Id*. When calculating the sentencing guidelines scores, a trial court may consider all evidence in the record, including but not limited to the presentence investigation report (PSIR) and admissions made by a defendant during a plea proceeding. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). The Michigan Supreme Court recently clarified that sentencing courts must determine the applicable minimum sentence range under the sentencing guidelines and take that range into account when imposing a sentence, but the guidelines are advisory only. *People v Lockridge*, 498 Mich 358, 364-365; 870 NW2d 502 (2015).

B. OV 13

Defendant first contends that the trial court incorrectly scored OV 13 at 25 points by improperly taking into account as scoreable felonies his two prior convictions for attempted resisting or obstructing a police officer. Defendant argues that the trial court should not have considered those convictions because they were only misdemeanor convictions punishable by less than one year in jail. We disagree.

A trial court assesses points for OV 13 when a defendant's criminal conduct within five years of the sentencing offense establishes a continuing pattern of felonious criminal behavior. MCL 777.43 governs the scoring of OV 13 and provides, in relevant part:

> (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.

In order to assess 25 points for OV 13, the trial court was required to find that defendant had engaged in a pattern of felonious criminal activity by committing three or more crimes against a person (including the January 20, 2014 sentencing offense) within five years of the sentencing offense. MCL 777.43(1)(c). Defendant did not dispute his criminal record, which included convictions for the following crimes: (1) attempting to resist or obstruct a police officer on November 18, 2010, (2) attempting to resist or obstruct a police officer on March 5, 2011, (3) possession of less than 25 grams of cocaine on May 17, 2013, and (4) resisting or obstructing a police officer on May 17, 2013. He had also been charged with two counts of armed robbery committed on January 20, 2014, which charges were dismissed as

part of the plea deal that resulted in defendant's conviction of one count of unarmed robbery in the instant matter.

Defendant argues that his attempted resisting or obstructing offenses cannot be considered for purposes of scoring OV 13 because the offenses were misdemeanors punishable by less than one year in jail. However, the sentencing guidelines specifically describe how trial courts must treat attempt offenses for scoring purposes. MCL 777.19 provides:

> (1) This chapter applies to an attempt to commit an offense enumerated in this part if the attempted violation is a felony. This chapter does not apply to an attempt to commit a class H offense enumerated in this part.
>
> (2) For an attempt to commit an offense enumerated in this part, the offense category is the same as the attempted offense.
>
> (3) For an attempt to commit an offense enumerated in this part, the offense class is as follows:
>
> (a) Class E if the attempted offense is in class A, B, C, or D.
>
> (b) Class H if the attempted offense is in class E, F, or G.

Pursuant to MCL 777.19(2), the trial court was required to consider defendant's attempted resisting or obstructing offenses in the same offense category as the offense of actually resisting or obstructing a police officer. For that reason, defendant's attempted resisting or obstructing offenses are to be considered crimes against a person. See MCL 777.16d and MCL 777.16x.

With regard to the crime class of an attempted offense, MCL 777.19(3) controls. It is not clear from the record whether defendant's convictions were for attempts to violate MCL 750.81d(1) or MCL 750.479(2),

but that makes no difference for purposes of scoring the sentencing guidelines. Under MCL 777.16d, resisting or obstructing a police officer in violation of MCL 750.81d(1) is a Class G felony. Similarly, under MCL 777.16x, resisting or obstructing a police officer in violation of MCL 750.479(2) is a Class G felony. Consequently, pursuant to MCL 777.19(3)(b), because resisting or obstructing a police officer is a Class G felony, the trial court was required to consider defendant's attempted resisting or obstructing a police officer offenses as Class H felonies when scoring the sentencing guidelines. Therefore, the trial court correctly counted defendant's attempted resisting or obstructing offenses as felonious criminal activity in its OV 13 score determination.[2] Because defendant had three or more felony crimes against a person within a five-year period of the

[2] Defendant argues that the issue is "not whether the offense is a felony for purposes of scoring the guidelines for a sentencing offense but rather, whether the act committed is itself felonious," given that MCL 777.43 requires "felonious criminal activity." Thus, defendant argues, because misdemeanor activity is not felonious activity, and because MCL 777.43 requires the sentencing court to look at acts "without regard to whether the offense resulted in conviction," the trial court "may not infer felonious criminal activity that is not in the record." Defendant's argument lacks merit, however, because MCL 777.19(2) specifically defines what constitutes felonious activity involving attempted offenses for purposes of sentencing. Although not binding, this Court in *People v Mosher*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2014 (Docket No. 312996), drew the same conclusion, which the trial court in the instant case found persuasive, as do we. In *Mosher*, this Court similarly refuted the defendant's argument that MCL 777.19 applies to sentencing offenses but is silent with regard to prior offenses. *Id*. at 6. In so doing, this Court correctly cited *People v Wright*, 483 Mich 1130 (2009) (remanding the case to the trial court for resentencing because the defendant's prior conviction for attempted assault with intent to do great bodily harm was to be treated as a Class E offense, according to MCL 777.19(3)(a), for purposes of scoring the guidelines). *Mosher*, unpub op at 6.

sentencing offense, including the sentencing offense itself, the trial court properly assessed 25 points for OV 13.[3]

C. OV 1 AND OV 2

Defendant argues in a Standard 4 brief[4] that the trial court erred by assessing points for OV 1 and OV 2 because the jury acquitted him of the felony-firearm charges.

A trial court assesses points for OV 1 for an offender's or multiple offenders' aggravated use of a weapon during the commission of a crime. *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). MCL 777.31 governs OV 1 scoring and, in relevant part, provides:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate

[3] The trial court correctly excluded offenses committed outside the permissible five-year period set by MCL 777.43(2)(a), as well as defendant's conviction for cocaine possession, which was not a crime against a person. See MCL 777.13m. The trial court also correctly excluded one count of armed robbery that had been dismissed as part of defendant's plea deal because the court had used it when scoring OV 12. See 777.43(2)(c). The trial court appropriately considered the sentencing offense, defendant's prior conviction for resisting or obstructing a police officer, and defendant's two attempted resisting or obstructing offenses when scoring OV 13 at 25 points.

[4] A "Standard 4" brief refers to the brief a defendant may file *in propria persona* pursuant to Standard 4 of Michigan Supreme Court Administrative Order No. 2004-6, 471 Mich c, cii (2004).

battery when threatened with a knife or other cutting or stabbing weapon ..... 15 points

(d) The victim was touched by any other type of weapon ..... 10 points

(e) A weapon was displayed or implied ..... 5 points

(f) No aggravated use of a weapon occurred .. 0 points

(2) All of the following apply to scoring offense variable 1:

(a) Count each person who was placed in danger of injury or loss of life as a victim.

(b) In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.

(c) Score 5 points if an offender used an object to suggest the presence of a weapon.

Points are assessed for OV 2 when an offender possessed or used a weapon during the commission of a crime, and the amount of points assessed depends on the lethal potential of the weapon. *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). MCL 777.32 governs the points assessed for OV 2 and, in relevant part, provides:

(1) Offense variable 2 is lethal potential of the weapon possessed or used. Score offense variable 2 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:

* * *

(d) The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon ..... 5 points

(2) In multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points.

> (3) As used in this section:
>
> * * *
>
> (c) "Pistol", "rifle", or "shotgun" includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle.

Each multiple-offender provision of these statutes states that if one offender is assessed points under the variable, "all offenders shall be assessed the same number of points." MCL 777.31(2)(b); MCL 777.32(2). In *Morson*, 471 Mich at 260, the Michigan Supreme Court held that the plain language of MCL 777.31(2)(b) "requires the sentencing court to assess the same number of points to multiple offenders." Therefore, trial courts have no scoring discretion in multiple-offender cases.

In the instant case, the commission of the January 20, 2014 robbery involved multiple offenders, one of whom was defendant's codefendant, Phillips. The Michigan Department of Corrections provided the trial court a PSIR that scored OV 1 at 15 points and OV 2 at 5 points. In a New Conviction Update Report, the department explained that defendant's OV 1 and OV 2 scores were based on the fact that Phillips had pleaded guilty to two counts of armed robbery arising out of the incident and had been assessed 15 points for OV 1 and 5 points for OV 2. Thus, the trial court had information that another offender involved in the commission of the robbery had been assessed points for OV 1 for the aggravated use of a firearm and points for OV 2 for possession or use of a firearm. Consequently, pursuant to *Morson*, the trial court correctly assessed defendant

the same number of points for OV 1 and OV 2 as had been assessed against Phillips, regardless of defendant's acquittal of the felony-firearm charges. Although the trial court did not state on the record that it calculated defendant's scores for OV 1 and OV 2 based on his codefendant's OV 1 and OV 2 scores, our Supreme Court's holding in *Morson* required it to do so; therefore, it cannot be held to have erred for so doing.

Even if the scoring decisions for Phillips did not bind the trial court, the court did not commit clear error in its factual determinations relevant to scoring OV 1 at 15 points and OV 2 at 5 points, and a preponderance of the evidence supported the court's findings.[5] See *Hardy*, 494 Mich at 438. At defendant's sentencing, the trial court noted that it had heard the evidence at trial, which it found to be credible, and was satisfied that a real firearm was pointed at or toward a victim. Each victim testified at trial that she saw masked men pointing guns at them. Each victim similarly described the guns' general physical appearances. Each felt that the robbers threatened them with the guns during the commission of the robbery and testified that she feared for her life. Graham testified that she felt the weight and cold metal of one robber's gun on her skull. Graham and Mack each testified confidently that they recognized defendant as the lead gunman by his voice and apparel. On the basis of a de novo review of the record, we conclude that the facts, as found, were

[5] A trial court is permitted to consider the facts underlying an acquittal in sentencing, *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992), and need only find facts to support its scoring decisions by a preponderance of the evidence, *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Thus, defendant's acquittal of the felony-firearm charges did not prohibit the trial court from assessing points for OV 1 and OV 2.

adequate to support the trial court's scoring decisions for both OV 1 and OV 2. *Id*.

Because the trial court did not err in its scoring of OV 1 and OV 2, we need not address defendant's argument that the trial court's minimum sentence calculation was incorrect and resulted in a disproportionate sentence. The trial court's minimum sentence was within the appropriate guidelines range, and thus, it is presumptively proportionate and must be affirmed. MCL 769.34(10); *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011). See also *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016).

Affirmed.

SAWYER, P.J., and HOEKSTRA and BECKERING, JJ., concurred.

DC MEX HOLDINGS LLC v AFFORDABLE LAND LLC

Docket No. 332439. Submitted July 12, 2017, at Detroit. Decided July 25, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 977.

DC Mex Holdings LLC was awarded a $2.5 million judgment in the Oakland Circuit Court against Dale B. Fuller and Affordable Land LLC, jointly and severally, after Fuller, Fuller's companies, and DC Mex participated in some failed transactions involving land in Mexico. The judgment was affirmed in *DC Mex Holdings, LLC v Affordable Land, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2015 (Docket No. 318791). DC Mex then filed a request for a writ of nonperiodic garnishment from the cash value of a life insurance policy (approximately $73,000) that Fuller held with The Prudential Insurance Company of America, the named garnishee, and the writ was entered. Fuller moved to quash the writ of garnishment, and the court, Shalina D. Kumar, J., denied Fuller's motion. Fuller's application for leave to appeal in the Court of Appeals was granted.

The Court of Appeals *held*:

1. MCL 500.2207 generally governs life insurance policies obtained to insure the life of a husband or father for the benefit of his wife or his children, and MCL 500.2207(1) specifically exempts from an insured's creditors the proceeds, including the cash value, of the insured's life insurance policy payable to the spouse or children of the insured. Fuller objected to the writ of garnishment obtained by DC Mex against the cash value of his life insurance policy. He argued that MCL 500.2207(1) expressly exempted the cash value of his policy from his creditors in part because the cash value of his life insurance policy could not be garnished until the cash value was owed to him by Prudential, which could only happen if Fuller was to surrender his policy or make a withdrawal from the policy. Absent any demand for the cash value of the policy during his lifetime, the policy proceeds would go to Fuller's daughter upon Fuller's death. DC Mex argued that the Legislature made "cash value" a subset of "proceeds" by using the phrase "including the cash value thereof" and that proceeds only became relevant upon an insured's death. Therefore, according to DC Mex, MCL 500.2207(1) did not exempt

the cash value of Fuller's policy during his lifetime. However, the relevant portion of MCL 500.2207(1) does not refer to the insured's death or contain a requirement that the proceeds be from the death benefit. Although DC Mex argued that there were time signals elsewhere in the statutory language, the parts of MCL 500.2207 are divided by semicolons and the text of the statute does not indicate that a modifier in one part of the statute should be applied to other parts of the statute. DC Mex also argued that the definition of "proceeds" indicated that they would come to fruition only when the insured had died. The term "proceeds" means "the total amount brought in" and "the net amount received . . . after deduction of any discount or charges[.]" But even using this definition of "proceeds," the cash value of Fuller's life insurance policy was exempt from his creditors because the exemption from creditors provided by MCL 500.2207(1) does not just protect the cash value of his policy after his death. Rather, the protection from creditors extended to the cash value of Fuller's policy during his lifetime. Therefore, the trial court erred by denying Fuller's motion to quash the writ of garnishment.

2. Generally, a prevailing party is not entitled to an award of attorney fees and costs unless an award of fees and costs is expressly authorized by statute or court rule. MCR 2.114(F) states that a court must impose costs on a party if the court determines that the civil action or defense to the action was frivolous. MCL 600.2591 also authorizes the imposition of costs and fees when a party has pleaded a frivolous complaint or raised a frivolous defense. MCL 600.2591(3) defines the term "frivolous." Under the statute, "frivolous" means that at least one of the following conditions is met: (1) the party's primary purpose in bringing the claim or raising the defense was to harass, embarrass, or injure the prevailing party, (2) the party bringing the claim or raising the defense had no reasonable basis on which to believe that the facts underlying that party's legal position were true, and (3) the legal position taken by the party bringing the claim or raising the defense was devoid of arguable legal merit. Fuller made a cursory argument in the trial court and in this Court—he said the law was clear on the matter and that DC Mex's efforts to obtain a writ of garnishment were primarily to harass and injure Fuller and that DC Mex's legal position was void of arguable legal merit. There was no evidence that DC Max sought the writ for the primary purpose of harassing Fuller. Rather, the record suggested that DC Mex sought the writ in order to collect money toward the judgment owed by Fuller. In addition, because the statutory

language is less than clear, DC Max's position had arguable legal merit. The trial court properly denied Fuller's request for fees and costs.

Reversed and remanded.

INSURANCE — LIFE INSURANCE POLICY — CASH PROCEEDS — EXEMPT FROM CREDITORS.

The proceeds of a life insurance policy payable to the spouse or children of the insured, including the cash value of the policy, are exempt from creditors under MCL 500.2207(1); the exemption is not limited to those proceeds paid to a beneficiary after an insured's death; that is, the cash value of a life insurance policy is exempt from the insured's creditors during the insured's lifetime.

Maddin, Hauser, Roth & Heller, PC (by *Jonathan B. Frank*), for DC Mex Holdings, LLC.

Elias & Elias, PC (by *Frederick D. Elias*), and *Robert L. Levi, PC* (by *Robert L. Levi*), for Dale Fuller.

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

PER CURIAM. On October 7, 2013, plaintiff, DC Mex Holdings LLC, was awarded a $2.5 million judgment against defendant, Affordable Land LLC, and defendant-appellant, Dale B. Fuller, jointly and severally. After this Court affirmed the judgment on appeal,[1] DC Mex filed a request for a writ of nonperiodic garnishment naming the Prudential Insurance Company of America as the garnishee. After the writ of garnishment was entered, Fuller moved to quash it, but the trial court denied the motion. Thereafter, Fuller filed an application for leave to appeal the order

[1] *DC Mex Holdings, LLC v Affordable Land, LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2015 (Docket No. 318791).

denying the motion, which this Court granted.[2] Because the trial court erred by denying the motion to quash the garnishment, we reverse and remand for further proceedings.

I. BASIC FACTS

Relevant to this appeal, DC Mex sought a writ of garnishment regarding any property or money that Prudential held belonging to Fuller, and the deputy clerk of the Oakland Circuit Court entered the writ. Subsequently, Prudential filed a disclosure indicating that Fuller owned an individual life insurance policy with an approximate cash value of $73,078.91. The disclosure also indicated that "[l]ife insurance may be exempt from garnishment under [MCL] 500.2207."

On January 27, 2016, Fuller filed an objection to the garnishment indicating that the funds were exempt and that the cash value did not represent a debt owed to him by Prudential. In Fuller's brief in support of the objection, he argued that the cash value of his life insurance policy was exempt under MCL 500.2207(1) because the policy was payable solely to his daughter. Fuller further argued that the garnishment statute only applied to obligations owing at the time of the writ, that he did not request a surrender of his policy or withdrawal of the cash value, and that the cash value was not owed to him. Therefore, Fuller requested that the trial court grant his objection and quash the writ of garnishment, and he further requested fees and costs under MCR 2.114(F) and MCL 600.2591.

On February 5, 2016, DC Mex filed a response to the objection. DC Mex argued that the cash value of a life

[2] *DC Mex Holdings LLC v Affordable Land LLC*, unpublished order of the Court of Appeals, entered September 28, 2016 (Docket No. 332439).

insurance policy was not protected under MCL 500.2207 during the insured's lifetime. According to DC Mex, under Fuller's interpretation, "a judgment debtor could simply 'park' all available cash in the 'cash value' portion of a life insurance policy and prevent a judgment creditor from collecting it, even though the judgment debtor could at any time retrieve some or all of the 'parked' cash." DC Mex did not dispute that MCL 500.2207 exempted life insurance proceeds, including the cash value, but under DC Mex's interpretation of MCL 500.2207, the exemption only applied when the money became payable (i.e., after the insured's death). DC Mex argued that the cash value was not exempt during Fuller's lifetime and that it was irrelevant that Fuller had not requested the cash value of the policy.

On February 10, 2016, the trial court held a hearing on the objection. Fuller argued that the cash value of a life insurance policy was only relevant during the insured's lifetime and that the statute specifically exempted the cash value. The trial court asked what would happen if the cash value was withdrawn during the lifetime, and Fuller responded that the cash could be garnished if he cashed out his policy. However, Fuller noted that he did not cash out his policy. Fuller argued that, in order for Prudential to owe him money, he would have to submit a request for the cash value. Fuller further argued that there was no basis for the garnishment, and he requested fees and costs. The trial court noted that it did not think the cash value could be garnished unless it was cashed out and that it did not "think [Fuller] should be forced to cash out his policy" because it would "take away his child's right to life insurance benefits . . . ." The trial court then asked DC Mex to correct it if it was wrong. Ultimately, the

trial court took the objection under advisement and allowed additional briefing.

After DC Mex and Fuller filed briefs supplementing their previous arguments, the trial court issued an opinion and order denying Fuller's objection to the writ of garnishment. The trial court relied on *Chrysler First Business Credit Corp v Rotenberg*, 789 F Supp 870, 873 (ED Mich, 1992) ("In the Court's view, the Michigan Supreme Court, if asked, would say that M.C.L.A. § 600.4011 and MCR 3.101(G)(1) permit a judgment creditor to garnish the cash value of an insurance policy, whether or not the insured has made a demand for payment."), and *Schenk Boncher & Prasher v Vanderlaan*, unpublished opinion per curiam of the Court of Appeals, issued August 28, 2003 (Docket No. 237690), pp 2-3 ("The plain and broad language of MCL 600.6104(3) allows for the satisfaction of a judgment out of any property, liquidated or unliquidated, that is not exempt."). Using these cases, the trial court held that the cash value of the life insurance policy was subject to garnishment. Although the trial court noted the argument under MCL 500.2207, it never specifically analyzed the argument.

II. GARNISHMENT

A. STANDARD OF REVIEW

Fuller argues that the trial court erred by denying his motion to quash the garnishment because MCL 500.2207 exempts the proceeds of his life insurance policy, including the cash value, from garnishment because it was payable to his daughter. "The proper interpretation and application of a statute is a question of law, which this Court reviews de novo." *Rogers v Wcisel*, 312 Mich App 79, 86; 877 NW2d 169 (2015).

> A court's primary goal when interpreting a statute is to discern legislative intent first by examining the plain language of the statute. Courts construe the words in a statute in light of their ordinary meaning and their context within the statute as a whole. A court must give effect to every word, phrase, and clause, and avoid an interpretation that renders any part of a statute nugatory or surplusage. Statutory provisions must also be read in the context of the entire act. It is presumed that the Legislature was aware of judicial interpretations of the existing law when passing legislation. When statutory language is clear and unambiguous, courts enforce the language as written. A statutory provision is ambiguous only when it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. [*Lee v Smith*, 310 Mich App 507, 509; 871 NW2d 873 (2015) (citations omitted).]

B. ANALYSIS

Fuller had a universal life insurance policy with Prudential. As outlined in the policy, Fuller could have surrendered the policy for its net cash value, which was defined as "the cash value less any contract debt" or zero if the contract was in default. Fuller could also make withdrawals, which would reduce the contract fund and involved charges and fees. The contract fund was explained in the policy as follows:

> When you make your first premium payment, the invested premium amount, less any charges due on or before that day, becomes your contract fund. Amounts are added to and subtracted from the contract fund as shown under Adjustments to the Contract Fund in the contract data pages. The contract fund is used to pay charges under this contract and will determine, in part, whether this contract will remain in force or go into default. The contract fund is also used to determine your loan and surrender values, the amount you may withdraw, and the death benefit.

Further, the policy provided that "[t]he cash value at any time is the contract fund less any surrender charge." Fuller had a "Type A" death benefit, which meant that if "the withdrawal would cause the net amount at risk . . . to increase, [Prudential] will reduce the basic insurance amount and, consequently, your death benefit to offset this increase." "The net amount at risk is used to determine the cost of insurance as described under Adjustments to the Contract Fund. It is equal to the death benefit . . . minus the contract fund." Therefore, a withdrawal would cause the contract fund to decrease and, in turn, would cause the net amount at risk to increase. With respect to the death benefit, the policy provided the following, in relevant part: "If this contract has a Type A death benefit, the death benefit on any date is equal to the greater of: (1) the basic insurance amount, and (2) the contract fund before deduction of any monthly charges due on that date, multiplied by the attained age factor that applies."

The policy also made the following relevant specifications: (1) "[t]he net cash value after withdrawal may not be less than or equal to zero after deducting (a) any charges associated with the withdrawal and (b) an amount that we estimate will be sufficient to cover the contract fund deductions for two monthly dates following the date of withdrawal"; (2) "[i]f the cash value is zero or less, the contract is in default"; and (3) "[w]e will pay a benefit to the beneficiary at the insured's death if this contract is in force at the time of that death; that is, if it has not been surrendered and it is not in default past the grace period."

MCL 500.2207(1), the statute governing the exemption at issue on appeal, provides as follows:

It shall be lawful for any husband to insure his life for the benefit of his wife, and for any father to insure his life for the benefit of his children, or of any one or more of them; and in case that any money shall become payable under the insurance, the same shall be payable to the person or persons for whose benefit the insurance was procured, his, her or their representatives or assigns, for his, her or their own use and benefit, free from all claims of the representatives of such husband or father, or of any of his creditors; and any married woman, either in her own name or in the name of any third person as her trustee, may cause to be insured the life of her husband, or of any other person, for any definite period, or for the term of life, and the moneys that may become payable on the contract of insurance, shall be payable to her, her representatives or assigns, free from the claims of the representatives of the husband, or of such other person insured, or of any of his creditors; and in any contract of insurance, it shall be lawful to provide that on the decease of the person or persons for whose benefit it is obtained, before the sum insured shall become payable, the benefit thereof shall accrue to any other person or persons designated; and such other person or persons shall, on the happening of such contingency, succeed to all the rights and benefits of the deceased beneficiary or beneficiaries of the policy of insurance, notwithstanding he, she or they may not at the time have any such insurable interest as would have enabled him, her or them to obtain a new insurance; *and the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured or to a trustee for the benefit of the wife, husband or children of the insured, including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured*; and said exemption shall apply to insurance heretofore or hereafter issued; and shall apply to insurance payable to the above enumerated persons or classes of persons, whether they shall have become entitled thereto as originally designated beneficiaries, by beneficiary designation subsequent to the issuance of the policy, or by assignment (except in case of transfer with intent to defraud creditors). [Emphasis added.]

Essentially, MCL 500.2207(1) provides a list of mandatory and permissive rules separated by semicolons.

The first portion expressly allows for a husband or father to obtain life insurance for the benefit of his wife or children. Next, the statute provides that any money payable under the life insurance policy is payable free from the husband's or father's creditors. Third, the statute provides that a married woman may insure her husband's life and that the money that becomes payable under the policy is free from her husband's creditors. Fourth, the statute allows for the designation of a contingent beneficiary. Fifth, the statute provides that the contingent beneficiary has the same rights as the primary beneficiaries even if the contingent beneficiary would not have an insurable interest necessary to obtain a new policy. Sixth, the statute provides an exemption from creditors that will be discussed in further detail below. Seventh, the statute provides that the exemption applies to insurance obtained before and after the statute's effective date. Finally, the statute provides that, in the absence of a fraudulent transfer, the exemption shall apply whether the beneficiary became entitled to the proceeds through an original designation, subsequent designation, or assignment.

The following portion of MCL 500.2207(1) is specifically at issue: "and the proceeds of any policy of life or endowment insurance, which is payable to the . . . children of the insured . . . , including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured[.]" Fuller argues that his life insurance policy was payable to his daughter and that, therefore, the cash value of his insurance policy was exempt from his creditors. At first blush, the statute appears to clearly exempt the cash value of

such an insurance policy. However, a closer reading demonstrates that the text is not so clear. DC Mex argues that MCL 500.2207(1) does not protect the cash value during the insured's lifetime because, by using the phrase "including the cash value thereof," the statute designates the cash value as a subset of proceeds, and proceeds only become relevant upon death.

MCL 500.2207 has roots dating back to the 1800s. Section 23 of 1869 PA 77 contains substantially similar language and provided:[3]

> It shall be lawful for any husband to insure his life for the benefit of his wife, and for any father to insure his life for the benefit of his children, or of any one or more of them; and in case that any money shall become payable under the insurance, the same shall be payable to the person or persons for whose benefit the insurance was procured, his, her or their representatives or assigns, for his, her or their own use and benefit, free from all claims of the representatives of such husband or father, or of any of his creditors; and any married woman, either in her own name or in the name of any third person as her trustee, may cause to be insured the life of her husband, or of any other person, for any definite period, or for the term of life, and the moneys that may become payable on the contract of insurance, shall be payable to her, her representatives or assigns, free from the claims of the representatives of the husband, or of such other person insured, or of any of his creditors; and in any contract of insurance, it shall be lawful to provide that on the decease of the person for whose benefit it is obtained, before the sum insured shall become payable, the benefit thereof shall accrue to any other person or persons desig-

[3] In fact, similar language can be traced back to 1848 PA 233. See 1848 PA 233 ("That it shall be lawful for any married woman . . . to cause to be insured for her sole use, the life of her husband or the life of any other person . . . and in case of her surviving her husband or such other person insured in her behalf, . . . the policy . . . shall be payable to her . . . free from the claims of the [insured's] representatives . . . or of any of his creditors . . . .").

> nated; and such other person or persons shall, on the happening of such contingency, become the lawful owner or owners of the policy of insurance, and entitled to enforce the same to the full extent of its terms, notwithstanding he, she or they may not at the time have any such insurable interest as would have enabled him, her or them to obtain a new insurance.

Eventually, 1927 PA 70 added text similar to the relevant portion of MCL 500.2207(1). That language was then codified in 1929 CL 12451, which the *Equitable Life* Court discussed. See *Equitable Life Assurance Society of the United States v Hitchcock*, 270 Mich 72, 80; 258 NW 214 (1935). As the *Equitable Life* Court explained,

> The statute . . . was later amended by [1927 PA 70] so as to add the following clause:
>
> > "And the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured, including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured." [*Id*., quoting 1927 PA 70.]

The Court further reasoned that "[a] subsequent amendment to the statute, by [1931 PA 170], extend[ed] the exemption to policies made payable to a trustee for the benefit of the wife, husband or children of the insured . . . ." *Id*. at 81. With respect to the amendment made by 1927 PA 70, the Court noted that the "amendment simply clarifies the meaning of the statute as originally worded, so as to specifically exempt all proceeds of the policies described in the original statute, whether such proceeds are realized through the surrender of the policy for its cash surrender value, or in any other manner." *Id*. at 80-81.

When the Insurance Code of 1956 was adopted, the Legislature kept much of the same language intact. In

fact, with the exception of adding "or to a trustee for the benefit of the wife, husband or children of the insured," the current language in the relevant portion of MCL 500.2207(1) is identical to the language in 1929 CL 12451. Compare MCL 500.2207(1) ("and the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured . . . , including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured . . . ."), with the language appearing in 1929 CL 12451 ("and the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured, including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured.").

We recognize that even though the Supreme Court interpreted the meaning of the relevant language in *Equitable Life*, the statement may have been dictum. "This Court is bound by stare decisis to follow the decisions of our Supreme Court." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). However, "[d]ictum is a judicial comment that is not necessary to the decision in the case," and it "does not constitute binding authority." *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246 (2014). "But if a court intentionally addresses and decides an issue that is germane to the controversy in the case, the statement is not dictum even if the issue was not decisive." *Id*.

We conclude that the statement in *Equitable Life*, although not decisive to the case, was germane to the controversy. The policy at issue in *Equitable Life* was a term policy, did not have a cash surrender value, and was originally payable to the estate of the insured. *Equitable Life*, 270 Mich at 74. The insured "was

hopelessly insolvent" and attempted to change the beneficiary of the term policy to his two minor sons a day or two before committing suicide. *Id*. at 75. The issue on appeal in *Equitable Life* was whether a change in beneficiary for a life insurance policy was a fraudulent conveyance. *Id*. at 76. The Court explained that "the proper rule [when there was a fraudulent conveyance] is to limit creditors to a recovery of the cash surrender value of the policy at the time of the transfer." *Id*. at 78.

Subsequently, the Court discussed 1929 CL 12451 and noted, "If the policy in the instant case had a cash surrender value at the time of the transfer, the proceeds of the policy, to the extent of such cash value, would not have been exempt from attacks of creditors of the insured under [1929 CL 12451] . . . ." *Id*. at 79. The Court explained the amendment and then stated that "[t]he amendment, however, does not provide that the proceeds of a policy originally payable to the estate of the insured, but later transferred to his wife or children, shall be exempt from the rights of creditors of the insured." *Id*. at 81. The Court went on to conclude that the lack of a cash surrender value precluded a fraudulent conveyance of property within the meaning of the relevant statute:

> The question as to the right of creditors to recover the cash surrender value does not even arise in the instant case, inasmuch as the policy here involved had no cash surrender value whatsoever, and therefore the change of beneficiary executed by the insured while insolvent did not constitute a conveyance of property in fraud of creditors within the meaning of the fraudulent conveyance act. The two minor children, or a trustee for them, are therefore entitled to the proceeds. [*Id*.]

Therefore, although not necessarily decisive of the ultimate decision, the discussion of 1929 CL 12451 was

germane to the controversy on appeal, and the Court intentionally explained the meaning of the amendment. See *Pew*, 307 Mich App at 334.

Moreover, even if the statement in *Equitable Life* was dictum, we nevertheless find the statement persuasive.[4] Again, the relevant portion of MCL 500.2207(1) provides, "and the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured . . . , including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured . . . ." Here, the parties disagree over what part of the text is referred to by "including the cash value thereof." DC Mex argues that the text indicates that the cash value is a subcategory of proceeds, whereas Fuller argues that the cash value refers to the insurance policy.

We conclude that both parties are slightly off point. The phrase "including the cash value thereof" refers to the entire subject, i.e., "the proceeds of any policy of life or endowment insurance" that is payable to the insured's spouse or children. The relevant portion of MCL 500.2207(1) only refers to proceeds of the life insurance policy—it does not limit the proceeds to the death benefit or limit proceeds in any manner. See *Equitable Life*, 270 Mich at 80-81 (explaining that the text "specifically exempt[s] all proceeds of the policies described in the original statute, *whether such proceeds are realized through the surrender of the policy for its cash surrender value, or in any other manner*") (emphasis added). Such an interpretation is consistent with the intent of preserving life insurance policies for the benefit of the insured's spouse or children.

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[4] See *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 698 n 3; 671 NW2d 89 (2003) (acknowledging that part of an opinion was dictum but finding the analysis persuasive).

We acknowledge that this Court has previously explained that "[i]n regards to life insurance contracts, the general public policy is to protect the insurance taken out by a person for the maintenance and support of the person's spouse and children from the claims of creditors *after the person's death*" and that "[e]vidence of the Legislature's intent as to this public policy can be found in MCL 500.2207(1) . . . ." *Baltrusaitis v Cook*, 174 Mich App 180, 182-183; 435 NW2d 417 (1988) (emphasis added).[5] Our interpretation is consistent with this intent because it prevents a life insurance policy taken out for the benefit of one's children or spouse from being devalued or from going into default. As explained, Fuller's policy would have been considered in default if the cash value was zero, and the death benefit would have been reduced if the cash value was reduced. Preventing a forced reduction of the death benefit or surrender of the policy is consistent with the Legislature's intent as evidenced by the language in the statute exempting the proceeds including the cash value.

We further note that the relevant portion of MCL 500.2207(1) does not refer to the insured's death or contain a requirement that the proceeds be from the death benefit. DC Mex argues that other portions of MCL 500.2207(1) provide timing signals (e.g., "and in case that any money shall become payable under the insurance") and that these signals should be applied to the exemption portion of the statute at issue on appeal. Although a statute must be read in context, MCL 500.2207(1) is divided into separate parts by semicolons, and modifiers in one part of the statute should not

[5] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority[.]" *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

be applied to other parts of the statute unless the text provides a clear intent that the modifier is to apply throughout the statute. Here, the relevant portion of MCL 500.2207(1) contains no indication that it is modified by previous parts of the statute.

DC Mex also relies on *In re Parsons*, 161 BR 194, 195, 198 (Bankr WD Mich, 1993), for the proposition that the exemption in MCL 500.2207 protects children and spouses as beneficiaries rather than protects the insured, but its reliance is misplaced because that case involved an annuity contract rather than a life insurance policy. See *id*. at 196 ("Subsection (1) of [MCL 500.2207] relates only to insurance policies for husbands and fathers, *and is not relevant to this case*.") (emphasis added). Moreover, protecting the cash value ultimately protects children and spouses as beneficiaries because it preserves the policy and death benefit.

DC Mex further argues that the definition of the word "proceeds" indicates that proceeds under a life insurance policy only come to fruition when the insured dies. The Insurance Code does not provide a definition of "proceeds." Thus, this Court may look to a dictionary. *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 218; 880 NW2d 793 (2015). *Merriam-Webster's Collegiate Dictionary* (11th ed) provides the following definition of "proceeds": "**1 :** the total amount brought in <<the ~ of a sale>> **2 :** the net amount received (as for a check or from an insurance settlement) after deduction of any discount or charges[.]" However, even taking into account the definition of "proceeds," the relevant portion of the statute does not indicate that death or any event must occur—it merely refers to proceeds of a life insurance policy payable to the insured's children, including the cash value of the policy. Therefore, we conclude that the proceeds at issue were exempt under MCL 500.2207(1).

Lastly, Fuller argues that changing the beneficiary on the policy from the trust naming his daughter as the sole beneficiary to his daughter directly was not fraudulent. DC Mex argues that the change in beneficiary prevents the exemption from applying. With respect to the underlying fraud case, DC Mex filed its complaint in October 2011. Before the lawsuit, the beneficiary of Fuller's life insurance policy was a revocable trust. The proceeds of the trust were to be divided between Fuller's "then living children and deceased children with then-living descendents [sic]." Fuller's only child was his daughter. In 2013, Fuller changed the beneficiary of his life insurance policy to his daughter.

On appeal, DC Mex argues that "[a] Trust is not a protected beneficiary, and it does not matter that [Fuller's] daughter may have been the only beneficiary of the trust." DC Mex further argues that, even assuming the exemption in MCL 500.2207(1) applied, the cash value before the 2013 change in beneficiary was not exempt. However, DC Mex's argument ignores the plain language of MCL 500.2207(1), which states that "the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured *or to a trustee for the benefit of the wife, husband or children of the insured*, including the cash value thereof, shall be exempt . . . ." (Emphasis added.) The exemption clearly applies to life insurance policies payable to a trustee for the benefit of the insured's children. MCL 500.2207(1) further states,

> [S]aid exemption shall apply to insurance heretofore or hereafter issued; and shall apply to insurance payable to the above enumerated persons or classes of persons, whether they shall have become entitled thereto as originally designated beneficiaries, *by beneficiary designation subsequent to the issuance of the policy*, or by assignment (except in case of transfer with intent to defraud creditors). [Emphasis added.]

Accordingly, the cash value of the policy was originally exempt, so changing the policy's beneficiary to a beneficiary where the cash value remained exempt did not defraud creditors.

For the foregoing reasons, the cash value of Fuller's life insurance policy was "exempt from execution or liability to any creditor of the insured . . . ." MCL 500.2207(1). The trial court, therefore, erred by denying the motion to quash the garnishment.

III. FEES AND COSTS

A. STANDARD OF REVIEW

Fuller argues that the trial court should have awarded him reasonable attorney fees and expenses incurred during the garnishment proceedings because the primary purpose for obtaining the garnishment was to injure and harass him, and because DC Mex's position lacked arguable legal merit. "A trial court's findings regarding whether a claim or defense was frivolous and whether sanctions may be imposed are reviewed for clear error." *Bronson Health Care Group, Inc v Titan Ins Co*, 314 Mich App 577, 585; 887 NW2d 205 (2016). "A finding of the trial court is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made." *Tennine Corp v Boardwalk Commercial, LLC*, 315 Mich App 1, 18; 888 NW2d 267 (2016) (citation and quotation marks omitted).

B. ANALYSIS

"In general, a party is not entitled to an award of attorney fees and costs unless such an award is expressly authorized by statute or court rule." *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277, 285-286; 882

NW2d 563 (2015). MCR 2.114(F) provides as follows: "In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages." In turn, MCR 2.625(A)(2) provides, "In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." Finally, MCL 600.2591 provides that the trial court shall award costs and fees when a civil action or defense was frivolous:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

"To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made," and "[t]he factual determination by the trial court depends on the particular facts and circumstances of the claim involved." *In re Costs & Attorney Fees*, 250 Mich App 89, 94-95; 645 NW2d 697 (2002).

In the court below, Fuller summarily argued that the "primary purpose in obtaining the garnishment was to harass and injure" him and that "DC Mex's legal position is devoid of arguable legal merit." Fuller repeats this cursory argument on appeal, primarily relying on the fact that "the law is clear" in this matter. He has provided no other explanation for why the primary purpose for requesting garnishment was to harass or injure him. Absent specific facts to the contrary, the record suggests that the primary purpose in obtaining the garnishment was to collect money for the large judgment that remained owing. Moreover, as explained, the statute is not entirely clear, and DC Mex's position had arguable legal merit. Consequently, the trial court did not clearly err by denying Fuller's request for fees and costs.

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

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

HEGADORN v DEPARTMENT OF HUMAN SERVICES DIRECTOR

TRIM v DEPARTMENT OF HUMAN SERVICES DIRECTOR

FORD v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket Nos. 329508, 329511, and 331242. Submitted January 13, 2017, at Lansing. Decided June 1, 2017. Approved for publication July 27, 2017, at 9:00 a.m. Leave to appeal granted 501 Mich 984.

Mary A. Hegadorn (Docket No. 329508) and Dorothy Lollar (Docket No. 329511) appealed separately in the Livingston Circuit Court the determinations of the Department of Human Services and its director—determinations affirmed by an administrative law judge (ALJ)—that assets placed by Hegadorn's and Lollar's respective husbands in "sole benefit of" (SBO) trusts were countable assets for the purpose of determining whether each plaintiff was eligible for Medicaid long-term-care benefits. Deborah D. Trim, as the personal representative of Lollar's estate, was later substituted as the plaintiff in Docket No. 329511 following Lollar's death. Roselyn Ford (Docket No. 331242) similarly appealed in the Washtenaw Circuit Court the department's determination—and an ALJ's decision affirming that determination—that assets placed by her husband in an SBO trust were countable assets for purposes of determining her eligibility for Medicaid long-term-care benefits. Each plaintiff was admitted to a nursing home and received long-term care, after which plaintiffs' spouses placed their respective assets in irrevocable SBO trusts that required all trust assets be paid to the particular spouse during his lifetime. Hegadorn applied for Medicaid assistance benefits in April 2014, Lollar applied in July 2014, and Ford applied in January 2014. The department denied each plaintiff's application for benefits on the basis that the respective countable assets—which the department determined to include the assets each plaintiff's spouse had placed in an SBO trust—exceeded the $2,000 eligibility limit allowed for the Medicaid program. Each plaintiff contested the department's determination, and in each case, an ALJ affirmed the department's determination, reasoning that the assets each plaintiff's spouse had placed in an SBO trust were countable assets for purposes of Medicaid long-term-care benefits. Each plaintiff appealed the

ALJ's respective decision in the relevant circuit court. In Docket Nos. 329508 and 329511, the court, Michael P. Hatty, J., reversed the ALJ's decisions, concluding that the SBO trust assets in each case were not countable assets for determining eligibility. The court reasoned that the department's August 20, 2014 memorandum—which had advised the public that all SBO trust assets were deemed countable for purposes of determining eligibility—reflected a change in the department's policy and indicated that SBO trust assets were therefore not countable for purposes of determining eligibility at the time Hegadorn and Lollar applied for the benefits. In Docket No. 331242, the court, Timothy P. Connors, J., similarly reversed the ALJ's decision that had affirmed the department's denial of Ford's application for benefits. The Court of Appeals granted the department's application for leave to appeal in each case, and the Court ordered the cases consolidated.

The Court of Appeals *held*:

1. To be eligible for Medicaid long-term-care benefits, an individual must have $2,000 or less in countable assets. How much of the principal of a trust is a countable asset depends on the terms of the trust and whether any of the principal consists of countable assets or countable income. Under the department's Bridges Eligibility Manual (BEM) 401, the department counts as the person's countable asset the value of the countable assets in a trust principal if there is any condition under which the principal could be paid to or on behalf of the person from the irrevocable trust; the department's BEM 401 countable-asset policy is consistent with the federal requirement set forth in 42 USC 1396p(d)(3)(B) of Title XIX of the Social Security Act, 42 USC 1396 *et seq*. In each case, the SBO trust in issue contained language that the trust's assets were to be used up during the husband's lifetime and required the trustee to distribute the assets on an actuarially sound basis so as to use up all the assets during that lifetime. Accordingly, because each SBO trust contained a condition under which the principal could be paid to or on behalf of a person from an irrevocable trust—here, on behalf of each plaintiff's husband—the department correctly determined that the assets in each SBO trust were countable assets with regard to plaintiffs' eligibility for Medicaid assistance benefits.

2. The department's August 20, 2014 memorandum did not constitute an impermissible change in law or policy but instead clarified the department's treatment of SBO trust assets to comply with federal mandates. The department correctly applied the policy clarification retroactively to plaintiffs when it calculated

their respective eligibility for the benefits. Retroactive application was appropriate because the federal government could impose sanctions on the department if it did not comply with the 42 USC 1396p requirements. In addition, there was no authority to support plaintiffs' argument that, even though they were not entitled to the benefits under federal law, they should have received the benefits because of the asserted change in the department's interpretation of the applicable state and federal law.

3. The language in 42 USC 1396r-5(c)(2), 42 USC 1396d(p)(2)(A)(i) and (ii), and 42 USC 1396p(h) establishes that Congress intended states to consider the assets held by the institutionalized spouse as well as the community spouse when determining whether the institutionalized spouse is eligible for Medicaid long-term-care benefits. Accordingly, for purposes of determining countable assets, the term "person" in BEM 401 and the term "individual" in 42 USC 1396p refer to the assets of both the institutionalized spouse who applied for Medicaid benefits (i.e., each plaintiff in these cases) as well as the community spouse (i.e., each plaintiff's spouse in these cases). The circuit courts erred in each case by not including the SBO trust assets held by plaintiffs' respective spouses when calculating plaintiffs' respective countable assets.

Reversed.

SOCIAL SERVICES — MEDICAID — LONG-TERM-CARE BENEFITS — ELIGIBILITY DETERMINATION — COUNTABLE ASSETS.

The Department of Health and Human Services must consider the assets held by an institutionalized spouse as well as his or her community spouse when determining whether the institutionalized spouse is eligible for Medicaid long-term-care benefits; countable assets include assets held by the community spouse in a "sole benefit of" trust when the trust contains any condition under which the principal could be paid to or on behalf of the person from the irrevocable trust.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Geraldine A. Brown* and *Chantal B. Fennessey*, Assistant Attorneys General, for the Department of Health and Human Services.

Nancy C. Nawrocki for Mary Ann Hegadorn and Deborah D. Trim.

Law Office of Gary P. Supanich (by *Gary P. Supanich*) for *Roselyn Ford*.

Amicus Curiae:

James Schuster for the Elder Law and Disability Rights Section of the State Bar of Michigan.

Before: M. J. KELLY, P.J., and STEPHENS and O'BRIEN, JJ.

PER CURIAM. The Department of Health and Human Services[1] and its Director (collectively, the Department) appeal by leave granted the circuit court orders reversing administrative decisions that affirmed the Department's denial of three individuals' applications for Medicaid benefits. *Hegadorn v Dep't of Human Servs Dir*, unpublished order of the Court of Appeals, entered December 22, 2015 (Docket No. 329508); *Lollar v Dep't of Human Servs Dir*, unpublished order of the Court of Appeals, entered December 22, 2015 (Docket No. 329511); *Ford v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered April 27, 2016 (Docket No. 331242). The legal question presented in each case is relatively straightforward: Are assets placed by an institutionalized individual's spouse into a "Solely for the Benefit of" Trust (SBO Trust) countable assets for determining whether the institutionalized individual is eligible for Medicaid benefits? We answer that question in the affirmative.

"To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of

[1] The Department of Community Health was merged with the Department of Human Services in 2015 after the plaintiffs in Docket Nos. 329508 and 329511 filed their complaints. The combined agency is now the Department of Health and Human Services. Executive Order No. 2015-4.

criteria, including having $2,000 or less in countable assets." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 698; 808 NW2d 484 (2010). This criterion—requiring that the individual have $2,000 or less in countable assets—is consistent with the purpose of Title XIX of the Social Security Act, commonly known as the Medicaid Act, 42 USC 1396 *et seq*., which "created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals." *Ketchum Estate v Dep't of Health & Human Servs*, 314 Mich App 485, 488; 887 NW2d 226 (2016) (citation and quotation marks omitted). "Participation in Medicaid is essentially need-based . . . ." *Mackey*, 289 Mich App at 693. As this Court has previously recognized, however, "[t]he act, with all of its complicated rules and regulations, has also become a legal quagmire that has resulted in the use of several 'loopholes' taken advantage of by wealthier individuals to obtain government-paid long-term care they otherwise could afford." *Id*. at 693-694. That is precisely the concern that the Department expresses in this case.

Mary Ann Hegadorn (Mrs. Hegadorn), the plaintiff in Docket No. 329508, began receiving long-term care at the MediLodge Nursing Home in Howell, Michigan, on December 20, 2013. Approximately one month later, on January 23, 2014, her husband, Ralph D. Hegadorn (Mr. Hegadorn), established the "RALPH D. HEGADORN IRREVOCABLE TRUST NO. 1 (SOLE BENEFIT TRUST)" (the Hegadorn Trust), which provided that it was intended to be "a 'Solely for the Benefit Of' trust." On April 24, 2014, approximately four months after beginning long-term care and three months after her husband had established the

Hegadorn Trust, Mrs. Hegadorn applied for Medicaid benefits. The Department denied Mrs. Hegadorn's application on August 14, 2014, determining that her countable assets, including the assets that were placed in the Hegadorn Trust, exceeded the applicable eligibility limit.

Dorothy Lollar (Mrs. Lollar), the plaintiff in Docket No. 329511, began receiving long-term care at the MediLodge Nursing Home in Howell, Michigan, on May 1, 2014. Less than two months later, on June 19, 2014, Mrs. Lollar's husband, Dallas H. Lollar (Mr. Lollar), established the "DALLAS H. LOLLAR IRREVOCABLE TRUST" (the Lollar Trust), which provided that it was intended to "be a 'Solely for the Benefit of' trust." On July 21, 2014, approximately three months after beginning long-term care and one month after Mr. Lollar established the Lollar Trust, Mrs. Lollar applied for Medicaid benefits. The Department denied Mrs. Lollar's application on August 29, 2014, determining that her countable assets, including the assets that were placed in the Lollar Trust, exceeded the applicable eligibility limit.

Roselyn Ford (Mrs. Ford), the plaintiff in Docket No. 331242, began receiving long-term care at the Saline Evangelical Nursing Home in Saline, Michigan, on December 5, 2013. Approximately one month later, on January 10, 2014, Mrs. Ford's husband, Herbert W. Ford (Mr. Ford), established the "HERBERT FORD IRREVOCABLE TRUST" (the Ford Trust), which provided that it was intended to be "a 'solely for the benefit of' trust." On January 30, 2014, almost two months after beginning long-term care and less than one month after Mr. Ford established the Ford Trust, Mrs. Ford applied for Medicaid benefits. The Department denied Mrs. Ford's application on September 29, 2014, determining that her countable assets, including the

assets that were placed in the Ford Trust, exceeded the applicable eligibility limit.

Each plaintiff appealed the Department's determination. A consolidated hearing was held before Administrative Law Judge (ALJ) Landis Y. Lain with respect to Mrs. Hegadorn and Mrs. Lollar. ALJ Lain affirmed the Department's determination with respect to Mrs. Hegadorn and Mrs. Lollar, explaining, in pertinent part, as follows:

> In this case, the Ralph D. Hegadorn Trust [with respect to Mrs. Hegadorn or the "Dallas Lollar" Trust with respect to Mrs. Lollar] meets all of the criteria of a Medicaid trust. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine [Medical Assistance (MA)] eligibility, and MA post-eligibility patient pay amount, a divestment penalty or an initial asset amount. The trust was established by the Claimant's spouse. The trust was established/amended on or after August 11, 1993. The trust was not established by will. The trust does not meet the condition of an exception A, special needs trust; or exception B, pooled trust as described in [Bridges Eligibility Manual (BEM)], Item 401.
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> In conducting the initial asset assessment the Department must count both Claimant's and his spouse's total combined assets which were in existence as of December 20, 2013 [with respect to Mrs. Hegadorn or May 1, 2014 with respect to Mrs. Lollar], when Claimant entered long-term care. Claimant's spouse did not place assets into an irrevocable trust until January 23, 2014 [or June 19, 2014]. The spouse's transfer of assets to an irrevocable trust does not undo the initial asset assessment amount. The initial amount of combined assets was $487,755.33 [with respect to Mrs. Hegadorn and $62,500 with respect to Mrs. Lollar]. The protected spousal amount limit was $115,920.00 [with respect to Mrs. Hegadorn and $31,267 with respect to Mrs. Lollar] leaving Claimant with total

countable assets as of long-term care entry date of $371,835.33 [with respect to Mrs. Hegadorn and $47,184 with respect to Mrs. Lollar]. Thus, the entire amount must be counted for purposes of Medicaid eligibility determination.

* * *

The Department is to count as the person's countable asset the value of the trust's countable income if there is any condition under which the income could be paid to or on behalf of the person. Individuals can keep income made off of property and the money goes to the individual not the trust. Property cannot be taken out of the trust.

* * *

In an application for [long-term case (LTC)] for an individual, the assets of both spouses are calculated when determining if there are excess assets. The couple is permitted to retain $2,000 for the application spouse plus the amount calculated as the Spousal Protected Resource amount. Medicaid is the joint state/federal program that provides payment for covered health care services for eligible ***indigent*** individuals. Medicaid is a means tested program. If Medicaid applicants have sufficient assets, income or insurance to pay for health care they do not qualify for the Medical Assistance program. Federal law allows a community spouse to retain a certain amount of assets. Any assets retained by the applicant or community spouse which exceed those allowed by law are necessarily countable. Transfers from the client's spouse to another SBO irrevocable trust are not divestment. Department policy requires that the distributions to the community spouse be counted for the applicant's eligibility. The trust requires that the assets be distributed back to the beneficiary community spouse during his/her lifetime. Therefore, there is a condition under which the principal could be paid to or on behalf of the person, which makes the assets countable.

* * *

> In this case, the community spouse's attempt to circumvent both federal law and policy by creating a SBO trust to shelter excess personal assets is an attempt to retain assets which are in addition to/exceed the amounts allowed by policy and law. Such an attempt must fail. The claimant's spouse cannot retain assets in excess of that allowed by law and policy. Claimant and spouse are not indigent. They, at all times relevant to this application, retained sufficient assets to pay claimant's LTC, and in fact, retained excess assets for purposes of Medical Assistance benefit eligibility. The department's determination must be upheld. [Citations omitted.]

Similarly, a hearing before ALJ Alice C. Elkin was held with respect to Mrs. Ford's appeal. ALJ Elkin reached the same conclusion as ALJ Lain:

> Under its terms, [Mr. Ford]'s SBO Trust requires the annual distribution of funds from the Trust to Spouse with the expectation that the entire principal of the Trust property would be distributed to Spouse over his expected lifetime based on life expectancy tables. The conditions for distributions of all income and principal from the SBO Trust to Spouse are more likely to be satisfied than the conditions leading to disbursement in the State Medicaid Manual example above where funds are disbursed to the beneficiary only in the event the beneficiary needs a heart transplant. Because there is a condition or circumstance for payment of the entire SBO Trust principal to [Mr. Ford], the SBO Trust is a countable asset under the State Medical Manual, with a value equal to the full value of the countable assets in the SBO Trust.
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> The fact that the trustee controls distribution of the Trust assets does not affect the assessment of whether the Trust is a countable asset. As discussed above, the Department's conclusion that the SBO Trust is a countable asset, despite the fact that the trustee controls the distribution of assets, is supported by federal law, Department policy, and the Stated Medicaid Manual and [the Program Op-

> erations Manual System]. Furthermore, under [42 USC] 1396p(d)(2)(C), the determination of a countable asset under [42 USC] 1396p(d)(3)(B) is not dependent on whether the trustee has or exercises any discretion to make payments. In fact, in in [sic] *In re Roscke*s, 783 NW2d 220, 225 (Minn App, 2010), the court held that, where the trust allowed the trustee to pay the beneficiary income and principal at such times and in such portions as he deemed advisable, all of the trust income and principal could have been paid to the beneficiary in some capacity and was, thus, available to the beneficiary under [42 USC] 1396p(d). Any argument that the assets in the SBO Trust are unavailable is further undermined by BEM 400, p. 9, which states that the determination of whether the asset is available for purposes of determining whether it is countable does **not** apply when the asset is a trust, and BEM 401, p. 10, which states that an asset is not considered unavailable because it is owned by the Medicaid trust rather than a person.
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> Therefore, Spouse's SBO Trust is, in accordance with Department policy and consistent with federal law, a countable asset valued at the full amount of the value of the assets in the trust corpus at the time of application. Claimant's counsel does not dispute that, when the value of Claimant's assets includes Spouse's SBO Trust, the difference between the value of those assets and the applicable [protected spousal amount] exceeds the $2000 MA asset limit applicable to Claimant's MA asset eligibility. Therefore, the Department acted in accordance with Department policy and federal law when it denied Claimant's MA application on the basis that the value of her countable assets exceeded the limit for MA eligibility.

In each case, the plaintiff appealed the respective ALJ's decision in the circuit court. In Docket Nos. 329508 and 329511, Livingston Circuit Judge Michael P. Hatty reversed ALJ Lain's decisions to affirm the Department's denials of Mrs. Hegadorn's and Mrs. Lollar's applications. Specifically, Judge Hatty's order provided as follows: "ALJ Lane's [sic] opinion determining

that the SBO trust assets were countable in determining eligibility is hereby reversed and benefits shall commence at the date of initial application for the reasons placed on the record. Request by [the Department] for stay denied." Judge Hatty explained his decision, in pertinent part, as follows:

> The situation is basically that the appellants have put -- or have had assets in a -- in a trust, so-called a SBO trust. And whether or not those assets are deemed countable to the recipient, to the person who is in the institution. And as of the date of the filing of the request for benefits, the assets were not countable to the institutionalized spouse. And while it may have changed afterwards but I -- I think I'm gonna rely on what the state of law was at the time that these two appellants applied. One applied June of 2014, the other applied in April of 2014. So it was clearly before that -- that date where -- the August date where the Department of Human Services made a change in policy that effected how these citizens positions will be put in a worst position than had the policy in effect at the time of their filing had placed them in. I -- I look to a case that -- that speaks -- that references law that supports the appellant's position here. It's called Hughes v McCarthy, it's 734 F.3d 473 at 480, it's a Sixth Circuit case of -- that came out in 2013. It looks to me to be controlling. And Hughes sort of stood for the proposition we had a annuity that was in place that had no restriction on how it could be distributed to the community spouse that was not countable to the -- to the institutionalized spouse. I don't know how you would favor a purchased annuity over a valid trust when they both would be -- appear to be provided for under the law.
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> So I'm going to grant the appeal of the petitioners on both counts and I'm gonna set aside the order of the Administrative Law Judge on both files. I further think that the applicants' position is supported by -- by -- supported by [42 USC 1396p(c)(1)(A) and (2)(B)]. So -- 'cause that defines what assets are and I think that it supports

> appellants' position here. So that's -- in conclusion I don't think that those -- the assets in question are -- I believe them to be non-countable assets. I do not believe the -- them to be countable assets when working throughout this formula. For those --
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> -- reasons I grant the appeal of the petition on both -- both files.

Thus, to use the lower court's own summary, it "reversed 'em and the benefits would be available back to the date of the application . . . ." In Docket No. 331242, Washtenaw Circuit Judge Timothy P. Connors also reversed the ALJ's decision to affirm the Department's denial of Mrs. Ford's application, relying entirely on Judge Hatty's decision. Judge Connors's order provided as follows: "The relief requested by the Appellant, Roselyn Ford, is hereby granted based upon the reasons contained in the record and stated on the record." These appeals followed.

"A final agency decision is subject to court review but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 583; 701 NW2d 214 (2005). "This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *Id*. at 585. Because we conclude that the circuit courts did not apply the correct legal principles in these appeals, we reverse the circuit

courts' orders and reinstate the decisions reached by the ALJs.

At the outset, it is undisputed that the trusts at issue in these cases were, in fact, Medicaid trusts. See State of Michigan, Department of Human Services, BEM 401, BPB 2014-015 (July 1, 2014), p 7. "How much of the principal of a trust is a countable asset depends on" "[t]he terms of the trust, and" "[w]hether any of the principal consists of countable assets or countable income." *Id*. at 10. With respect to irrevocable trusts, BEM 401 provides, in pertinent part, as follows: "Count as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust." *Id*. at 11. Thus, the issue before us is whether "there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust." We conclude that there is.

In Docket No. 329508, the Hegadorn Trust provided, in pertinent part, as follows:

> **2.2 Distribution of Resources.** During each fiscal year of the Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime such part of all of the net income and principle ("Resources") of the Trust as Trustee determines is necessary in order to distribute the resources in an actuarially sound basis. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached hereto as Exhibit 1, to determine the appropriate portion of Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust can be used for anyone other than me. Notwithstanding anything contained herein to the contrary, Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the

> Resources during my lifetime. The Resources of the Trust shall be valued on the 1st day of January of each fiscal year of the Trust, except in the first fiscal year of the Resources of the Trust shall be valued as of the date of their contribution to the Trust.

Likewise, in Docket No. 329511, the Lollar Trust provided, in pertinent part:

> 2.2 *Distribution of resources*. During each fiscal year of the Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime such part or all of the net income and principal ("Resources") of the Trust as Trustee determines is necessary to distribute the resources in an actuarially sound basis; provided, however, during the first fiscal year of the Trust, the distribution shall not be made to me until after such time as Medicaid eligibility has been determined for my spouse, but in no event later than **May 31, 2015**. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached as exhibit A, to determine the appropriate minimum portion of Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust can be used for anyone other than me, except for Trustee fees. Notwithstanding anything contained herein to the contrary, Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime. The Resources of the Trust shall be valued on the first day of **June 1st** of each fiscal year of the Trust, except that in the first fiscal year, the Resources of the Trust shall be valued as of the date of their contribution to the Trust.

Similarly, in Docket No. 331242, the Ford Trust provided:

> 2.2 *Distribution of resources*. During each fiscal year of the Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime whatever part of the net income and principal (the Resources) of the Trust that Trustee determines is

> necessary to distribute the resources on an actuarially sound basis. However, during the first fiscal year of the Trust, the distribution shall be made to me after **August 1, 2014**, but before **December 1, 2014**. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached to this Agreement as exhibit A, to determine the appropriate minimum portion of the Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust may be used for anyone other than me, except for Trustee fees. Notwithstanding anything in this Agreement to the contrary, Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime. The Resources of the Trust shall be valued on the first day of July of each fiscal year of the Trust, except that in the first fiscal year the Resources of the Trust shall be valued as of the date of their contribution to the Trust.

Generally, this Court's goal in interpreting trust language is to determine and give effect to the settlor's intent. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). In doing so, we first examine the language of the trust itself, and, if unambiguous, we interpret it according to its plain and ordinary meaning. *Id*. As is apparent from the plain and ordinary meaning of the cited language, all the assets that were placed into each trust shortly before plaintiffs filed their Medicaid applications are to be "use[d] up" during the husbands' lifetimes. Similarly, all three trusts include language that instructs the trustees to distribute the assets "on an actuarially sound basis," which means that the "spending must be at a rate that will use up all the resources during the person's lifetime." State of Michigan, Department of Human Services, BEM 405, BPB 2015-010 (July 1, 2015), p 12. Accordingly, because there was a "condition under which the principal could be paid to or on behalf of the person from an irrevocable trust," the

assets in each trust were properly determined to be countable assets by the Department. BEM 401, p 12.

This conclusion is consistent with applicable authority other than the BEM. Most importantly, it is consistent with the statutory requirements set forth in 42 USC 1396p. Specifically, 42 USC 1396p(d)(3)(B) provides, in pertinent part, as follows:

> In the case of an irrevocable trust—
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> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—
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> (I) to or for the benefit of the individual, shall be considered income of the individual, and
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> (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and
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> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

The circuit courts' decisions to the contrary appear to have been premised on what Judge Hatty perceived as a change "of law"—"I think I'm gonna rely on what the state of law was at the time that these two appellants applied"—or "a change in policy"—"the August date where the Department of Human Services

made a change in policy that effected how these citizens [sic] positions will be put in a wors[e] position than had the policy in effect at the time of their filing had placed them in." Similarly, plaintiffs argue that the Department impermissibly changed its policy to their detriment. We disagree.

The basis for the circuit courts' and plaintiffs' position is an August 20, 2014 memorandum by the Department that "advised that all SBO trust assets are deemed countable pursuant [to] BEM 401, page 11 regarding Medicaid irrevocable trusts . . . ."[2] According to the circuit courts and plaintiffs, this decision—to begin treating, or at least consistently treat, SBO trust assets as countable assets—constituted an impermissible change of law or policy, but we are unable to find any legal authority to support that position. We are unable to find any law or policy—including the applicable federal statutes, any provisions of the BEM, or any other relevant authority—that was unilaterally and impermissibly changed by the Department when it released the memorandum. Indeed, the Department expressly acknowledges that the memorandum did, in fact, "clarify" the way it had treated SBO trust assets for Medicaid-eligibility purposes, explaining that the change was required to comply with federal mandates; however, that is not a change in law or policy. We therefore disagree with the circuit courts' conclusions and plaintiffs' arguments that this change was legally impermissible.

Relatedly, plaintiffs argue that, even if this change was legally permissible, it is nevertheless inapplicable to them because the change cannot be retroac-

[2] State of Michigan, Department of Human Services, FOA Memo 2014-44, *Treatment of "Solely for the Benefit of" Trusts for Purposes of Determining Medicaid Eligibility* (August 20, 2014).

tively applied. While we appreciate the concerns raised by plaintiffs and amicus curiae the Elder Law and Disability Rights Section of the State Bar of Michigan in this regard, we ultimately feel compelled to disagree. First, as identified by the Department, there could be severe consequences statutorily imposed on the Department should it choose not to comply with the federal requirements. See 42 USC 1396c; see also *Nat'l Federation of Indep Business v Sebelius*, 567 US 519, 575-588; 132 S Ct 2566; 183 L Ed 2d 450 (2012) (opinion by Roberts, J.) (stating that although the Secretary of the Department of Health and Human Services could not use 42 USC 1396c to withdraw Medicaid funds from states that failed to comply with Medicaid expansion, that holding did not affect application of 42 USC 1396c to the existing Medicaid program). Furthermore, plaintiffs and amicus do not cite, and we are unable to find, any authority to support the proposition that individuals who are not entitled to Medicaid benefits should nevertheless receive them because of an alleged change in the Department's interpretation of applicable state and federal authority. While plaintiffs and amicus cite to cases that involved the retroactive application of statutes or rules that affected the recipient's benefits in somewhat similar scenarios, it appears that those cases generally involved situations in which a person was denied benefits that they were entitled to, not situations in which a person was denied benefits that they were not entitled to. See, e.g., *Tompkins v Dep't of Social Servs*, 97 Mich App 218; 293 NW2d 771 (1980). Accordingly, we see no reason to retroactively apply the Department's previous interpretation under the facts and circumstances of this case.

Nevertheless, plaintiffs' primary arguments on appeal focus more on the validity of the change itself, i.e., whether the change in interpretation is correct, than on the timing of the change itself. Specifically, they argue that the term "person" in BEM 401 and the term "individual" in 42 USC 1396p, when reviewed in context, refer only to the Medicaid applicant, i.e., the institutionalized spouse, not the Medicaid applicant's spouse, i.e., the community spouse. Plaintiffs argue that because the SBO trusts at issue in these cases were solely for the benefit of the husbands, i.e., the community spouses, the trusts' assets are not countable as a matter of law. We disagree.

This dispute, which essentially asks us to interpret and apply federal statutes and related administrative manuals, is a question of law that is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). "When interpreting a federal statute, [o]ur task is to give effect to the will of Congress . . . . To do so, [w]e start, of course, with the statutory text, and [u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Id*. at 381-382 (citations and quotation marks omitted; alterations in original). This is true even when reviewing the statutory interpretations and applications of administrative agencies. *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009). "Principles of statutory interpretation apply to the construction of administrative rules." *City of Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003).

Applying those rules to the authority at issue in this case, we are of the view that the trusts' assets—despite being for the sole benefit of the husbands according to the trusts' language—were correctly determined to be

countable assets for purposes of plaintiffs' Medicaid eligibility. There are many federal statutory provisions that support this view. For example, 42 USC 1396r-5(c)(2) provides as follows:

> **Attribution of resources at time of initial eligibility determination**
>
> In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—
>
> (A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and
>
> (B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

Similarly, 42 USC 1396p(h) provides as follows:

> **Definitions**
>
> In this section, the following definitions shall apply:
>
> (1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—
>
> (A) by the individual or such individual's spouse,
>
> (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
>
> (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

42 USC 1396p(d) likewise provides, in pertinent part, as follows:

> **Treatment of trust amounts**
>
> * * *
>
> (2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:
>
> (i) The individual.
>
> (ii) The individual's spouse.

In our view, it is apparent from this clear legislative language that Congress intended that when making an initial eligibility determination, states are to consider the assets held by an institutionalized spouse—in this case, each plaintiff—*and* the community spouse—in this case, each plaintiff's husband. 42 USC 1396r-5(c)(2). Congress has clearly indicated that an institutionalized individual's assets include not only those that he or she has, but *also* those that his or her spouse has, 42 USC 1396p(h)(1), and that remains true even when those assets are placed into a trust by the spouse, 42 USC 1396p(d)(2)(A)(i) and (ii). That is precisely the case here. While we appreciate that there are several statutory subsections that, when reviewed in isolation, could arguably support plaintiffs' claim that SBO Trust assets in these types of situations should not be considered, we are simply not willing to overlook what is, in our view, a clear indication by Congress to the contrary.

Accordingly, because we agree with the Department's and the ALJs' conclusion that assets placed by an institutionalized individual's spouse into an SBO Trust are countable assets for determining whether an

individual is eligible for Medicaid benefits, we reverse the circuit courts' orders providing otherwise and reinstate the decision reached by the ALJ in each case.

Reversed.

M. J. KELLY, P.J., and STEPHENS and O'BRIEN, JJ., concurred.

VALUE, INC v DEPARTMENT OF TREASURY

Docket No. 331581. Submitted July 12, 2017, at Detroit. Decided August 1, 2017, at 9:00 a.m.

Value, Inc., brought an action in the Oakland Circuit Court against the Department of Treasury (the Department), seeking a judicial determination of the lawfulness of the Department's seizure and forfeiture of Value's "other tobacco product" (OTP) after an inspection of Value's facility in Oak Park revealed various purported violations of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. Following the seizure, a Department referee conducted a hearing at which Value argued that it had purchased the OTP from Basik Trading, an out-of-state distributor; that Basik had removed the required labels; that Value had invoices to prove that the purchases were made legally; and that the product should be returned. The referee concluded that the seizure and forfeiture were lawful because it was undisputed that the OTP lacked the required markings under MCL 205.429. The Department subsequently adopted the referee's recommendation, and Value filed the instant action pursuant to MCL 205.429(4). The court, Daniel P. O'Brien, J., held that contrary to MCL 205.426(6), the OTP lacked the name and address of the person making the first purchase. However, the court held that because the Department had conceded that the required taxes had been paid on the product, thereby overcoming the presumption in MCL 205.426(6) that the OTP was held by Value in violation of the TPTA, Value was entitled to a return of the OTP. Value contended that the OTP had gone stale or deteriorated while in the care of the Department and therefore argued that it was entitled to the monetary value of the OTP. The court agreed that, due to spoilage, Value was entitled to receive the value of the product; however, because the court viewed Value as equally at fault for the spoilage, it only awarded Value half the product's value. The court further held that Value was not entitled to a return on the taxes paid on the OTP, concluding that the taxable event was Value's purchase of the OTP from an out-of-state distributor, not its anticipated future sales to consumers. The Department appealed, and Value cross-appealed.

The Court of Appeals *held*:

1. MCL 205.429(1) provides, in relevant part, that a tobacco product held, owned, possessed, transported, or in control of a person in violation of the TPTA and any related books and records are contraband and may be seized and confiscated by the Department. MCL 205.429(2) further provides that the tobacco product may be seized and is subject to forfeiture as contraband as provided in MCL 205.429. MCL 205.426(6) provides that if a tobacco product other than cigarettes is received or acquired within this state by a wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, or retailer, each original manufacturer's shipping case shall bear the name and address of the person making the first purchase or any other markings the Department prescribes. In this case, the Department required that OTP acquired by an unclassified acquirer have a tax stamp affixed; otherwise, the Department was permitted to seize OTP in unmarked containers. Because MCL 205.426(6) provides that other markings prescribed by the Department—such as the tax stamp—must be affixed when the OTP is received or acquired, not when it is shipped or sold, Value's contention that there was no evidence in the lower court record that the tax stamp was not an "other marking" prescribed by the Department under MCL 205.426(6) was rejected. It was unrefuted that the seized OTP had neither the shipping labels identifying the first purchaser nor other markings under MCL 205.426(6); therefore, Value was in violation of MCL 205.426(6).

2. A violation of the recordkeeping requirements of MCL 205.426(6) is only a presumed violation of the TPTA. Under MCL 205.426(6), if an unclassified acquirer has possession of OTP without proper markings, including labels identifying the first purchaser, then the presumption shall be that the tobacco product is kept in violation of the TPTA. Accordingly, because the OTP in this case indisputably failed to identify the first purchaser or to have a stamp affixed to it as prescribed by the Department, Value's possession of the OTP was a presumed violation of the TPTA. Consequently, because at the time of seizure there was a presumed violation of the TPTA, the seizure of the OTP was lawful.

3. Under MCL 205.429(2), forfeiture is not automatic; OTP possessed in violation of the TPTA is merely subject to forfeiture after it has been seized. MCL 205.429(3) provides the process for delivery of an inventory statement of the property seized to the person from whom the seizure was made, and the inventory statement must contain a notice providing that unless demand for a hearing is made within 10 business days, the designated

property is forfeited to the state. MCL 205.429(3) further provides that if it is determined that the property is lawfully subject to seizure and forfeiture, then—provided the person from whom the property was seized or any persons claiming an interest in the property do not take an appeal to the circuit court of the county in which the seizure was made within the time prescribed in MCL 205.429—the property seized shall be considered forfeited to the state by operation of law. In this case, because Value demanded a hearing for a determination as to whether the property was lawfully subject to seizure and forfeiture, the OTP could not be forfeited based on the failure to demand a hearing. Additionally, Value took a timely appeal to the proper circuit court, so forfeiture was not proper under MCL 205.429(3).

4. There was a factual dispute with regard to whether the presumption in MCL 205.426(6) could be rebutted by the evidence submitted by Value. Although Value presented evidence that allowed an inference that the seized OTP came from Basik and that it had paid taxes on the seized product, the Department rebutted that evidence with an affidavit from a state police trooper explaining the inherent deficiency of that evidence—that there was no way to determine whether the seized OTP came from Basik and that without the shipping labels, whether the taxes were actually paid on the OTP was essentially a guess. Accordingly, there was a factual dispute, and therefore summary disposition was inappropriate under MCR 2.116(C)(10).

Reversed; remanded for an evidentiary hearing to determine whether Value can rebut the presumption that it possessed the OTP in violation of the TPTA.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Randi M. Merchant*, Assistant Attorney General, for the Department of Treasury.

Yono & Associates, PLLC (by *Fakhri W. Yono*), and *Joel F. Yono* for Value, Inc.

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

PER CURIAM. Defendant, the Department of Treasury, and plaintiff, Value, Inc., cross-appeal by right

the circuit court orders (1) requiring the Department to return one half of the value of certain "other tobacco product" (OTP) seized from Value under the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., and (2) denying Value's request for the return of approximately $24,000 in taxes paid on the seized OTP. The Department contends that the circuit court erred by concluding that the seized product or the value of the seized product had to be returned, either in whole or in part, to Value. Value argues that the circuit court erred by only awarding half of the product's value and by not awarding the taxes paid on the product. We reverse and remand for further proceedings.

I. BASIC FACTS

On November 3, 2014, the Michigan State Police, acting on behalf of the Department of Treasury, conducted an inspection of Value's facility in Oak Park. After observing various purported violations of the TPTA, the officers seized approximately $77,000 in OTP from Value. On December 8, 2014, a referee at the Department of Treasury conducted a hearing concerning whether the Department legally seized the OTP and whether the OTP should be forfeited to the state. At the hearing, the Department argued, in part, that Value violated MCL 205.426(6) by possessing OTP that failed to identify the first purchaser of the product. The Department asserted that law enforcement therefore properly seized the OTP and that it should be forfeited. Value argued that it had purchased the OTP from Basik Trading,[1] that Basik had removed the required labels, that Value had invoices to prove that the purchases were made legally, and that the product

[1] Based on the record, Basik is an out-of-state distributor, and Value was purchasing OTP from it.

should be returned. Following the hearing, the referee concluded that the seizure and forfeiture were lawful and that the product should not be returned. The referee reasoned that it was undisputed that the OTP lacked the required markings, so the OTP was lawfully seized and subject to forfeiture under MCL 205.429. On December 18, 2014, the Department of Treasury's hearings division administrator, acting on behalf of the Department, adopted the referee's recommendation in a Decision and Order of Determination.

On January 6, 2015, Value filed a complaint in circuit court, seeking, under MCL 205.429(4), "a judicial determination of the lawfulness of the seizure and forfeiture." On November 18, 2015, in response to competing motions for summary disposition, the court determined that contrary to MCL 205.426(6), the OTP lacked the name and address of the person making the first purchase. The court, however, held that the Department had conceded that the required taxes had been paid on the product, thereby overcoming the presumption in MCL 205.426(6) that the OTP was held by Value in violation of the TPTA. As a result, the court concluded that Value was entitled to a return of the OTP.[2]

Thereafter, Value contended that the OTP had gone stale or deteriorated while in the care of the Department. Value argued that it was therefore entitled to the monetary value of the seized OTP, which it asserted consisted of approximately $77,000 in product value

[2] The parties could not agree on the language to be included in the court's order effectuating the court's decision on summary disposition. Accordingly, both parties eventually submitted proposed orders to the court. The court concluded that neither order was sufficient and issued an order granting in part and denying in part both parties' motions "for the reasons stated on the record." The court attached the relevant pages of the motion-hearing transcript to the order.

and about $24,000 in taxes paid. The Department countered that the circuit court only had jurisdiction to order the return of the product and that, in any event, Value was only entitled to the base amount of the product, not a return of the product's value plus the taxes paid on it. The circuit court agreed that, due to spoilage, Value was entitled to receive the value of the product; however, because the court viewed Value as equally at fault for the spoilage, it only awarded Value half the product's value. Further, the court rejected Value's contention that it was entitled to a return on the taxes paid on the product, concluding that the taxable event was Value's purchase of the OTP from an out-of-state distributor, not its anticipated future sales to consumers.

II. SEIZURE AND FORFEITURE OF OTP UNDER THE TPTA

A. STANDARD OF REVIEW

The Department argues that the circuit court erred by ordering it to return the product or to return one half of the value of the product because, under MCL 205.426(6) and MCL 205.429, the seizure was proper, as was the forfeiture. Value argues that the circuit court erred by only ordering half of the product's value returned and by denying its request for the return of taxes paid on the product. This Court reviews de novo a circuit court's grant or denial of a motion for summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Further, resolution of the issues on appeal involves matters of statutory construction, which are reviewed de novo. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d

164 (1999). "The intent of the Legislature is discerned from the plain language of the statute, affording words their common, ordinary meaning." *Shotwell v Dep't of Treasury*, 305 Mich App 360, 366; 853 NW2d 414 (2014), vacated in part on other grounds 497 Mich 977 (2015). If the language of the statute is unambiguous, this Court presumes that the Legislature intended the meaning clearly expressed, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

B. ANALYSIS

"[T]he TPTA 'is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded.' " *People v Beydoun*, 283 Mich App 314, 327; 770 NW2d 54 (2009), quoting *People v Nasir*, 255 Mich App 38, 42; 662 NW2d 29 (2003). The act, which "can aptly be described as a pervasive group of tobacco product regulations[,] . . . contains detailed definitions, licensing and stamping requirements, recordkeeping and document maintenance obligations, schedules of tax rates, civil and criminal penalties for violations of the TPTA, procedures governing seized property, and a delineation of tobacco tax disbursements for various purposes." *Beydoun*, 283 Mich App at 328. Under MCL 205.429(1), "[a] tobacco product held, owned, possessed, transported, or in control of a person in violation of this act, . . . and any related books and records are contraband and may be seized and confiscated by the department as provided in this section." MCL 205.429(2) further provides:

> If an authorized inspector of the department or a police officer has reasonable cause to believe and does believe

> that a tobacco product is being acquired, possessed, transported, kept, sold, or offered for sale in violation of this act for which the penalty is a felony, the inspector or police officer may investigate or search the vehicle of transportation in which the tobacco product is believed to be located. If a tobacco product is found in a vehicle searched under this subsection or in a place of business inspected under this act, the tobacco product, vending machine, vehicle, other than a vehicle owned or operated by a transportation company otherwise transporting tobacco products in compliance with this act, or other tangible personal property containing those tobacco products and any books and records in possession of the person in control or possession of the tobacco product *may be seized by the inspector or police officer and are subject to forfeiture as contraband as provided in this section*. [Emphasis added.]

Accordingly, in order for the seizure of the OTP to be lawful, Value's possession of the OTP must have violated the TPTA.

The Department contends that Value possessed the OTP in violation of the TPTA. In support, it directs our attention to the first sentence in MCL 205.426(6), which provides as follows: "If a tobacco product other than cigarettes is received or acquired within this state by a wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, or retailer, each original manufacturer's shipping case shall bear the name and address of the person making the first purchase or any other markings the department prescribes." The Department asserts that the seized OTP did not have labels identifying the first purchaser or a tax stamp as prescribed by the Department.

Value, however, argues that it did not possess OTP contrary to the requirements in MCL 205.426(6). In support, it also directs our attention to the statutory language in MCL 205.426(6), which provides, in relevant part, that OTP "received or acquired" in Michi-

gan by an unclassified acquirer must have "the name and address of the person making the first purchase *or* any other markings the department prescribes" affixed to "each original manufacturer's shipping case." (Emphasis added.) Value contends that because it was required to have either the shipping labels identifying the first purchaser *or* "any other" prescribed markings, it was not actually required to have the shipping labels on the OTP at its facility because it could have the other prescribed markings instead. Value then asserts that it was not required to have *any* markings on the OTP because the Department had not provided any proof that other markings had been prescribed.

Based on our review of the record, the Department required OTP acquired by an unclassified acquirer to have a tax stamp affixed. This requirement is set forth in the Department's Application for Non-Cigarette Tobacco Products Stamp,[3] which provides:

> Only . . . unclassified acquirers receive other tobacco products in original manufacturers' shipping cases. . . .
>
> Since secondary wholesalers, vending machine operators, or retailers are prohibited from possessing other tobacco products in containers that do not bear the proper markings, . . . *unclassified acquirers MUST mark containers they ship to their customers with their OTP stamp*. It is a violation of the Tobacco Products Tax Act (TPTA) for a secondary wholesaler, vending machine operator, or retailer to possess a shipping container without an OTP stamp of its supply source, *and OTP found in unmarked containers can be seized*. [Emphasis added.]

Value contends that the application only requires that it affix a tax stamp to the OTP before selling or

[3] Michigan Department of Treasury, *Application for Non-Cigarette Tobacco Products Stamp*, p 2, available at <https://www.michigan.gov/documents/323f_2919_7.pdf> [https://perma.cc/U5T8-ZYDP].

shipping it to another. However, the application clearly states that OTP in unmarked containers can be seized. More importantly, MCL 205.426(6) provides that other markings prescribed by the Department—such as the tax stamp—must be affixed when the OTP is received or acquired, not when it is shipped or sold. Accordingly, we reject Value's contention that there is no evidence in the lower court record that the tax stamp was not an "other marking" prescribed by the Department under MCL 205.426(6).

Additionally, assuming arguendo that the Department wholly failed to prescribe any other markings under MCL 205.426(6), the statute still unambiguously requires either the shipping labels identifying the first purchaser or other markings. In this case, it is unrefuted that the seized OTP had neither.

Next, a violation of MCL 205.426(6) is only a presumed violation of the TPTA.[4] MCL 205.426(6) provides, in part:

> If a tobacco product other than cigarettes is found in a place of business or otherwise in the possession of a

[4] The Department seems to suggest that violating MCL 205.426(6) constitutes a violation of the TPTA sufficient to allow the seizure and forfeiture of the OTP kept in violation of MCL 205.426(6) without regard to whether the taxes on the seized OTP are paid or unpaid and without regard to whether the unclassified acquirer can establish that it legally obtained the OTP (and so did not violate the substantive provisions of the TPTA even though it violated the recordkeeping requirements of MCL 205.426(6)). However, given that MCL 205.426(6) expressly provides that a violation of MCL 205.426(6) is only a presumptive violation of the TPTA, we reject that interpretation as contrary to the plain language of the statute. If the Legislature had intended that any violation of the recordkeeping requirements in MCL 205.426 would constitute a per se violation of the TPTA, then it would not have included a sentence expressly stating that such a violation was only a presumptive violation of the TPTA. See *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (stating that we should avoid interpreting a statute in a way that renders any part of the statute surplusage or nugatory).

> wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transporter, or retailer without proper markings on the shipping case, box, or container of the tobacco product or if an individual package of cigarettes is found without a stamp affixed as provided under this act or if a tobacco product is found without proper substantiation by invoices or other records as required by this section, the presumption shall be that the tobacco product is kept in violation of this act.

Therefore, if an unclassified acquirer (like Value) has possession of OTP "without proper markings," including labels identifying the first purchaser, as required by MCL 205.426(6), then "the presumption shall be that the tobacco product is kept in violation of this act." Accordingly, because the OTP in this case indisputably failed to identify the first purchaser or to have a stamp affixed to it as prescribed by the Department, Value's possession of the OTP was a presumed violation of the TPTA.[5]

Under MCL 205.429(1), "[a] tobacco product held, owned, possessed, transported, or in control of a person in violation of this act, . . . and any related books and records are contraband and may be seized and confiscated by the department as provided in this section."

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[5] MCL 205.426(6) requires OTP "received or acquired within this state" to "bear the name and address of the person making the first purchase or any other markings the department prescribes." The statute is silent with regard to who bears the responsibility of ensuring that the proper markings are on the OTP that is received or acquired. However, the plain language of the statute nevertheless requires the markings on receipt or acquisition of the product. Accordingly, even though Value presented evidence showing that the labels identifying the first purchaser had been removed by Basik, that does not change the fact that Value thereafter had "received or acquired" OTP without the required labels. Stated differently, the presumption of a violation of the TPTA is not negated by the fact that Value took no action to obscure the identity of the first purchaser.

Consequently, because at the time of seizure there was a presumed violation of the statute, the seizure of the OTP was lawful.[6]

Because tobacco products seized on the basis of violations of the TPTA are only "subject to forfeiture," MCL 205.429(2), the next question is whether the OTP seized in this case should have been forfeited. The statute clearly provides that forfeiture is not automatic. MCL 205.429(2) states:

> If an authorized inspector of the department or a police officer has reasonable cause to believe and does believe that a tobacco product is being acquired, possessed, transported, kept, sold, or offered for sale in violation of this act for which the penalty is a felony, the inspector or police officer may investigate or search the vehicle of transportation in which the tobacco product is believed to be located. If a tobacco product is found in a vehicle searched under this subsection or in a place of business inspected under this act, the tobacco product, vending machine, vehicle, other than a vehicle owned or operated by a transportation company otherwise transporting tobacco products in compliance with this act, or other tangible personal property containing those tobacco products and any books and records in possession of the person in control or possession of the tobacco product may be seized by the inspector or police officer and are subject to forfeiture as contraband as provided in this section.

The plain language of the statute, therefore, provides that OTP possessed in violation of the TPTA is merely *subject* to forfeiture after it has been seized.

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[6] We note that the Legislature provided two forums for a taxpayer to challenge the lawfulness of a seizure, see MCL 205.429(3) and (4), which we believe allows the Department to seize tobacco products even when there is only a presumptive violation of the TPTA. In other words, the Department is not required to provide a preseizure opportunity for a taxpayer to rebut the presumption in MCL 205.426(6) because the Legislature has already provided a postseizure process for doing so.

MCL 205.429(3) provides that "[a]s soon as possible, but not more than 5 business days after seizure of any alleged contraband, the person making the seizure shall deliver personally or by registered mail to the last known address of the person from whom the seizure was made, if known, an inventory statement of the property seized." The inventory statement, which must be filed with the state treasurer, must "contain a notice to the effect that unless demand for hearing as provided in this section is made within 10 business days, the designated property is forfeited to the state." MCL 205.429(3). Because Value made a demand for a hearing "for a determination as to whether the property was lawfully subject to seizure and forfeiture," the OTP could not be forfeited based on the failure to demand a hearing. See MCL 205.429(3).

There is no dispute that in accordance with MCL 205.429(3) a hearing on the lawfulness of the seizure and the possible forfeiture was timely held and resulted in a determination in the Department's favor. The statute provides that, following the hearing before the Department, if it is determined that "the property is lawfully subject to seizure and forfeiture," then, provided "*the person from whom the property was seized or any persons claiming an interest in the property do not take an appeal to the circuit court of the county in which the seizure was made within the time prescribed in this section*, the property seized shall be considered forfeited to the state by operation of law . . . ." MCL 205.429(3) (emphasis added). Here, Value took a timely appeal to the proper circuit court, so forfeiture was not proper under MCL 205.429(3).

In the circuit court, Value presented evidence allegedly showing that it had paid taxes on the seized OTP. It also provided invoices that it argued showed who it

had acquired the seized OTP from and why the seized OTP lacked the proper markings. In response, the Department contended that without the required markings on the OTP, i.e., the labels identifying the first purchaser, it could not conclusively determine whether the taxes had actually been paid on the seized OTP or whether they were paid on some other OTP. In support, the Department attached an affidavit from Michigan State Police Trooper Todd Berdan, who stated that without the shipping labels, there was no way for him to determine whether the seized OTP came from Basik. He also averred that without the shipping labels, whether the taxes were actually paid on the OTP was essentially a guess or assumption. Berdan explained:

> In my experience with tobacco tax fraud someone is going to have invoices for fraudulently obtained products. You buy good stuff and you buy bad stuff, [and] you make sure all that stuff is on an invoice. I don't know if that's the case with [Value] but that's—in my experience that is what a good fraud program or operation does, so again, there's no way I can determine whether that box is from Basik, which he has invoices from, or whether it's from Pennsylvania and Yahoo tobacco, without that label, that label tells me who he bought it from.

He further explained that looking at the invoices or calling Basik would not help because "it doesn't tell me that that's the box we're talking about." He added:

> The only way to tell me that box is the box we're either talking about or looking at on the invoice is with that shipping label. Again, if I got one invoice for one box of Swedish Match cigarillos and I've got—get that very box with the shipping label, I sell it, the next day I buy the same box but from a white van, I don't know without that shipping label . . . .

Accordingly, although Value presented evidence that allowed an inference that the seized OTP came from Basik and that it had paid taxes on the seized product, the Department rebutted that evidence with Berdan's affidavit explaining the inherent deficiency of that evidence. As a result, there is a factual dispute with regard to whether the presumption in MCL 205.426(6) could be rebutted by the evidence submitted by Value. Because there was a factual dispute, summary disposition was inappropriate under MCR 2.116(C)(10).[7] We therefore reverse the circuit court order granting in part and denying in part the parties' motions for summary disposition.

On remand, the circuit court shall hold an evidentiary hearing to determine whether Value can rebut the presumption that it possessed the OTP in violation of the TPTA. In order to rebut the presumption, Value must present evidence establishing (1) that it lawfully obtained the OTP and (2) that it properly paid taxes on the seized OTP. If the court finds that the presumption in MCL 205.426(6) was rebutted, it may order the return of the seized OTP.[8] If, however, the court finds

[7] We note that Value raised a number of constitutional challenges to the Department's seizure of the OTP in this case. Value's claim, however, was brought pursuant to MCL 205.429(4), which provides that "[i]f a person is aggrieved by the decision of the department, that person may appeal to the circuit court of the county where the seizure was made to obtain a judicial determination of the lawfulness of the seizure and forfeiture." The statute further provides that during the proceeding before the circuit court, the circuit court "shall hear the action and determine the issues of fact and law involved in accordance with rules of practice and procedure as in other in rem proceedings." Accordingly, the constitutional claims should be brought in a separate proceeding.

[8] Given our resolution with regard to the court's decision on summary disposition, we need not address the court's post-summary disposition decision to award Value one half of the seized OTP's value on the basis of evidence that the OTP spoiled while in the Department's possession or the court's decision not to order a tax refund for the taxes allegedly

that Value cannot rebut the presumption, then it should allow the product to be forfeited.

Reversed and remanded for further proceedings. Neither party having prevailed in full, we decline to award costs under MCR 7.219(A). We do not retain jurisdiction.

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

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paid on the seized OTP. We note, however, that under some circumstances the TPTA does allow for a return of the monetary value of seized tobacco products as opposed to a return of the actual tobacco product. See MCL 205.429(4).

FOUR ZERO ONE ASSOCIATES LLC v DEPARTMENT OF TREASURY

Docket No. 332639. Submitted June 8, 2017, at Lansing. Decided June 15, 2017. Approved for publication August 1, 2017, at 9:05 a.m.

Four Zero One Associates LLC filed a petition in the Michigan Tax Tribunal, seeking a small business alternative credit for the 2008 tax year. The Michigan Department of Treasury had denied Four Zero One's claim for the tax credit because the compensation received by officer and shareholder Lawrence F. DuMouchelle during the 2008 tax year exceeded $180,000. A $30,000 bonus received by DuMouchelle in 2008 raised his compensation for 2008 from $163,996 to $193,996. Four Zero One employed the accrual method of accounting and argued that eligibility for the tax credit should be ascertained by determining compensation using the taxpayer's method of accounting. Because DuMouchelle's $30,000 bonus had been deducted in 2007 by Four Zero One using the accrual method of accounting, Four Zero One claimed that the bonus should not count toward compensation in 2008 even though the bonus was paid in 2008. The Tax Tribunal, Steven H. Lasher, J., granted the Department of Treasury's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Four Zero One appealed.

The Court of Appeals *held*:

The Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*., provides a small business alternative credit in MCL 208.1417. Under MCL 208.1417(1)(b)(*i*), a corporation other than an S corporation is disqualified from taking the credit if the compensation and director's fees of a shareholder or officer exceed $180,000. The term "compensation" is defined in the first sentence of MCL 208.1107(3) as including all wages, salaries, fees, bonuses, commissions, and other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers. The third sentence of MCL 208.1107(3) goes on to state that the term "compensation" also includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, certain payments to a pension, retirement, or profit-sharing plan and payments for insurance for which employees are

the beneficiaries. The question in this case was whether a bonus constitutes compensation in the year of payment or whether a taxpayer's election of an accrual method of accounting controls the calculation of compensation for a given year such that a bonus is included in compensation in the year in which the company deducts the bonus. Four Zero One used an accrual method of accounting, under which income is includable in gross income when all the events have occurred that fix the right to receive the income and the income amount can be determined with reasonable accuracy. In contrast, under a cash method of accounting income is includable in gross income when actually or constructively received. The first sentence of MCL 208.1107(3) does not expressly require that a specific method of accounting be used to determine whether a bonus should be considered compensation in any given year. In contrast, the language in the third sentence of MCL 208.1107(3) expressly indicates that payments to a pension, retirement, or profit-sharing plan and payments for an employee's insurance should be calculated according to the taxpayer's method of accounting. The rules of statutory interpretation require recognition that the Legislature's inclusion of language in one place in a statute and its omission of that language in another place in the same statute was purposeful. Therefore, the taxpayer's method of accounting does not control when a bonus constitutes compensation. Rather, given its dictionary definition and its placement in the first sentence of MCL 208.1107(3), a "bonus" is a type of payment that counts as compensation in the year it is received. Four Zero One contrarily asserted that the last-antecedent rule applied and that, therefore, a bonus should not be considered a payment made in the tax year because the phrase "made in the tax year" only modifies the term "other payments." But the last-antecedent rule should not be applied when there is something in the subject matter of the statute that requires a different interpretation. And considering the statute as a whole, the definition of "compensation" does not single out "other payments" for a cash method of accounting; rather, in context, it is clear that all payments identified in the first sentence of MCL 208.1107(3) are to be treated similarly and that all these payment types are subject to a cash method of accounting for purposes of determining compensation. The statutory language is unambiguous, and Four Zero One's suggestion that this interpretation of MCL 208.1107(3) would cause absurd results because of the possible "mismatch" of accounting methods was without merit. The Tax Tribunal correctly granted the Department of Treasury's motion for summary disposition because there

was no genuine issue of material fact regarding whether DuMouchelle's compensation for the 2008 tax year exceeded the statutory limit of $180,000.

Affirmed.

Miller, Canfield, Paddock & Stone, PLC (by *Gregory A. Nowak*), for Four Zero One Associates LLC.

Bill Schuette, Attorney General, and *Emily C. Zillgitt*, Assistant Attorney General, for the Michigan Department of Treasury.

Before: O'BRIEN, P.J., and HOEKSTRA and BOONSTRA, JJ.

PER CURIAM. In this appeal from the Michigan Tax Tribunal, petitioner, Four Zero One Associates LLC (Four Zero One), seeks to claim, for the 2008 tax year, the small business alternative credit (SBAC) available under the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*.[1] Respondent, the Michigan Department of Treasury (the department), denied Four Zero One's claim for the SBAC, and the Tax Tribunal ruled in favor of the department, granting the department's motion for summary disposition under MCR 2.116(C)(10). Four Zero One now appeals as of right. Because Four Zero One exceeded the compensation limit imposed by MCL 208.1417(1)(b)(*i*), Four Zero One could not claim the SBAC for the 2008 tax year. We therefore affirm the Tax Tribunal's grant of summary disposition to the department.

The MBTA provides for the SBAC in MCL 208.1417. Notably, under MCL 208.1417(1)(b)(*i*), Four Zero One is disqualified from claiming the SBAC if compensation

[1] The MBTA has been repealed for most business tax filers, but some businesses have been permitted to continue filing returns using the MBTA in order to claim refundable tax credits. 2011 PA 39.

for a shareholder or officer exceeds $180,000 for the respective tax year. Central to the present case is the amount of compensation received by officer and shareholder Lawrence F. DuMouchelle for the 2008 tax year. The department contends that DuMouchelle's compensation in 2008 totaled $193,996, which included a $30,000 bonus paid to DuMouchelle in 2008. Factually, Four Zero One concedes that DuMouchelle received a $30,000 bonus in 2008. However, Four Zero One asserts that whether a bonus should be included in calculating compensation for purposes of determining eligibility for the SBAC should be based on the taxpayer's elected method of accounting. Given that Four Zero One follows an accrual method of accounting[2] and that Four Zero One deducted the bonus in 2007, Four Zero One argues that the bonus received by DuMouchelle should be included as compensation for 2007, placing DuMouchelle's compensation for 2008 at $163,996.

Applying the definition of "compensation" set forth in MCL 208.1107(3),[3] the Tax Tribunal concluded that a bonus constitutes compensation for the tax year in which the bonus payment is made, irrespective of the taxpayer's method of accounting. Consequently, the Tax Tribunal included the $30,000 as compensation for

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[2] "Under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy." 26 CFR 1.451-1(a). In comparison, under a cash method of accounting, "such an amount is includible in gross income when actually or constructively received." *Id*.

[3] The version of MCL 208.1107 in effect in 2008 was enacted by 2007 PA 36, effective January 1, 2008. This opinion cites the language that appeared in the last version of MCL 208.1107, amended by 2011 PA 292, effective January 1, 2012. The definition of "compensation" discussed at length in this opinion is identical in both versions of MCL 208.1107 although its subsection number changed from (2) in the 2008 version to (3) in the 2012 version.

2008, resulting in compensation for DuMouchelle in excess of $180,000 for the 2008 tax year. Based on the conclusion that DuMouchelle's compensation exceeded $180,000 for 2008, the Tax Tribunal found Four Zero One ineligible for the SBAC and granted the department's motion for summary disposition.

On appeal, Four Zero One argues that the Tax Tribunal erred in its interpretation of the term "compensation" as defined in the MBTA. Specifically, Four Zero One argues that, adhering to the last-antecedent rule, the definition of "compensation" found in MCL 208.1107(3) does not expressly mandate a particular method of accounting for purposes of determining when a bonus must be included as compensation. Absent definitive direction, Four Zero One contends that the statute is ambiguous and should be interpreted in favor of the taxpayer, which in this case means interpreting the statute to allow for Four Zero One's accrual method of accounting. Additionally, Four Zero One asserts that the department's interpretation leads to absurd results because the potential "mismatch" between a taxpayer's accounting method and the computation of compensation allows taxpayers to manipulate the time of payment to become eligible for the SBAC. We disagree.

I. STANDARD OF REVIEW

"This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008) (quotation marks and citation omitted). We review de novo a decision on a motion for summary

disposition. *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1, 6; 884 NW2d 848 (2016). "A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact." *Sturrus v Dep't of Treasury*, 292 Mich App 639, 646; 809 NW2d 208 (2011).

"The interpretation and application of a statute constitutes a question of law that this Court reviews de novo." *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 407; 809 NW2d 669 (2011). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Orthopaedic Assoc of Grand Rapids, PC v Dep't of Treasury*, 300 Mich App 447, 451; 833 NW2d 395 (2013) (quotation marks and citation omitted). When construing statutory language, we "read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014) (quotation marks and citation omitted). "[A] provision of the law is ambiguous only if it irreconcilably conflict[s] with another provision, or when it is *equally* susceptible to more than a single meaning." *Ashley Capital*, 314 Mich App at 6 (quotation marks and citations omitted; alterations in original). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id*. (quotation marks and citation omitted).

II. ANALYSIS

The statutory question presented in this case is whether Four Zero One may claim the SBAC as pro-

vided for in MCL 208.1417. If a taxpayer qualifies for the SBAC, the credit "is the amount by which the tax imposed under this act exceeds 1.8% of adjusted business income." MCL 208.1417(4). However, there are several requirements that must be met to claim the SBAC. These requirements include ceilings on gross receipts, MCL 208.1417(1), and, relevant to this case, limitations on the amount of compensation and fees paid to corporate shareholders and officers, MCL 208.1417(1)(b)(*i*). The parties agree that Four Zero One's entitlement to the SBAC is controlled by MCL 208.1417(1), which provides:

> (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 directors' fees of a shareholder or officer exceed $180,000.00. [Emphasis added.]

As defined by statute, in relevant part, the term "tax year" refers to "the calendar year, or the fiscal year ending during the calendar year, upon the basis of which the tax base of a taxpayer is computed under this act." MCL 208.1117(4). The term "compensation" is defined by statute, in relevant part, as follows:

> "Compensation" means all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers, and any earnings that are net earnings from self-employment as defined under [26 USC 1402] of the internal revenue code of the taxpayer or a partner or limited liability company member of the taxpayer. Compensation includes, but is not limited to, payments that are subject to or specifically exempt or excepted from withholding under [26 USC 3401 to 26 USC 3406] of the internal revenue code. Compensation also includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax

> purposes, payments to a pension, retirement, or profit sharing plan other than those payments attributable to unfunded accrued actuarial liabilities, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payment of fees for the administration of health and welfare and noninsured benefit plans. [MCL 208.1107(3).]

Clearly, the term "compensation" has been expressly defined by MCL 208.1107(3) to include bonuses as a form of compensation. The only question is *when* the bonus constitutes compensation, i.e., whether the definition of "compensation" requires inclusion of a bonus as compensation in the year of payment or whether a taxpayer's election of an accrual method of accounting controls the calculation of compensation for a given year such that the bonus is included as compensation in the year in which the company deducts the bonus. Considering MCL 208.1107(3) as a whole and in context, we conclude that the definition of compensation is unambiguous, and it is clear that a bonus should be counted as compensation in the year in which the bonus was paid.

The term "bonuses" appears in the first sentence of MCL 208.1107(3), which begins by stating that compensation "means all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers, and any earnings that are net earnings from self-employment . . . ." MCL 208.1107(3). On its face and when read in isolation, this sentence does not expressly dictate that a specific method of accounting must be used to determine whether a bonus should be included as compensation for a given tax year. However, the definition of "compensation" is not limited to the bonuses, wages, com-

missions, fees, salaries and other payments mentioned in the first sentence of MCL 208.1107(3). Rather, the statutory definition of "compensation" goes on to identify numerous additional types of compensation. See MCL 208.1107(3). Notably, in the third sentence of MCL 208.1107(3), the statute specifies that "[c]ompensation also includes, *on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes*, payments to a pension, retirement, or profit sharing plan . . . ." MCL 208.1107(3) (emphasis added).

This practice of determining compensation in reference to the taxpayer's "cash or accrual" method of accounting is precisely the system that Four Zero One wants to inject into the first sentence of MCL 208.1107(3) for determining compensation consisting of bonuses, wages, salaries, commissions, and fees. Yet, the "cash or accrual" language so clearly articulated in the third sentence of MCL 208.1107(3) is noticeably missing from the first sentence. The fact that the Legislature chose to recognize the taxpayer's "cash or accrual" method of accounting with respect to the certain types of compensation specified in the third sentence of MCL 208.1107(3) makes plain that had the Legislature similarly intended this result with regard to bonuses (and wages, commissions, fees, and salaries), it knew how to make its intentions clear. See *People v Brantley*, 296 Mich App 546, 558; 823 NW2d 290 (2012), reversed in part on other grounds by *People v Comer*, 500 Mich 278; 901 NW2d 553 (2017). In other words, when the Legislature has expressly included language in one part of a statute and omitted this same language elsewhere in the provision, this inclusion and omission should be construed as intentional. See *id*.; *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 840 NW2d 743 (2013). Therefore, we will not read into

the first sentence of MCL 208.1107(3) language that the Legislature chose to omit. See *Book-Gilbert*, 302 Mich App at 542. Rather, applying the plain language of the statute, the taxpayer's method of accounting is relevant to the calculation of compensation involving pensions, retirement, and profit sharing, but the taxpayer's method of accounting does not control the determination of compensation involving bonuses, commissions, fees, wages, salaries, and other payments. See MCL 208.1107(3).

Considering the first sentence of MCL 208.1107(3), we also agree with the department that, under the plain terms of the statute, a bonus is a type of payment and that, like the other payments identified in the first sentence of MCL 208.1107(3), a bonus counts as compensation in the tax year in which the bonus is paid. Again, MCL 208.1107(3) begins with a list of items, namely "all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers and any earnings that are net earnings from self-employment . . . ." As commonly understood, wages, salaries, fees, bonuses, and commissions are types of payments.[4] That these terms refer to payments is also clear from the inclusion of the phrase "other payments" in the list of compensation types in the first sentence of MCL 208.1107(3). See *Manuel v*

[4] For instance, a "bonus" is "[s]omething given or paid in addition to what is usual or expected." *The American Heritage Dictionary of the English Language* (2011). In comparison, a "wage" is a "regular payment, usually on an hourly, daily, or weekly basis . . . ." *Id*. Likewise, a "commission" is "a fee paid to an agent or employee for transacting a piece of business or performing a service[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). In turn, a "fee" is "a sum paid or charged for a service[.]" *Id*. Finally, a "salary" is "fixed compensation paid regularly for services[.]" *Id*.

Gill, 481 Mich 637, 650; 753 NW2d 48 (2008) ("It is a familiar principle of statutory construction that words grouped in a list should be given related meaning.") (quotation marks and citations omitted). In other words, the placement of the phrase "*other* payments" makes plain that the preceding terms in the list—wages, salaries, fees, bonuses, and commissions—are also types of payments.

This listing of types of payments is significant because it leads to the conclusion that, without some indication to the contrary, a cash method of accounting is required. That is, the statute plainly identifies types of payments, which, quite simply, suggests *payment* consistent with a cash method of accounting as opposed to the mere accrual of obligations without payment having yet been made as contemplated by an accrual method of accounting.[5] See generally *United States v George*, 420 F3d 991, 996 (CA 9, 2005) ("[F]ees paid to cash-basis taxpayers are income in the year actually paid . . . ."); *Interex, Inc v Comm'r of Internal Revenue*, 321 F3d 55, 58 (CA 1, 2003) (stating that accrual method taxpayers who meet certain criteria "may deduct expenses when they are incurred even if they have not yet been paid"). Therefore, in the absence of a reference to a taxpayer's method of accounting—a reference of the type that appears in the third sentence of MCL 208.1107(3)—it appears from the plain definition of "compensation" that the Legislature intended for a cash method of accounting to apply, and that all wages, commissions, fees, salaries, bonuses, and other payments should be included as compensation in the year payment is made.

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[5] Indeed, in its reply brief, Four Zero One concedes that the statutory reference to "payments" "would lead one to conclude that the cash method is mandated . . . ."

In contrast to this conclusion, Four Zero One contends that the statute is ambiguous and should be construed to avoid absurd results. Specifically, Four Zero One argues for application of the last-antecedent rule. Applying this rule, Four Zero One contends that "other payments" constitute compensation in the year those other payments are made, which is consistent with a cash method of accounting, but that the statute is ambiguous with respect to when a bonus constitutes compensation. Based on the contention that the statute is ambiguous, Four Zero One urges this Court to interpret the statute in order to avoid the absurdity that will result if there is a "mismatch" between the taxpayer's method of accounting and the computation of compensation for purposes of the SBAC. We find these arguments to be without merit.

First, with respect to the last-antecedent rule, once again, in part, the first sentence of MCL 208.1107(3) states that "compensation" means "all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers, and any earnings that are net earnings from self-employment . . . ." Given the grammatical structure of this sentence, Four Zero One argues that under the last-antecedent rule, the phrase "made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers" only modifies the phrase "other payments." See *Tuscola Co Bd Of Comm'rs v Tuscola Co Apportionment Comm*, 262 Mich App 421, 425; 686 NW2d 495 (2004) (explaining that under the last-antecedent rule, "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation") (quotation marks and citation omitted). However, the last-

antecedent rule is merely one rule of statutory interpretation, and it "should not be applied blindly." *Hardaway v Wayne Co*, 494 Mich 423, 428; 835 NW2d 336 (2013). That is, it should not be applied if "there is something in the subject matter or dominant purpose which requires a different interpretation." *Tuscola Co Bd Of Comm'rs*, 262 Mich App at 425 (quotation marks and citations omitted). See also *Duffy v Dep't of Natural Resources*, 490 Mich 198, 221; 805 NW2d 399 (2011).

In this case, we decline to apply the last-antecedent rule in such a way as to impose a cash method of accounting solely for "other payments," while wages, bonuses, commissions, fees, and salaries may be calculated based on an accrual method of accounting. Considering MCL 208.1107(3) as a whole, we conclude that the Legislature did not intend such a result. As already discussed, all of the terms at issue—i.e., "wages," "commissions," "salaries," "bonuses," "fees," and "other payments"—denote types of payments indicative of a cash method of accounting. Moreover, as discussed, this conclusion is further bolstered by the Legislature's express reference to a taxpayer's choice of a "cash or accrual" method elsewhere in the definition of compensation, which makes plain that the omission of this language with respect to wages, commissions, bonuses, fees, and salaries was deliberate. See *Book-Gilbert*, 302 Mich App at 541-542. Additionally, while Four Zero One argues that it is only "other payments" that must be "made in the tax year," we agree with the department that this construction ignores the significance of the word "other." In context, the word "other" indicates a purposeful similarity, rather than a difference, between these *other* "payments made in the tax year" and the preceding list of wages, commissions, bonuses, salaries, and fees. Indeed, there would be no need to refer to "other" payments "made in the tax year" if *only*

these unspecified "payments" had to be made in the tax year. Instead, given its placement in the statute, use of the word "other" suggests that all specified payments—wages, fees, salaries, commissions, bonuses—as well as the unspecified "other payments" must be made in the tax year, consistently with a cash method of accounting, to constitute compensation for that year. In short, considering the statute as a whole, we do not read the definition of "compensation" as singling out "other payments" for a cash method of accounting; rather, in context, it is clear that all payments identified in the first sentence of MCL 208.1107(3) are to be treated similarly and that all these payments are subject to a cash method of accounting for purposes of determining compensation. Consequently, we reject Four Zero One's interpretation based on the application of the last-antecedent rule.

Insofar as Four Zero One contends that the department's interpretation should be set aside in order to avoid absurd results, this argument is similarly without merit. The absurd-results rule applies only when statutes are ambiguous, *Gauthier v Alpena Co Prosecutor*, 267 Mich App 167, 174; 703 NW2d 818 (2005), and, as we have determined, the statutory definition of "compensation" is unambiguous. Therefore, there is no need to resort to the absurd-results rule.[6]

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[6] While we find it unnecessary to reach the absurd-results rule, we note briefly that the purported absurdity identified by Four Zero One would not be cured by the interpretation proposed by Four Zero One. Specifically, relying on the last-antecedent rule, Four Zero One appears to argue that a cash method of accounting applies solely to "other payments" while other forms of compensation should be calculated using the taxpayer's selected method of accounting. Thus, with respect to "other payments" there would remain a possibility for a "mismatch" between the taxpayer's method of accounting and the calculation of compensation for purposes of the SBAC. We fail to see how this interpretation would result in the consistency that Four Zero One

Finally, we emphasize that our conclusions with respect to the meaning of "compensation" are in line with both the department's interpretation as well as the interpretation adopted by the Tax Tribunal. Specifically, both the department and the Tax Tribunal have examined the statutory definition of "compensation" and decided that bonuses (as well as wages, commissions, fees, salaries, and other payments) must be included as compensation under MCL 208.1107(3) based on the year in which the payments are made. This interpretation is "entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *Younkin v Zimmer*, 497 Mich 7, 10; 857 NW2d 244 (2014) (quotation marks and citation omitted). See also *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 222; 668 NW2d 181 (2003) ("This Court defers to the tribunal's interpretation of a statute that it is charged with administering and enforcing."). Because the interpretation of the department and the Tax Tribunal does not conflict with the Legislature's intent as expressed in the plain language of the statute, we see no "cogent reason" to adopt a different interpretation. See *Younkin*, 497 Mich at 10; *Kelly Servs, Inc v Dep't of Treasury*, 296 Mich App 306, 311; 818 NW2d 482 (2012). Therefore, we hold that, under MCL 208.1107(3), all bonuses, salaries, commissions, fees, wages, and other payments are to be included as compensation in the year in which these payments are made.

III. APPLICATION

Having determined that MCL 208.1107(3) requires that bonuses be included in the calculation of compen-

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maintains is necessary to avoid manipulation of the SBAC. It strikes us that treating *all* payments in the first sentence of MCL 208.1107(3) in the same manner is a more consistent—and less absurd—approach than that offered by Four Zero One.

sation for the year in which a bonus was paid, the application to this case is simple and straightforward. It is uncontested that although Four Zero One deducted the bonus in 2007, DuMouchelle actually received the $30,000 bonus in 2008, which brought his compensation in 2008 to $193,996. In these circumstances, Four Zero One exceeded the compensation limits imposed by MCL 208.1417(1)(b)(*i*), and Four Zero One was therefore ineligible to claim the SBAC for the 2008 tax year. No material question of fact remains, and the Tax Tribunal properly granted the department's motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

O'BRIEN, P.J., and HOEKSTRA and BOONSTRA, JJ., concurred.

PEOPLE v WELLMAN

Docket No. 332429. Submitted July 12, 2017, at Lansing. Decided August 3, 2017, at 9:00 a.m.

Michael A. Wellman was convicted following a jury trial in the Delta Circuit Court of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). He was sentenced as a fourth-offense habitual offender to 5 to 25 years of imprisonment. At sentencing, Wellman asserted that Offense Variable (OV) 4, MCL 777.34, was erroneously scored at 10 points. According to Wellman, zero points should have been assigned under OV 4. The court, Stephen T. Davis, J., disagreed and noted that the events that occurred would cause psychological harm to an ordinary person and did, in fact, cause psychological harm to the victim in this case. Wellman appealed.

The Court of Appeals *held*:

OV 4 addresses serious psychological injury requiring professional treatment that occurred to a victim of a defendant's crime. According to MCL 777.34(1)(a) and (2), 10 points should be assessed for OV 4 when a victim has suffered serious psychological injury that requires professional treatment regardless of whether the victim has sought professional treatment for the psychological injury. The language in MCL 777.34 is substantially similar to the language in MCL 777.35, the statute governing OV 5. The Michigan Supreme Court decided in *People v Calloway*, 500 Mich 180 (2017), that statements made at sentencing by the family of the victim were sufficient to support the assessment of 15 points under OV 5 for serious psychological injury to a member of a victim's family even though there was no evidence that any of the family members had an intention to seek treatment. OV 4 should be similarly applied. The evidence in this case supported the trial court's assessment of 10 points for OV 4 because, as the trial court noted, the victim was reluctant to testify and had difficulty appearing on the witness stand. Moreover, the victim asked that the courtroom be closed to the public at Wellman's preliminary examination, and she was allowed to bring her mother as a support person to the preliminary examination. At Wellman's preliminary examination, the trial court explained that the sensitive nature of

criminal sexual conduct cases and the emotional trauma a case can cause a victim justified closing the courtroom. The trial court also stated that the fairly significant violence involved in Wellman's assault of the victim, and the victim's resulting bloody lacerations, justified closing the courtroom. Additional evidence of the victim's psychological injury included the victim's statement during the cross-examination that she needed a break because she was pretty shaken up as well as the fact that the victim was receiving disability benefits for her anxiety and post-traumatic stress disorder. The victim further testified at trial that her everyday life was harder since the assault and that she had continuing memory loss. She was fidgety and nervous on the witness stand and did not want to be in the same room as Wellman. Finally, since the assault, the victim had been experiencing digestive issues. The evidence in this case was sufficient to support assigning 10 points under OV 4 for the serious psychological injury caused to the victim by Wellman's assault, and the trial court properly did so.

Affirmed.

CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLE 4 — SERIOUS PSYCHOLOGICAL INJURY TO A VICTIM.

Offense Variable (OV) 4 addresses serious psychological injury to a victim; 10 points should be assessed for OV 4 when serious psychological injury requiring professional treatment occurred to a victim; points may be assessed under OV 4 when the victim has not sought or received treatment if the psychological injury may require professional treatment in the future; the victim need not presently intend to seek treatment in order for points to be assessed under OV 4.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Jessica E. LePine*, Assistant Attorney General, for the people.

Terence R. Flanagan for defendant.

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

PER CURIAM. Early in the afternoon on January 23, 2015, the victim and defendant, longtime friends, took

a bus together to a walk-in clinic. They returned around 4:00 p.m. The victim went back to her apartment alone. Defendant texted the victim that evening indicating that she should come over around 8:00 p.m. for a drink at his apartment. She went and had one spiced rum and coke. From there she went home to meet another friend. The victim and her friend drove around a park and went to the store. As that friend dropped the victim off at her apartment, the victim witnessed defendant stumbling and staggering back from the Kon Tiki Bar. After the victim's friend dropped her off, the victim started walking to her girlfriend's house, and she passed by defendant's apartment. Remembering she had left a basket of clean laundry at defendant's apartment, she decided to stop by and retrieve it. While there, the assault occurred.

Defendant appeals by right the sentence imposed by the trial court after his jury trial conviction of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve a prison term of 5 to 25 years. We affirm.

A trial court's factual determinations under the sentencing guidelines must be supported by a preponderance of the evidence and are reviewed for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. "[W]hen determining how offense variables should be scored, this Court reads the sentencing guideline statutes as a whole." *People v Bonilla-Machado*, 489 Mich 412, 422; 803 NW2d 217 (2011).

"The cardinal rule of statutory construction is to identify and to give effect to the intent of the Legislature." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). See also *Mull v Equitable Life Assurance Society of the United States*, 444 Mich 508, 514 n 7; 510 NW2d 184 (1994). We focus first on the plain language of the statute. *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104, 110; 252 NW2d 818 (1977). Individual words and phrases are not only read for bare meaning but are also read in the context of the entire legislative scheme. *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "When, as here, 'the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.' " *Malpass v Dep't of Treasury*, 494 Mich 237, 249; 833 NW2d 272 (2013), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Defendant does not dispute the conviction but alleges there to be an error in the scoring of Offense Variable (OV) 4, resulting in an incorrect sentence. Defendant argues that OV 4 was scored on the basis of inaccurate information and, thus, that OV 4 was scored in violation of his state and federal due process rights. OV 4 should be scored at 10 points when "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). "In making this determination, the fact that treatment has not been sought is not conclusive[.]" MCL 777.34(2). Defendant argues that the record does not support a score of 10 points because it cannot be proved that the victim sustained a serious psychological injury from his attack, let alone an injury requiring professional treatment. Further, defendant emphasizes that

the victim did not supply a victim impact statement or explicitly testify that defendant caused her psychological injuries. An OV 4 score of 10 points resulted in a total OV score of 50 points, the lowest number for OV Level V (50-74 points) for a Class D offense. MCL 777.21(1)(a).

While the Crime Victim's Rights Act, MCL 780.751 *et seq*., affords a victim the right to submit an impact statement for the presentence investigation report and at sentencing,[1] such a submission is not necessary in order to establish evidence of psychological harm. The term "right" is defined, in relevant part, as "the power or privilege to which one is justly entitled" or "something to which one has a just claim." *Merriam Webster's Collegiate Dictionary* (11th ed). Although the victim did not provide a statement, she did testify at trial, relaying how the assault occurred. She stated that after walking into defendant's basement to pick up a load of clean laundry she had finished there because her apartment did not have a washer or dryer, defendant shut and locked the door behind her, pinned her in a bear hug, picked her up, and lifted her up the stairs into his apartment. There, he pinned her against the refrigerator and pulled off her t-shirt, repeatedly punching her in the face with his fists. She testified that he then laid atop her and stated, "I will drag you bloody and beaten to my bed and then rape you," threatening to kill her if she refused. When he momentarily lost his footing, she escaped and called 911. She testified that she had been "scared for [her] life" and that the beating had been "traumatic." The police described the victim as "hysterical" and noted that she had multiple facial lacerations and was dripping in blood upon their arrival.

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[1] MCL 780.763(1)(c) and (f).

"When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a [presentence investigation report]." *People v Thompson*, 314 Mich App 703, 708-709; 887 NW2d 650 (2016). A sentencing court may also consider "plea admissions[] and testimony presented at a preliminary examination." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015).

Based on an analysis of the statute's clear meaning, the scoring of OV 4 was not clearly erroneous. Whether the victim had undergone psychological treatment is not determinative.[2] MCL 777.34(2). The trial court explained that 10 points was the appropriate score "[n]ot simply because these events that occurred to an ordinary person would give rise [to psychological injury which would require professional treatment], but in her particular case, they, in fact, did give rise [to psychological injury]," noting the victim's reluctance and difficulty in giving testimony and appearing on the witness stand. Furthermore, we note that the preliminary examination was closed to the public by the trial court at the victim's request. The trial court explained that cases involving criminal sexual conduct are "very sensitive" and can be "emotionally traumatic for the victims involved," and the court emphasized that this case involved a "fairly significant alleged violent act with blood . . . ." Also of note, the victim was allowed to bring her mother as a support person to the preliminary examination, and during cross-examination at trial, the victim stated that she was "going to need a break pretty quick" as she was "pretty shook up." In

[2] At defendant's preliminary examination, the trial court stated that the prosecutor had been in counseling at Pathways. This clearly is a transcription error, or the judge misspoke, because it is obvious from the context that the court meant the victim.

addition, the victim was currently on disability for her anxiety and post-traumatic stress disorder.

This Court has held that a victim's "statements about feeling angry, hurt, violated, and frightened" support a score of 10 points for OV 4. *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012). This approach also comports with *People v Calloway*, 500 Mich 180; 895 NW2d 165 (2017), which reversed this Court's opinion in *People v Calloway*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2016 (Docket Nos. 323776 and 325524). Therefore, this Court affirms defendant's sentence by extending *Calloway*, which involved OV 5, in deference to the plain meaning and the exact verbiage of both OV 4 and OV 5. The statutory language of OV 5, concerning serious psychological injury to a victim's family requiring treatment, MCL 777.35, is as follows:

> (1) Offense variable 5 is psychological injury to a member of a victim's family. Score offense variable 5 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) Serious psychological injury requiring professional treatment occurred to a victim's family ..... 15 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim's family ... 0 points
>
> (2) Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

Considering the trial court's scoring of OV 5 at 15 points, this Court's *Calloway* panel noted that although the victim's stepfather reported that the "incident has had a tremendous, traumatic effect on him and his family" and that the incident "will change them

for the rest of their lives," "there is no evidence indicating that any member of the victim's family intended to receive professional treatment in relation to the incident or required professional treatment because of the incident." *Calloway*, 500 Mich at 183 (quotation marks and citation omitted).

In its review of this Court's opinion in *Calloway*, the Michigan Supreme Court examined the language of MCL 777.35. The Court reasoned that "[a]t first blush, the second subsection of MCL 777.35 appears to contradict the first concerning whether professional treatment is required for points to be assessed. However, the more specific second subsection is clearly intended as a further explication of the circumstances justifying a 15-point score." *Calloway*, 500 Mich at 185. The Court noted that "serious" means " 'having important or dangerous possible consequences[.]' " *Id*. at 186, quoting *Merriam-Webster's Collegiate Dictionary* (11th ed). In contrast to what the Court of Appeals had held, the Supreme Court ultimately interpreted MCL 777.35 to mean that a family member need not be, at present, seeking or receiving professional treatment or intending to do so. *Calloway*, 500 Mich at 186. In deciding *Calloway*, the Supreme Court noted that "the Court of Appeals did not discuss any details regarding the victim's grandmother's 'emotional response to the [victim's] death,' or consider the letter she submitted 'that spoke about her disbelief, grief, anger, and heartbreak at the loss of the [victim].' " *Id*. at 187-188.

Given the similarity between the language of MCL 777.34 and MCL 777.35, we extend the Supreme Court's analysis of OV 5 in *Calloway* to OV 4. There is no reason to assume that OV 4 and OV 5 should be interpreted differently when they are two branches stemming from the same tree, for "why [should we]

abandon our usual presumption that 'identical words used in different parts of the same statute' carry 'the same meaning' "? *Henson v Santander Consumer USA Inc*, 582 US ___, ___; 137 S Ct 1718, 1723; 198 L Ed 2d 177 (2017), quoting *IBP, Inc v Alvarez*, 546 US 21, 34; 126 S Ct 514; 163 L Ed 2d 288 (2005). When the Legislature uses identical words or phrases, this Court interprets them as synonymous.

The Supreme Court, in applying the plain language of MCL 777.35 to the facts of *Calloway*, determined that the score of 15 points for OV 5 was appropriate given the statements of the victim's family in the presentence investigation report, which demonstrated the serious psychological issues they were suffering that could require future professional treatment. The Court referred to one particular statement made by the victim's stepfather. Addressing the trial court at the sentencing, the stepfather stated that " 'since [the day of the murder], [he had] thought about this every single day" and that he would "probably think about it for the rest of [his] life.' " *Calloway*, 500 Mich at 189.

The statement in *Calloway* is no great departure from the statements the victim in this case made at trial. The victim here has explained that the assault was traumatic for her and that one of the lasting effects on her was how her "everyday life was harder now." Moreover, her body language was evidence of this difficulty; while testifying she was "fidgeting" and nervous, not wanting to have to be in the same room with defendant. She also testified about her continuing memory loss. Furthermore, all involved in the trial, save for the jury, acknowledged that the victim had been experiencing some digestive issues since the incident. She was experiencing them on the day she testified—while trying to get to the courthouse to give

her testimony, she had to stop at several rest stops on her way to court. Therefore, we adhere to the Legislature's intent and hold that the victim's statements support a score of 10 points for OV 4, and the trial court did not clearly err in its decision to assess 10 points for OV 4.

Affirmed.

MARKEY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ., concurred.

PEOPLE v MEAD (ON REMAND)

Docket No. 327881. Submitted May 8, 2017, at Lansing. Decided August 8, 2017, at 9:00 a.m. Leave to appeal sought.

Larry G. Mead was convicted following a jury trial in the Jackson Circuit Court of possession of methamphetamine, MCL 333.7403(2)(b)(*i*). Defendant was a passenger in a car that was pulled over by a Jackson Police Department officer because the car's license plate was expired. The driver consented to a search of the car. Defendant placed the backpack he had been holding on his lap on the passenger compartment floor when he got out of the car for the officer's search. The officer found nothing illegal on defendant when defendant consented to a search of his person. However, the officer found methamphetamine in defendant's backpack when the officer searched the vehicle; defendant admitted that the backpack belonged to him. Before trial, defendant moved to suppress the evidence, arguing that the search was unreasonable under US Const, Am IV, and Const 1963, art 1, § 11. The court, Thomas D. Wilson, J., denied the motion. In an unpublished per curiam opinion, issued September 13, 2016 (Docket No. 327881), the Court of Appeals, TALBOT, C.J., and O'CONNELL and OWENS, JJ., affirmed, concluding that the circuit court had correctly denied the motion. The Court of Appeals reasoned that its decision was controlled by *People v LaBelle*, 478 Mich 891 (2007), and it held that defendant lacked standing to challenge the validity of the search because the driver of the vehicle consented to the search and defendant did not assert a possessory interest in the backpack until after the search was completed. In lieu of granting leave to appeal, the Supreme Court vacated the Court of Appeals' decision and remanded the case to the Court of Appeals for consideration of whether *LaBelle* was distinguishable, whether the record demonstrated that the police officer reasonably believed that the driver had common authority over the backpack such that the driver's consent justified the search in accordance with *Illinois v Rodriguez*, 497 US 177 (1990), and whether there were any other grounds that justified the search. 500 Mich 967 (2017).

On remand, the Court of Appeals *held*:

1. In *LaBelle*, a passenger in a vehicle that had been legally stopped by a police officer left her backpack in the vehicle when the officer searched the vehicle with the driver's consent. *LaBelle* held that the passenger lacked standing to challenge the search of her backpack in the third party's vehicle because the stop was legal and that, because the search was legal, the police officer had authority to search the entire passenger compartment of the vehicle, including any unlocked containers like the defendant's backpack. The relevant facts in *LaBelle* were indistinguishable from the relevant facts in this case, and the holding in *LaBelle* therefore controlled the outcome here. For that reason, defendant lacked standing to challenge the search of the driver's car following a legal stop, and the police officer had authority to search his backpack.

2. Under the common-authority framework set forth in *Rodriguez*, the Fourth Amendment prohibition against warrantless searches of a person's home does not apply when the police obtain the voluntary consent of the person whose property is searched, of a third party who possesses common authority over the premises, or of a third party whom an officer reasonably believes possesses common authority over the premises. Other federal circuit and state courts have applied the *Rodriguez* common-authority framework to analyze whether a police officer's search—with consent—of containers in a vehicle was reasonable. If the *Rodriguez* framework were applied to this case, the search might have been unreasonable because the officer most likely did not have a reasonable belief that the driver of the car had common authority over defendant's backpack such that the driver's consent to search her car extended to defendant's backpack; a backpack is generally a container used to store personal items, defendant and the driver met on the night of the search, the officer saw defendant holding the backpack on his lap when the officer stopped the car, and the officer searched the backpack while it was on the passenger side of the car. However, even if defendant's lack of standing were not dispositive of the case, the Court of Appeals would not have applied the *Rodriguez* common-authority framework to warrantless searches of containers in automobiles because our Supreme Court rejected our application of the framework in *People v LaBelle*, 273 Mich App 214 (2006), rev'd 478 Mich 891 (2007). Finally, no other grounds justified the search of defendant's backpack.

Affirmed.

SEARCHES AND SEIZURES — TRAFFIC STOPS — EXCEPTIONS TO THE WARRANT REQUIREMENT — CONSENT — THIRD-PARTY STANDING TO CHALLENGE A SEARCH.

A third-party passenger does not have standing to challenge the validity of a police officer's search of a vehicle pursuant to the driver's consent, including the search of any unlocked containers in the passenger compartment that belong to the passenger (US Const, Am IV; Const 1963, art 1, § 11).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*), for defendant.

ON REMAND

Before: TALBOT, C.J., and O'CONNELL and K. F. KELLY, JJ.

O'CONNELL, J. This case addressing defendant Larry Gerald Mead's Fourth Amendment right to be free from unreasonable searches returns to us on remand from the Michigan Supreme Court. Mead appeals as of right his conviction, following a jury trial, of possessing methamphetamine, MCL 333.7403(2)(b)(*i*), as a fourth-offense habitual offender, MCL 769.12. The trial court sentenced him to serve 2 to 10 years' imprisonment. Defendant challenged the validity of the search in the trial court. In our prior opinion, we concluded that Mead, a passenger in a vehicle, lacked standing to challenge the search of a container in the vehicle under *People v LaBelle*, 478 Mich 891 (2007), and we affirmed Mead's conviction on that basis.[1] However, the Michi-

[1] *People v Mead*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2016 (Docket No. 327881).

gan Supreme Court vacated our judgment and remanded for us to consider:

> (1) whether [the Michigan Supreme Court's] peremptory order in *People v LaBelle*, 478 Mich 891 (2007), is distinguishable; (2) whether the record demonstrates that the police officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search, see *Illinois v Rodriguez*, 497 US 177, 181, 183-189; 110 S Ct 2793; 111 L Ed 2d 148 (1990); and (3) whether there are any other grounds upon which the search may be justified.[2]

On remand, we address all three issues, conclude that Issue (1) controls, and affirm.

I. FACTUAL BACKGROUND

On the night of May 29, 2014, Rachel Taylor was driving a vehicle, and Mead rode in the front passenger seat. Officer Richard Burkart testified that he stopped the vehicle for an expired license plate. Officer Burkart stated that Mead had a backpack on his lap. According to Officer Burkart, Taylor consented to a search of the vehicle, Officer Burkart asked Taylor and Mead to exit the vehicle, and Mead left the backpack "on the front passenger floorboard." When Officer Burkart searched the vehicle, he opened the backpack and found methamphetamine. Mead admitted that the backpack belonged to him but moved to suppress the evidence found in the backpack. The trial court denied his motion.

II. *PEOPLE v LABELLE*

We conclude that the Michigan Supreme Court's order in *LaBelle*, 478 Mich at 891-892, is not distin-

[2] *People v Mead*, 500 Mich 967 (2017).

guishable from the present case, and therefore we are required to affirm both defendant's conviction and sentence.

The defendant in *LaBelle* was a passenger in a motor vehicle. *Id*. The *LaBelle* vehicle's driver violated MCL 257.652(1), and the police stopped the vehicle. *Id*. at 891. The Michigan Supreme Court concluded that the stop was objectively lawful. *Id*. After the stop, the driver consented to a search of the vehicle. *Id*. The police then searched an unlocked backpack that the defendant had left in the "passenger compartment of the vehicle." *Id*. at 891-892. The defendant moved to suppress evidence of the contents of the backpack. See *id*. at 892. However, the Supreme Court concluded that "[t]he search of the backpack was valid," explaining that "[b]ecause the stop of the vehicle was legal, the defendant, a passenger, lacked standing to challenge the subsequent search of the vehicle." *Id*. Further, "[a]uthority to search the entire passenger compartment of the vehicle includes any unlocked containers located therein, including the backpack in this case." *Id*.

We cannot distinguish the relevant facts of Mead's case from those underlying the Supreme Court's order in *LaBelle*. Mead was a passenger in a motor vehicle driven by Taylor. Officer Burkart stopped the vehicle. Mead has not challenged the validity of the stop. After the stop, Taylor consented to a search of the vehicle. Officer Burkart then searched an unlocked backpack in the vehicle's passenger compartment. Therefore, under *LaBelle*, Mead lacked standing to challenge the search, and Officer Burkart had authority to search the backpack. *LaBelle* is binding on this Court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). Because Mead lacks standing to challenge the

search, any challenge to the search must fail. See *People v Earl*, 297 Mich App 104, 107; 822 NW2d 271 (2012), aff'd 495 Mich 33 (2014).

III. REASONABLE BELIEF OF COMMON AUTHORITY

Notwithstanding the fact that existing Michigan law provides that a passenger in a motor vehicle does not have standing to contest the search of a third party's vehicle, the Supreme Court has directed us to address whether the record in the present case demonstrates that Officer Burkart reasonably believed that Taylor had common authority over the backpack in order for Burkart's consent to justify the search of the backpack. In regard to that issue, the Supreme Court has directed our attention to *Rodriguez*, 497 US at 181, 183-189.

The *Rodriguez* Court did not address warrantless searches, pursuant to consent, of containers in automobiles. Rather, it addressed "[w]hether a warrantless entry [to an apartment] is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not" possess common authority. *Id*. at 179. In doing so, the Court ruled that the Fourth Amendment prohibition against warrantless entry to another's home does not apply when the police obtained "voluntary consent" from either "the individual whose property is searched," "a third party who possesses common authority over the premises," or a third party whom an officer reasonably believes possesses common authority over the premises. *Id*. at 181-182, 186-189. Common authority exists among persons with " 'mutual use of the property by persons generally having joint access or control for most purposes . . . .' " *Id*. at 181, quoting

United States v Matlock, 415 US 164, 171 n 7; 94 S Ct 988; 39 L Ed 2d 242 (1974). An officer reasonably believes that a third party possesses common authority over a premises if "the facts available to the officer at the moment" would "warrant a man of reasonable caution in the belief that the consenting party had authority over the premises[.]" *Rodriguez*, 497 US at 188 (quotation marks and citations omitted).

Multiple federal circuit courts and other state courts have applied *Rodriguez*'s common-authority framework to evaluate a third party's consent to search a container inside a vehicle. See *State v Harding*, 282 P3d 31, 34-41; 2011 UT 78 (2011) (discussing several of those cases). Those foreign courts have determined that officers violate a person's Fourth Amendment rights when searching a bag in a car when officers could not have a reasonable belief that a third party had common authority to consent to the search. *Id*. In citing caselaw from those courts, the Utah Supreme Court determined that courts evaluate the reasonableness of an officer's actions by analyzing several factors, such as the type of container searched, any identifying material on the outside of the container, the container's location, the number of containers, the number of passengers, and the passengers' conduct. *Id*. at 38-39.

If *Rodriguez* and its extension to searches of containers in automobiles as applied in foreign courts were the law in Michigan, an argument that Officer Burkart lacked a reasonable belief that Taylor had common authority over the backpack would have some merit. A backpack is a container used to store personal items, which suggests individual, rather than common, ownership. *Harding*, 282 P3d at 38. The relationship between Mead and Taylor suggests that Taylor would not have had authority over Mead's personal items. Mead testi-

fied that he met Taylor on the night of the search. Taylor stated on a video of the traffic stop that Mead was in her car because she was dropping Mead off on her way to another destination. Officer Burkart testified that Mead had the backpack on his lap with his arms resting on either side at the time of the stop. The video shows that Officer Burkart searched the backpack while it was placed in the passenger side of the vehicle. Officer Burkart testified that he believed that the backpack belonged to Mead.

However, in Michigan, *Rodriguez*'s common-authority framework does not apply to warrantless searches of containers in automobiles. Caselaw from foreign courts is not binding. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 414; 761 NW2d 371 (2008). No Michigan Court has successfully applied *Rodriguez*'s common-authority framework to warrantless searches, pursuant to consent, of containers in automobiles. To the contrary, this Court applied the framework to the search of the backpack in *People v LaBelle*, 273 Mich App 214, 221-226; 729 NW2d 525 (2006), rev'd 478 Mich 891 (2007), and concluded that the deputy had no consent to search the backpack because it was not reasonable for the deputy to believe that the driver had common authority over the backpack. But the Michigan Supreme Court reversed that judgment, reasoned that "[a]uthority to search the entire passenger compartment of the vehicle includes any unlocked containers located therein," and concluded that "[t]he search of the backpack was valid." *LaBelle*, 478 Mich at 891-892.

Police officers in Michigan are trained to follow Michigan law. For example, state statutes allow the Michigan Commission on Law Enforcement Standards (MCOLES) to institute and publicize training stan-

dards for law enforcement officers. See MCL 28.621; MCL 28.611. Pursuant to that authority, the Michigan State Police developed a manual that addresses the issues of search and seizure law most commonly encountered by police officers in Michigan. See Michigan Department of State Police, *Michigan Criminal Law & Procedure: A Manual for Michigan Police Officers, Third Edition* (Dubuque: Kendall Hunt Publishing Co, 2014). The manual cites the Michigan Supreme Court's order in *LaBelle* when discussing the scope of a warrantless search of a container pursuant to consent. *Manual*, p 343. Specifically, the manual states that a search's scope "turns on whether it is objectively reasonable for the officer to believe that the scope of the consent permits the officer to open a particular closed container" and that the *LaBelle* "court held that when police have authority to search the entire passenger compartment of a vehicle, that authority extends to any unlocked containers within the vehicle." *Id*.

Therefore, because Mead lacks standing to challenge the validity of the search and because current Michigan law does not apply *Rodriguez*'s common-authority framework to warrantless searches of containers in automobiles, we decline to apply *Rodriguez*'s common-authority framework to this case.

IV. OTHER GROUNDS JUSTIFYING THE SEARCH

Finally, the Michigan Supreme Court directed us to consider whether other grounds justified the search of the backpack. We conclude that, under the facts of the case presented to this panel, no other grounds justified the search.

Both the United States and Michigan Constitutions "guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Hyde*,

285 Mich App 428, 438; 775 NW2d 833 (2009) (quotation marks and citations omitted). See US Const, Am IV; Const 1963, art 1, § 11. "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008) (quotation marks and citation omitted). A discussion of relevant exceptions follows.

A warrantless search of abandoned property does not violate the Fourth Amendment. *People v Rasmussen*, 191 Mich App 721, 725; 478 NW2d 752 (1991). Fourth Amendment protections apply only when a person has an expectation of privacy in the searched property. See *id*. By definition, a person lacks an expectation of privacy in abandoned property. *Id*. A person is considered to have abandoned property when "he voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy in the property at the time of the search." *Id*. at 726-727. For example, a person abandons a bag when he discards it while running from the police. *People v Lewis*, 199 Mich App 556, 557-560; 502 NW2d 363 (1993).

Mead demonstrated a possessory interest in the backpack by holding it on his lap while in the vehicle. He did not abandon the backpack by leaving it inside the vehicle because leaving a bag inside the vehicle in which you are riding does not equate to discarding, leaving behind, or relinquishing ownership in the item.

A police officer may conduct a protective or *Terry* search of the passenger compartment of a vehicle without a warrant "if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational infer-

ences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons," "limited to those areas in which a weapon may be placed or hidden." *Michigan v Long*, 463 US 1032, 1049; 103 S Ct 3469; 77 L Ed 2d 1201 (1983), quoting *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed 2d 889 (1968). When evaluating the validity of a search, the " 'issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' " *Long*, 463 US at 1050, quoting *Terry*, 392 US at 27.

The protective or *Terry* search exception does not apply here. At no point did Officer Burkart testify that he had a reasonable belief that Taylor or Mead could gain immediate control of a weapon inside the vehicle or testify that he believed his safety or the safety of others was in danger, and the prosecution did not cite this exception as a basis for the search.

An officer may conduct a search incident to arrest without a warrant "whenever there is probable cause to arrest." *People v Nguyen*, 305 Mich App 740, 756; 854 NW2d 223 (2014). To have probable cause for an arrest, the investigating officers "must possess information demonstrating" " 'a probability or substantial chance' " "that an offense has occurred and that the defendant has committed it." *Id*. at 751, 752, quoting *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). An officer " '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.' " *People v Tavernier*, 295 Mich App 582, 584; 815 NW2d 154 (2012), quoting *Arizona v Gant*, 556 US 332, 351;

129 S Ct 1710; 173 L Ed 2d 485 (2009). "[T]here is no reason to believe that evidence relevant to the crime of arrest would be found in the vehicle" when police are addressing "civil infractions" or a person "driving without a valid license." *Tavernier*, 295 Mich App at 586. "[J]ustifying the arrest by the search and at the same time the search by the arrest, just will not do." *Smith v Ohio*, 494 US 541, 543; 110 S Ct 1288; 108 L Ed 2d 464 (1990) (quotation marks, alterations, and citation omitted). For example, a "search of a container cannot be justified as being incident to an arrest if probable cause for the contemporaneous arrest was provided by the fruits of that search." *People v Champion*, 452 Mich 92, 116-117; 549 NW2d 849 (1996).

In this case, Officer Burkart did not search the backpack incident to the arrest of Mead or Taylor. Officer Burkart stopped the vehicle because of an expired license plate. It is unclear how the vehicle could contain evidence of an expired license plate. Officer Burkart repeatedly testified that he had no intent to arrest Taylor for the infraction. Additionally, Officer Burkart testified that Mead and Taylor admitted using narcotics. But he did not testify that drug use was the basis for the stop of the vehicle, that either admitted possessing drugs that night, that either admitted using drugs that night, or that either exhibited signs of being under the influence of narcotics. Upon viewing the video of the traffic stop, it does not appear that Taylor or Mead is within reaching distance of the backpack or passenger compartment of the vehicle at the time of the search. Therefore, Officer Burkart lacked probable cause for a lawful arrest as is required to permit a search incident to arrest.

Police may also search a vehicle or a container within a vehicle without a warrant if they have probable cause that the vehicle or container " 'contains articles that the officers are entitled to seize.' " *People v Garvin*, 235 Mich App 90, 101; 597 NW2d 194 (1999), quoting *People v Armendarez*, 188 Mich App 61, 71-72; 468 NW2d 893 (1991). See also *People v Bullock*, 440 Mich 15, 24; 485 NW2d 866 (1992). Probable cause exists if the totality of the circumstances demonstrates "a substantial basis for concluding that a search would uncover evidence of wrongdoing" and "a fair probability that contraband or evidence of a crime will be found in a particular place." *Garvin*, 235 Mich App at 102 (quotation marks, citations, brackets, and ellipses omitted).

The record in Mead's case does not contain evidence that Officer Burkart had probable cause to search the backpack in the automobile. Again, Officer Burkart testified that Mead and Taylor admitted using narcotics. But he did not testify that drug use was the basis for the stop of the vehicle, that either admitted possessing or using drugs that night, that he believed the backpack would contain narcotics, or that either exhibited signs of being under the influence of narcotics. And again, the prosecution did not cite this exception as a basis for the search.

An inventory search is a "well-defined exception to the warrant requirement of the Fourth Amendment." *Colorado v Bertine*, 479 US 367, 371; 107 S Ct 738; 93 L Ed 2d 739 (1987). "[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Florida v Wells*, 495 US 1, 4; 110 S Ct 1632; 109 L Ed 2d 1 (1990). See also *People v Poole*, 199 Mich App 261, 266; 501 NW2d 265 (1993). Rather, the search "protect[s] an owner's property

while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property" and "guard[s] the police from danger." *Bertine*, 479 US at 372. The search must be conducted reasonably, *id*. at 374, in good faith, *id*., and pursuant to standardized police procedures "designed to produce an inventory," including procedures that "regulate the opening of containers found during inventory searches," *Wells*, 495 US at 4. See also *Poole*, 199 Mich App at 266.

The record lacks evidence as to whether Officer Burkart's search of the backpack fell within the scope of a proper inventory search. Officer Burkart testified that he searches vehicles to "check for valuables or any damage to the vehicle, anything that may be in there" whenever he tows or impounds a vehicle. However, Officer Burkart offered no further explanation of police department policies, did not explain department policy for the search of a container, and did not explain how his search complied with department policy. Therefore, we lack evidence to determine that he conducted a proper inventory search.

"The inevitable-discovery rule permits the admission of evidence obtained in violation of the Fourth Amendment if the prosecution establishes by a preponderance of the evidence that the information inevitably would have been discovered through lawful means." *People v Mahdi*, 317 Mich App 446, 469; 894 NW2d 732 (2016).

The inevitable-discovery exception does not apply here. On appeal, the prosecution only argues that Taylor consented to the search and that Mead lacked standing to contest the search. The prosecution is correct. Even assuming that the search violated Mead's Fourth Amendment rights, the prosecution advanced no other argument that the police inevitably

would have discovered the contents of the backpack. We conclude that no other grounds justified the search.

We affirm.

TALBOT, C.J., and K. F. KELLY, J., concurred with O'CONNELL, J.

GARFIELD MART, INC v DEPARTMENT OF TREASURY

Docket No. 333094. Submitted August 2, 2017, at Lansing. Decided August 8, 2017, at 9:05 a.m. Leave to appeal denied 501 Mich 1038.

Garfield Mart, Inc., brought an action in the Michigan Tax Tribunal against the Department of Treasury (the Department), contesting the Department's issuance of a Final Assessment following an audit of Garfield Mart's sales tax return for tax years 2007 through 2011. Garfield Mart sold wireless calling arrangements for prepaid cell phones, including "PINless top-up minutes" and electronic personal identification numbers (EPINs). PINless top-up minutes allow a customer to automatically add minutes to a prepaid cell phone via wireless download upon completion of payment, whereas an EPIN customer refills minutes on a prepaid cell phone only after entering a PIN into the cell phone. Garfield Mart was able to provide these services to its customers through a "PayGo prepaid system," an electronic interface provided by Marceco Ltd., and because this system was entirely electronic, no traditional phone cards were necessary. PINless top-up minutes were wirelessly downloaded to a customer's cell phone and were immediately available after the customer provided a cashier with his or her cell phone number and the cashier entered that number and the amount of the purchase into a credit-card-type terminal. Conversely, EPIN purchases required that a customer dial a 1-800 number and enter the PIN to access the additional purchased minutes; the Marceco terminal generated the PIN upon purchase, and the PIN was delivered via the Internet and printed on the receipt provided to the customer. The Department audited Garfield Mart's sales tax returns, and because Garfield Mart had failed to maintain adequate records of its sales, the Department applied an indirect sampling methodology by which it estimated Garfield Mart's sales for the audit period using the best information available over a three-month period. The Department's audit revealed that Garfield Mart had underreported its sales of wireless calling arrangements and had overreported its deductions for food, resulting in a tax deficiency. The Department subsequently issued Garfield Mart a Final Assessment, and Garfield Mart contested the assessment, alleging that its sales of prepaid wireless calling arrangements were not subject to sales

tax under MCL 205.52(2)(b) of the general sales tax act (GSTA), MCL 205.51 *et seq*., and that the audit was inaccurate. Garfield Mart contested the audit results by requesting an informal conference before the Department, and the hearing referee issued an Informal Conference Recommendation concluding that under MCL 205.52(2)(b), the EPIN transactions were taxable, whereas the PINless top-up transactions were not taxable. Notwithstanding the hearing referee's recommendation, the Department issued a Decision and Order of Determination levying sales tax on both wireless calling arrangements. Consistently with this decision, the Department then issued a Final Assessment against Garfield Mart, which Garfield Mart appealed in the Tax Tribunal. The administrative law judge (ALJ), Peter M. Kopke, J., entered a Proposed Opinion and Judgment affirming the Final Assessment, reasoning that PINless top-up and EPIN transactions fall within the definition of "prepaid telephone calling card" under MCL 205.52(2)(b) and that the transactions resulted in the reauthorization of calling services. The Tribunal, Steven H. Lasher, J., adopted the ALJ's findings of fact and conclusions of law regarding the PINless top-up and EPIN transactions, rejected Garfield Mart's assertions that the audit was inaccurate, and assessed a negligence penalty to the tax deficiency calculated for the PINless top-up minutes. Garfield Mart appealed.

The Court of Appeals *held*:

1. Under the GSTA, MCL 205.52(2)(b) provides that an annual sales tax applies to the sale of a prepaid telephone calling card or a prepaid authorization number for telephone use, rather than for resale, including the reauthorization of a prepaid telephone calling card or a prepaid authorization number. The language of MCL 205.52(2)(b) is unambiguous. Under this provision, only the sale of a "prepaid telephone calling card" or a "prepaid authorization number for telephone use"—or the "reauthorization" of either of the foregoing—is subject to sales tax. Therefore, to be subject to the sales tax, the EPIN and PINless top-up transactions in this case had to fall within the meaning of any of these statutory terms.

2. MCL 205.52(2)(b) does not define "prepaid telephone calling card." Dictionary definitions and testimony in this case supported the industry understanding of the term "prepaid telephone calling card" as a small, rectangular scratch-off card containing a PIN necessary to access the prepaid minutes. In this case, neither the PINless top-up nor the EPIN calling arrangements were "prepaid telephone calling cards" as that term is used in the statute. Neither of these prepaid calling arrangements

involved the sale of scratch-off plastic or credit-card-type calling cards that contain a preprinted authorization number that represents the minutes purchased. The Tribunal's conclusion that these calling arrangements constituted such calling cards was error and contrary to the plain and ordinary meaning of the term "prepaid telephone calling card." By holding that the instant transactions are the "new" calling card, the Tribunal extended the tax statute by implication, running afoul of the principle that tax statutes are to be given a practical construction because taxing is a practical matter.

3. MCL 205.52(2)(b) similarly does not define "prepaid authorization number for telephone use." However, like a calling card, this mechanism for accessing phone services uses a number, i.e., an authorization number, and this number, as indicated by the Legislature's use of the preposition "for," is used for the purpose of accessing telephone services. The term "authorization" evokes the act of authorizing or of giving the power or authority to do something, which—in the context of the statutory language here—is the power to access the prepaid telephone account. Taking these terms together, a "prepaid authorization number for telephone use" is a number representing a prepaid account used by the owner to access the purchased telephone services. Accordingly, when MCL 205.52(2)(b) is read as a whole, the Legislature intended to tax the sale of both prepaid, tangible (calling cards) and intangible authorization numbers for telephone services as well as the reauthorization of those numbers. In this case, an EPIN transaction is the sale of a prepaid authorization number for telephone use. When a customer purchases an EPIN, he or she receives a PIN on the receipt that must be entered on the customer's cell phone in order to access the telephone services associated with the PIN. Because the EPIN represents a prepaid account used by the owner to access the purchased telephone services associated with the EPIN, it falls within the definition of prepaid authorization number. Accordingly, the sale of an EPIN is taxable under MCL 205.52(2)(b). However, the sale of a PINless top-up is not subject to sales tax under MCL 205.52(2)(b) because a customer who buys a PINless top-up does not purchase any number representative of the account purchased that is used to access the purchased telephone service. Instead, the additional minutes are downloaded instantly to the customer's cell phone upon purchase; no authorization number or PIN is necessary to access the purchased telephone services. Because no sale of a prepaid authorization number occurs when a customer purchases a PINless top-up, the sale is not taxable under MCL 205.52(2)(b). Accordingly, the Tribunal's conclusion with respect to the EPIN

transactions was affirmed, but its conclusion with respect to the PINless top-up transactions was reversed.

4. Under MCL 205.68(1), a person liable for any tax imposed under the GSTA shall keep in a paper, electronic, or digital format an accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the Department requires. Under MCL 205.68(4), in the event the taxpayer fails to preserve or maintain these records as prescribed in MCL 205.68(1) and the Department believes outstanding tax is due, the Department may assess the amount of the tax due from the taxpayer based on an indirect audit procedure or any other information that is available or that may become available to the Department. MCL 205.38(4)(c) further provides that the Department may use any method to reconstruct income, deductions, or expenses that is reasonable under the circumstances. The Department's assessment is considered prima facie correct for the purpose of the GSTA, and the burden of proof of refuting the assessment is upon the taxpayer. In this case, Garfield Mart failed to maintain adequate sales records and to provide those records to the Department. Therefore, Garfield Mart had no right to insist upon a particular audit methodology, and Garfield Mart failed to rebut the presumption that the audit was accurate. Contrary to Garfield Mart's contention that the Tribunal erred by approving the Department's indirect sampling method because the Department failed to follow its audit guidelines, no affirmative evidence demonstrated that the audit was actually inaccurate so as to rebut its presumptive validity.

5. MCL 205.23(3) requires the imposition of a penalty in the event that a tax deficiency is due to the taxpayer's negligence. Under Rule 205.1012 of the Michigan Administrative Code, negligence, for purposes of imposing such a penalty, is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances. Whether a taxpayer was negligent is determined on a case-by-case basis, but the standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute. Accordingly, if the taxpayer demonstrates to the satisfaction of the Department that the deficiency was due to reasonable cause, the Department shall waive the penalty. In this case, the Department imposed a 10% negligence penalty for Garfield Mart's failure to remit the sales taxes for the

tax years at issue, but because the PINless top-up sales were not taxable under MCL 205.52(2)(b), the negligence penalty had to be adjusted on remand to reflect that fact.

Affirmed in part; reversed in part; case remanded for further proceedings.

1. TAXATION — GENERAL SALES TAX ACT — SALES OF PREPAID TELEPHONE CALLING CARDS — SALES OF PREPAID AUTHORIZATION NUMBERS FOR TELEPHONE USE.

MCL 205.52(2)(b) of the general sales tax act, MCL 205.51 *et seq*., provides that an annual sales tax applies to the sale of a prepaid telephone calling card or a prepaid authorization number for telephone use, rather than for resale, including the reauthorization of a prepaid telephone calling card or a prepaid authorization number; a "prepaid telephone calling card" means a small, rectangular scratch-off card containing a personal identification number necessary to access prepaid minutes; a "prepaid authorization number for telephone use" is a number representing a prepaid account used by the owner to access the purchased telephone services; under MCL 205.52(2)(b), the Legislature intended to tax the sale of both prepaid, tangible (calling cards) and intangible authorization numbers for telephone services as well as the reauthorization of those numbers.

2. TAXATION — GENERAL SALES TAX ACT — SALES OF ELECTRONIC PERSONAL IDENTIFICATION NUMBERS FOR PREPAID CELL PHONES — SALES OF PINLESS TOP-UP MINUTES FOR PREPAID CELL PHONES.

MCL 205.52(2)(b) of the general sales tax act, MCL 205.51 *et seq*., provides that an annual sales tax applies to the sale of a prepaid telephone calling card or a prepaid authorization number for telephone use, rather than for resale, including the reauthorization of a prepaid telephone calling card or a prepaid authorization number; an electronic personal identification number (EPIN) associated with a prepaid cell phone falls within the definition of prepaid authorization number because the EPIN represents a prepaid account used by the owner to access the purchased telephone services associated with the EPIN, and therefore the sale of an EPIN is taxable under MCL 205.52(2)(b); however, because no sale of a prepaid authorization number occurs when a customer purchases PINless top-up minutes for a prepaid cell phone, the sale of PINless top-up minutes is not taxable under MCL 205.52(2)(b).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief

Legal Counsel, and *James A. Ziehmer*, Assistant Attorney General, for the Department of Treasury.

Maurice S. Reisman, PC (by *Maurice S. Reisman*), for Garfield Mart, Inc.

Before: CAVANAGH, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM. Respondent, the Department of Treasury, conducted an audit of petitioner, Garfield Mart, Inc.'s sales tax return for tax years 2007 through 2011. As a result of the audit, the Department discovered that Garfield Mart had underreported its sales, resulting in a tax deficiency. The Department subsequently issued Garfield Mart a Final Assessment for $236,591.25, including penalty and interest. Garfield Mart appealed the assessment in the Michigan Tax Tribunal, alleging that its sales of certain prepaid wireless calling arrangements were not subject to sales tax under MCL 205.52(2)(b) of the general sales tax act (GSTA), MCL 205.51 *et seq*., and that the audit was inaccurate. The Tribunal disagreed and entered a Final Opinion and Judgment in favor of the Department. Garfield Mart now appeals by right. For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

Garfield Mart is a gas station and convenience store that sells gas, cigarettes, lottery tickets, phone cards, groceries, and other miscellaneous items. Relevant to this dispute, Garfield Mart also sells "wireless calling arrangements" for prepaid cell phones, including "PINless top-up minutes" and electronic personal identification numbers (EPIN). Generally, PINless top-up

minutes allow an individual to automatically add minutes to a prepaid cell phone via wireless download upon completion of payment, whereas an EPIN customer refills minutes on a prepaid cell phone only after entering a PIN into the cell phone. Garfield Mart is able to provide these services to its customers through a "PayGo prepaid system," which is essentially an electronic interface provided to Garfield Mart by Marceco Ltd. Under its contract with Marceco, Garfield Mart sells these wireless calling arrangements to customers and retains a 5% to 10% commission on the sale. Because this system is entirely electronic, no traditional phone cards are necessary.

To purchase PINless top-up minutes, a customer gives his or her cell phone number to the cashier, who in turn enters that number and the amount of the purchase into a credit-card-type terminal. After the clerk presses "enter," the terminal prints out a receipt reflecting the transaction amount and a reference number. The additional minutes purchased are then wirelessly downloaded to the customer's cell phone and are available immediately. The receipt is given to the customer, who may need the reference number in the event there is a problem with the service.

Some of Garfield Mart's customers using the Marceco service elect to purchase an EPIN as opposed to the PINless top-up. In these instances, a receipt is printed showing the details of the transaction and also including a PIN and directions on how to use the PIN. To access the additional purchased minutes, the customer must dial a 1-800 number and enter the PIN. Garfield Mart does not store these PINs electronically at the store; rather, the Marceco terminal generates the PIN upon purchase, and the PIN is delivered via the Internet and printed on the receipt provided to the customer.

The Department conducted an audit of Garfield Mart's reported sales tax for the July 2007 through June 2011 tax years. Because Garfield Mart failed to maintain adequate records of its sales, the Department applied an indirect sampling methodology by which it estimated Garfield Mart's sales for the audit period using the best information available over a three-month period. The audit revealed that Garfield Mart had underreported its sales of merchandise (cigarettes and general taxable items) and the wireless calling arrangements and that it had overreported its deductions for food. After adjusting for these deficiencies, the Department determined that Garfield Mart owed $178,463 in unpaid sales tax.

Garfield Mart contested the audit results by requesting an informal conference before the Department, asserting, in part, that the gross sales of the wireless calling arrangements are not taxable. The Department disagreed, positing that such sales are taxable under MCL 205.52(2)(b), which states that the general sales tax applies to "[t]he sale of a prepaid telephone calling card or a prepaid authorization number for telephone use, rather than for resale, including the reauthorization of a prepaid telephone calling card or a prepaid authorization number."

The hearing referee agreed, in part, with Garfield Mart and issued an Informal Conference Recommendation concluding that under MCL 205.52(2)(b) the EPIN transactions are taxable, whereas the PINless top-up transactions are not taxable. Notwithstanding the hearing referee's recommendation, the Department issued a Decision and Order of Determination levying sales tax on both wireless calling arrangements. Consistently with this decision, the Department then issued a Final Assessment against Garfield

Mart for a net tax liability of $178,463. The Final Assessment also included a negligence penalty of $17,847 and interest in the amount of $40,281.25, for a total bill of $236,591.25.

Garfield Mart filed an appeal in the Michigan Tax Tribunal, alleging that no sales tax was due, in part, because it merely receives commissions from Marceco and because PINless top-up services are not taxable under the GSTA. An administrative law judge (ALJ) held a hearing. Garfield Mart presented a single witness, its store manager, Javed Ahmad. Ahmad testified to the general nature of the PINless top-up and EPIN sales. He further clarified that Garfield Mart did not sell any telephone calling cards, which he characterized as a plastic card that contains a PIN, which is uncovered by scratching the back of the card. He explained that the owner then uses the PIN to access the purchased telephone service associated with the PIN each time the customer wishes to use the service.

The Department presented the testimony of its auditor, Sarah Johnson, who explained the audit methodology. Johnson said that although she requested documentation from Garfield Mart for the sample period, February through March 2011, she never received any inventory reports, general ledgers, purchase spreads, or "Z-tapes," which record daily sales at the cash register. To verify Garfield Mart's sales in the absence of Z-tapes, Johnson used Garfield Mart's purchases (of merchandise, cigarettes, etc.), applied a "mark-up" to the purchases to arrive at "projected sales," and compared that number to the sales that Garfield Mart actually reported. As a result of the audit, Johnson found that Garfield Mart underreported sales and overreported deductions. She testified that adjustments were made to both merchandise

(which included cigarettes and general taxable items) and the wireless calling arrangements as well as to the food deduction.

At the conclusion of the evidence, Garfield Mart argued that the PINless top-up sales were not subject to sales tax because no calling card or PIN is used and further argued that the EPIN sales were not subject to sales tax because the EPIN technology did not exist when the statute was enacted. Garfield Mart also asserted that the Department's sampling method was faulty; more specifically, it asserted that the adjustment for food allowance used an inconsistent methodology and that fluctuations in inventory and cigarette rebates were not properly accounted for. The Department countered that both PINless top-up sales and EPIN sales are taxable, pointing out that in both instances, the customer is "re-authorizing an existing account of credit balance for prepaid telephone use." With respect to the accuracy of the audit, the Department argued that the audit was based on the best evidence available and that Garfield Mart had not submitted any evidence showing that the audit was inaccurate.

Thereafter, the ALJ entered a Proposed Opinion and Judgment affirming the Final Assessment. In its factual findings, the ALJ found that "[t]he purported 'receipt' issued by the MARCECO terminal was a paper prepaid telephone card evidencing the type of transaction (i.e., top-up or EPIN), which was utilized to enforce the top-up transactions, if necessary, or finalize the EPIN transactions" and that Garfield Mart "was responsible for the payment of sales taxes on the top-up and EPIN transactions." In its conclusions of law, the ALJ framed the issue as whether the wireless calling arrangements "resulted in the sale of prepaid

telephone calling cards, prepaid authorization numbers, or the reauthorization of prepaid authorization numbers" such that they are subject to sales tax under MCL 205.52(2)(b). The ALJ, relying on dictionary definitions, construed "prepaid telephone calling card" as "a piece of paper, cardboard, or plastic given to a customer in exchange for money that contains information that can be used for telephone calls or telephone service (i.e., minutes)." The ALJ then reasoned that the PINless top-up and EPIN transactions fall within this definition because the underlying transactions involve "the purchasing of prepaid calling services or, more specifically, the purchasing of minutes to allow further use of the prepaid cellular telephone utilized to complete the transaction[.]" The ALJ also held that the transactions resulted in the reauthorization of calling services, stating:

> Notwithstanding the recognition of these transactions as resulting in the issuance of paper prepaid telephone calling cards, it is also arguable that the transactions result in the reauthorization of a prepaid authorization number. More specifically, the customers are required to have a prepaid cellular telephone to complete each transaction, as the number assigned to or otherwise authorizing the use of that telephone must be inputted to effectuate the sale of additional minutes to that telephone. As such, the telephone number is a prepaid authorization number that is utilized for the purpose of reauthorizing the further use of that prepaid authorization number.

With respect to Garfield Mart's claim that the Department's audit was inaccurate, the ALJ stated:

> [Garfield Mart] did not submit to [the Department] all of the records it requested and the records submitted were incomplete and unreliable, particularly in light of [Garfield Mart's] failure to retain required source documentation (i.e., Z-tapes or, more specifically, daily sales receipts).

> As a result, [the Department] lacked necessary information to verify if [Garfield Mart] had collected the amount of required sales tax and the lack of such information justifies [the Department's] use of [Garfield Mart's] purchase invoices and the markups provided by [Garfield Mart's] representative (i.e., "the best information available") to determine the amount of [Garfield Mart's] liability. Although [Garfield Mart] could have offered the requested records, other business records, or test samples for admission to demonstrate that the audit or sampling was inaccurate, [Garfield Mart] did not offer such information or [Garfield Mart's] representative as a witness to explain why the requested records were not provided or, more importantly, how the records submitted were prepared and the basis of the discrepancy, if any, between the markups purportedly provided by [Garfield Mart] to its representative and the markups provided by the representative to [the Department], as [Garfield Mart's] representative was responsible for the preparation of those records and the providing of the information utilized in the audit. Rather, [Garfield Mart] offered as its sole witness its store manager and Mr. Ahmad's testimony and the few invoices submitted were insufficient for the Tribunal to determine what modifications, if any, should have been made to the assessment, particularly given the prima facie correctness of the audit.

Garfield Mart filed exceptions to the Proposed Opinion and Judgment, arguing that the ALJ misconstrued the statutory language by characterizing the PINless top-up and EPIN transactions as the " 'new' version of the phone card." Garfield Mart explained that the statute only applies to certain methods of delivering telephone services, mainly arrangements that require the user to input a code to access the purchased services.

The Tribunal, however, rejected this argument in its Final Opinion and Judgment, stating:

> [T]he ALJ did not err in characterizing the receipts [Garfield Mart's] customers receive when they purchase cardless and PINless calling arrangements as the new version of the phone card, or in describing the scope of the statute to cover "prepaid calling services" as [Garfield Mart] contends. MCL 205.52(2) imposes a tax upon the sale of prepaid telephone calling cards, reauthorization of prepaid telephone calling cards, prepaid authorization numbers for telephone use, and reauthorization of prepaid authorization numbers for telephone use. The Legislature's inclusion of "authorization numbers" evidences its intent to tax more than just the sale of tangible property, i.e., the cards. It clearly intended to tax the calling services associated with those cards, and with the referenced authorization numbers. Moreover, the receipts, as they stand with respect to the EPIN transactions, contain a PIN number that the customer inputs into his or her phone to obtain the add-on minutes purchased at [Garfield Mart's] store. Consequently, the only difference between these receipts and a standard prepaid calling card is that the latter is preprinted and held in a physical inventory. As noted in the admitted Marceco brochure, "Prepaid transactions started out in the 1990's with preprinted scratch-off cards with PIN numbers. Marceco jumped to the forefront of electronic PIN delivery in 2003 . . . ." Even assuming, however, that said receipts cannot be construed as prepaid telephone calling cards within the meaning of MCL 205.52(2), the PINs themselves clearly constitute prepaid authorization numbers for telephone use. Similarly, even assuming that the PINless transactions cannot be construed as prepaid telephone calling cards or prepaid authorization numbers due to their PINless nature, such transactions are properly considered reauthorizations of a prepaid authorization number. As noted in the Proposed Opinion and Judgment, customers are required to have a prepaid telephone to complete each top-up transaction, as the number assigned to or otherwise authorizing use of that telephone must be inputted into the MARCECO terminal to effectuate the sale of additional minutes to the telephone.

The Tribunal also rejected Garfield Mart's assertions that the audit was inaccurate, stating:

> Because [Garfield Mart] failed to maintain complete daily sales records, [the Department] had authority to conduct an indirect audit to test the accuracy of its books and records. [Garfield Mart] had no right to choose the audit method employed by [the Department] and the assessment is prima facie correct; [Garfield Mart] bears the burden of proving by a preponderance of the evidence that it is incorrect in whole or in part, and it failed to submit adequate affirmative evidence establishing that [the Department's] audit was inaccurate. The few invoices submitted were insufficient to determine what, if any, modifications should have been made to the sample, and on the issue of markups, [Garfield Mart] did not offer its accountant as a witness to explain how the records were prepared or the basis of the discrepancy, if any between the markups provided by [Garfield Mart] to the accountant and those provided by the accountant to [the Department].

The Tribunal adopted the ALJ's findings of fact and conclusions of law in its Final Opinion and Judgment.

This appeal follows.

II. GENERAL SALES TAX

A. STANDARD OF REVIEW

Garfield Mart argues that the Tribunal erred by interpreting MCL 205.52(2)(b) to include PINless top-up minutes and EPIN transactions. It also argues that the Department's audit was inaccurate and should not have been used, and that the Tribunal erred by assessing the negligence penalty to the tax deficiency assessed for the PINless top-up minutes. "Review of a decision by the MTT is very limited." *Drew v Cass Co*, 299 Mich App 495, 498; 830 NW2d 832 (2013). Unless fraud is alleged, this Court reviews the tribu-

nal's decision for a "misapplication of the law or adoption of a wrong principle." *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008) (citation and quotation marks omitted). "The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record." *Drew*, 299 Mich App at 499 (citation and quotation marks omitted). "Substantial evidence" is "more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Leahy v Orion Twp*, 269 Mich App 527, 529-530; 711 NW2d 438 (2006) (citation and quotation marks omitted). This Court reviews de novo issues of statutory construction. *Drew*, 299 Mich App at 499.

B. ANALYSIS

1. INTERPRETATION OF MCL 205.52(2)(b)

Under the GSTA, MCL 205.52(2)(b) provides:

> (1) Except as provided in section 2a, there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.
>
> (2) The tax under subsection (1) also applies to the following:
>
> * * *
>
> (b) The sale of a prepaid telephone calling card or a prepaid authorization number for telephone use, rather

> than for resale, including the reauthorization of a prepaid telephone calling card or a prepaid authorization number.

No Michigan caselaw has interpreted the meaning of this provision. When interpreting statutory language, this Court's goal is to discern the Legislature's intent. *One's Travel Ltd v Dep't of Treasury*, 288 Mich App 48, 54; 791 NW2d 521 (2010). The best indicator of that intent is the plain and ordinary language used. *Id*. In construing a statute, the Court must read the language as a whole, giving meaning to each word in the context of the statute. *Green v Ziegelman*, 282 Mich App 292, 301-302; 767 NW2d 660 (2009). If the language is unambiguous, then the language must be applied as written. *One's Travel Ltd*, 288 Mich App at 54. Further, tax statutes are not to be extended by implication and are to be construed against the taxing authority if an ambiguity exists. *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994).

The language of MCL 205.52(2)(b) is unambiguous. Under this provision, only the sale of a "prepaid telephone calling card" or a "prepaid authorization number for telephone use"—or the "reauthorization" of either of the foregoing—is subject to sales tax. Therefore, to be subject to the sales tax, the EPIN and PINless top-up transactions must fall within the meaning of any of these statutory terms.

MCL 205.52 does not define "prepaid telephone calling card" or "prepaid authorization number for telephone use." This Court may rely on dictionary definitions to discern the ordinary meaning of language used. *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 394; 852 NW2d 786 (2014). "Calling card" is defined as "a card *displaying a number* that can be used to charge telephone calls to a single account

regardless of where the calls are placed." *Merriam-Webster's Collegiate Dictionary* (11th ed) (emphasis added). The statute specifies that the calling card is "prepaid," indicating that the access number on the card contains a certain amount of minutes that have already been paid for, as opposed to a pay-as-you-go system. See *id*. (defining "prepay" as "to pay or pay the charge on in advance"). And, as commonly understood in the retail and telecommunications industry, such calling cards traditionally contain the information pertinent to the telecommunications services on a small, rectangular scratch-off card (typically made of some stiff material that is the size of a credit card), where a PIN for accessing the service is revealed by scratching the back of the card. See generally *id*. (defining "card," such as a credit card, as "a flat stiff usu. small and rectangular piece of material (as paper, cardboard, or plastic) usu. bearing information"). Indeed, Garfield Mart presented testimony supporting this industry understanding of the term "telephone calling card" as a plastic scratch-off card containing a PIN necessary to access the prepaid minutes. The Department presented no contrary evidence and fails to point to any statutory language indicating that a "prepaid telephone calling card" is anything other than a credit-card-sized stiff card with a PIN.

MCL 205.52 also does not define "prepaid authorization number for telephone use." However, like a calling card, this mechanism for accessing phone services uses a number, i.e., an authorization number. This number, as indicated by the Legislature's use of the preposition "for," is used for the purpose of accessing telephone services. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "for" as "a function word to indicate purpose"). And the term "authoriza-

tion" evokes the act of authorizing or of giving the power or authority to do something, which—in the context of the statutory language here—is the power to access the prepaid telephone account. See *id*. (defining "authorization"). Taking these terms together, a "prepaid authorization number for telephone use" is a number representing a prepaid account used by the owner to access the purchased telephone services. Given the foregoing, it is clear that the Legislature, when MCL 205.52(2)(b) is read as a whole, intended to tax the sale of both prepaid, tangible (calling cards) and intangible authorization numbers for telephone services as well as the reauthorization of those numbers.

Here, neither the PINless top-up nor the EPIN calling arrangements are "telephone calling cards" as that term is used in the statute. Neither of these prepaid calling arrangements involves the sale of scratch-off plastic or credit-card-type calling cards that contain a preprinted authorization number that represents the minutes purchased. The Tribunal's conclusion that these calling arrangements constitute such calling cards was error and contrary to the plain and ordinary meaning of the term "prepaid telephone calling card." Indeed, by holding that the instant transactions are the "new" calling card, the Tribunal extended the tax statute by implication, running afoul of the principle that tax statutes are to be given a practical construction because taxing is a practical matter. See *Mich Bell Tel Co*, 445 Mich at 478.

This conclusion does not end our analysis because these wireless calling arrangements may be subject to sales tax if they constitute the sale of a "prepaid authorization number for telephone use" or, alternatively, the "reauthorization" of a prepaid authorization

number. We conclude that an EPIN transaction is the sale of a prepaid authorization number for telephone use. When a customer purchases an EPIN, he or she receives a PIN on the receipt that must be entered on the customer's cell phone in order to access the telephone services associated with the PIN. Because the EPIN represents a prepaid account used by the owner to access the purchased telephone services associated with the EPIN, it falls within the definition of prepaid authorization number. It follows that the sale of an EPIN is taxable under MCL 205.52(2)(b).

However, the sale of a PINless top-up is not subject to sales tax under MCL 205.52(2)(b). When Garfield Mart sells a PINless top-up, its customer does not purchase any number representative of the account purchased that is used to access the purchased telephone service. Instead, the additional minutes are downloaded instantly to the customer's cell phone upon purchase; no authorization number or PIN is necessary to access the purchased telephone services. Stated differently, a purchaser of a PINless top-up purchases additional prepaid telephone services without any concomitant purchase of an authorization number necessary to access the purchased service. Because no sale of a prepaid authorization number occurs when a customer purchases a PINless top-up, the sale is not taxable under MCL 205.52(2)(b).

The Department's and the Tribunal's contrary interpretation of the statute is unpersuasive. First, the Tribunal's characterization of the reference number on the PINless top-up receipt as a PIN is not supported by the record. There is no dispute that the reference number is not used to access the prepaid telephone services and that it is instead only relevant in the event there is a technical problem with the service. As

such, the reference number is not a prepaid authorization number as that term is used in the statute; it is more akin to a confirmation number that a customer receives to evidence an electronic sale.

Likewise, the Tribunal's conclusion that a PINless top-up transaction is a reauthorization of a prepaid authorization number strains credulity. In support, the Tribunal reasoned that a customer's prepaid cell phone number is an authorization number and that entering it into the terminal to complete the top-up transaction constitutes a reauthorization. A prepaid cell phone number, however, is not and cannot reasonably be characterized as a prepaid authorization number for telephone use. Rather, a prepaid cell phone number is a number assigned to that phone to call that phone. Simply because that number is used in the top-up transaction to add minutes does not transform it into a prepaid authorization number.

Certainly the Legislature, in enacting MCL 205.52(2)(b), intended to tax the sale of telephone services affiliated with the sale of authorization numbers, whether contained on a physical card or not. Yet, the instant sales of PINless top-up are not accompanied by any authorization number necessary to access the service. If the Legislature wants to tax the sale of these PINless services, then it must amend the statute to do so. Under the present language of MCL 205.52(2)(b), PINless top-up sales are not subject to sales tax because they do not involve the sale of a telephone calling card or authorization number for telephone use, nor do they involve the reauthorization of a telephone calling card or authorization number. Accordingly, we affirm the Tribunal with respect to the EPIN transactions but reverse with respect to the PINless top-up transactions.

2. AUDIT ACCURACY

Garfield Mart also asserts that the audit conducted by the Department was inaccurate. Under MCL 205.68(1), "[a] person liable for any tax imposed under this act shall keep in a paper, electronic, or digital format an accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires." In the event the taxpayer fails to preserve or maintain these records as prescribed in MCL 205.68(1) and the Department believes outstanding tax is due, "the department may assess the amount of the tax due from the taxpayer based on an indirect audit procedure or any other information that is available or that may become available to the department." MCL 205.68(4). MCL 205.68(4) further provides:

> That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer. An indirect audit of a taxpayer under this subsection shall be conducted in accordance with 1941 PA 122, MCL 205.1 to 205.31, and the standards published by the department under section 21 of 1941 PA 122, MCL 205.21, and shall include all of the following elements:
>
> (a) A review of the taxpayer's books and records. The department may use an indirect method to test the accuracy of the taxpayer's books and records.
>
> (b) Both the credibility of the evidence and the reasonableness of the conclusion shall be evaluated before any determination of tax liability is made.
>
> (c) The department may use any method to reconstruct income, deductions, or expenses that is reasonable under the circumstances. The department may use third-party records in the reconstruction.

> (d) The department shall investigate all reasonable evidence presented by the taxpayer refuting the computation.

On appeal, Garfield Mart argues that the Tribunal erred by approving the Department's indirect sampling method because the Department failed to follow its audit guidelines. Garfield Mart, however, cites no law indicting that the failure to strictly adhere to the Department's internal audit guidelines constitutes error requiring reversal. Moreover, Garfield Mart even concedes that it has no right to demand a particular audit method due to its failure to provide the Department with adequate records of its sales. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 42-43; 703 NW2d 822 (2005). Additionally, Garfield Mart points to no affimative evidence demonstrating that the audit was, in fact, actually inaccurate so as to rebut its presumptive validity.

Even assuming that failure to follow internal audit guidelines could constitute evidence of an inaccurate audit, Garfield Mart's arguments fail. First, with respect to the adjustment to the nonprepared food deduction, Garfield Mart contends that the Department did not use the same methodology as that used for "calculating the sales tax deficiency for non-exempt products" as required by the audit manual. Johnson, the Department's auditor, however, testified that the method used for the nonprepared food deduction was consistent with the Department's published guidance. Second, Garfield Mart contends that the Department should not have subtracted rebates received from the projected purchases of cigarettes; however, inclusion of those rebates in the projected sales price would increase Garfield Mart's sales tax liability, and Garfield Mart does not otherwise explain why subtraction of the

rebates results in an inaccurate assessment for cigarette sales. Next, Garfield Mart argues that the audit is inaccurate because Johnson failed to account for breakage and theft of merchandise, which would have reduced its tax liability. Johnson, however, testified that there was no evidence of theft during the sampling period. Finally, Garfield Mart claims that the Department should have accounted for increases in inventory during the sampling period, given that not all merchandise was sold during that time frame. While Johnson testified that no such adjustments were made, the audit manual does not require such adjustments and Garfield Mart did not provide the Department with evidence that would have supported such an adjustment because Garfield Mart failed to provide its inventory logs.

In sum, given Garfield Mart's failure to maintain adequate sales records and to provide those records to the Department, it had no right to insist upon a particular audit methodology, and Garfield Mart has otherwise failed to rebut the presumption that the audit was accurate.

3. NEGLIGENCE PENALTY

Finally, Garfield Mart argues that the negligence penalty should not apply to the PINless top-up minutes. In the Final Assessment, the Department imposed a 10% negligence penalty for Garfield Mart's failure to remit the sales taxes for the tax years at issue. In the Proposed Opinion and Judgment, the ALJ affirmed the imposition of the penalty, stating:

> As for the levied penalty, [Garfield Mart's] claim that it was not responsible for the payment of sales taxes on the top-up or EPIN transactions or that it was not aware that

> it was required to maintain complete daily sales records is neither supported by the record nor justifies a waiver of the levied penalty.

In the Final Opinion and Judgment, the Tribunal affirmed the penalty without comment.

MCL 205.23(3) requires the imposition of a penalty in the event that a tax deficiency is due to the taxpayer's negligence. Negligence, for purposes of imposing such a penalty, "is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances." Mich Admin Code, R 205.1012. Whether a taxpayer was negligent is determined on a case-by-case basis, but the "standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute." Rule 205.1012. As such, if the taxpayer "demonstrates to the satisfaction of the department that the deficiency . . . was due to reasonable cause, the department shall waive the penalty." MCL 205.23(3). Here, because the PINless top-up sales were not taxable under MCL 205.52(2)(b), the negligence penalty must be adjusted on remand to reflect that fact.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH, P.J., and METER and M. J. KELLY, JJ., concurred.

BRANG, INC v LIQUOR CONTROL COMMISSION

Docket No. 333007. Submitted August 1, 2017, at Grand Rapids. Decided August 10, 2017, at 9:00 a.m.

The Liquor Control Commission (LCC) issued a complaint containing 27 separate alleged violations of Mich Admin Code, R 436.1011(6)(e), against Brang, Inc., doing business as 5 Corners Party Store, after LCC investigators discovered and seized numerous items that the LCC characterized as narcotics paraphernalia in the store. At the hearing on the complaint, LCC investigators testified that the items seized from the store consisted of narcotics paraphernalia. The investigators based their conclusion on their experience and the totality of circumstances existing at the store on the day the items were seized—the items' placement in glass cases, the price, function, design, and size of the items, and the items' location in relation to other items in the store. One of the store's owners testified that the items seized were merely tobacco accessories that were kept in glass cases because they were expensive and small enough to be easily shoplifted if not protected. The LCC commissioner issued an order indicating that the evidence presented substantiated all 27 of the alleged violations and imposed a $50 fine for each violation, ordered a one-day suspension of the store's license, and directed that the seized property be disposed of in accordance with the law. The store requested an appeal hearing, a three-member LCC Appeal Board (the Board) granted the request, and the Board conducted a two-day hearing. The Board remanded the case to the LCC commissioner, voicing concerns about whether the items seized constituted narcotics paraphernalia in light of the evidence presented, the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and the definition of drug paraphernalia in the Public Health Code (PHC), MCL 333.1101 *et seq*. The LCC commissioner held a hearing on remand and concluded that the evidence substantiated 25 of the 27 alleged violations. The commissioner again ordered a $50 fine for each violation, the one-day suspension of the store's license, and disposal of the seized merchandise. The store appealed to the Board, and the Board, in a 2-1 ruling, concluded that there was no error in the commissioner's findings of fact and conclusions of law. The store

then appealed the Board's decision in the Montcalm Circuit Court. The court, Suzanne Hoseth Kreeger, J., affirmed the Board's ruling that the store had violated Rule 436.1011(6)(e) by having narcotics paraphernalia displayed and for sale on its premises. According to the court, the seized merchandise satisfied the plain language definition of drug paraphernalia. The store appealed by leave granted.

The Court of Appeals *held*:

A law is unconstitutionally vague when it is overbroad and infringes First Amendment freedoms, when it fails to give fair notice of the conduct proscribed, or when it is so indefinite that the trier of fact has unlimited discretion in determining whether an offense was committed. Rule 436.1011(6)(e) prohibited an establishment licensed by the LCC from allowing narcotics paraphernalia to be used, stored, exchanged, or sold on the licensed premises. Narcotics paraphernalia was not defined in the rule; the only elaboration of the term appeared in an LCC interpretive statement. But under MCL 24.207(h) and MCL 24.232(5), an interpretive statement is explanatory only. It does not have the power of law, and it is not the equivalent of an enforceable rule. Due process requires that administrative agencies perform their delegated legislative tasks in accordance with standards that are as reasonably precise as the subject matter permits or requires and that persons of common intelligence be able to understand the meaning and application of the law or rule. A rule is unconstitutionally vague when it forbids or requires conduct in terms that cause persons of common intelligence to guess at the rule's meaning and to differ about the rule's proper application. In this case, the rule was problematic because it did not define the term "narcotics paraphernalia." The LCC treated the term as effectively interchangeable with the term "drug paraphernalia" such that the LCC viewed the presence of marijuana paraphernalia as violative of Rule 436.1011(6)(e). But not all drugs are narcotics, and the decision to refer to "narcotics paraphernalia" in the rule, when the rule is applied to bar all drug paraphernalia, leads to the indefiniteness, uncertainty, and lack of fair notice and precision that the void-for-vagueness doctrine seeks to eliminate. Because the rule failed to supply any parameters, guidance, standards, criteria, or quantifiers to aid in identifying items as narcotics paraphernalia, it was susceptible to arbitrary and discriminatory enforcement. Therefore, the rule was unconstitutionally vague, and it was void and unenforceable by the LCC.

Reversed and remanded.

ADMINISTRATIVE LAW — LIQUOR CONTROL COMMISSION — LICENSEES — PROHIBITION AGAINST NARCOTICS PARAPHERNALIA ON THE PREMISES.

Mich Admin Code, R 436.1011(6)(e), prohibited the use, storage, exchange, or sale of narcotics paraphernalia on premises licensed by the Liquor Control Commission, but the term "narcotics paraphernalia" was undefined, and the rule failed to supply any parameters, guidance, standards, criteria, or quantifiers to aid in identifying items as narcotics paraphernalia; the rule was unconstitutionally vague and therefore void and unenforceable.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jason A. Geissler*, Assistant Attorney General, for the Liquor Control Commission.

Burns Law Office, PLC (by *Daniel L. Burns*), for Brang, Inc.

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

MURPHY, J. This appeal concerns the enforcement of Mich Admin Code, R 436.1011(6)(e), which precludes an establishment licensed by defendant, the Liquor Control Commission (LCC), from "[a]llow[ing] narcotics paraphernalia to be used, stored, exchanged, or sold on the licensed premises." The question posed to us involves the proper identification of products or merchandise that fall under the umbrella of "narcotics paraphernalia" as that term is employed in Rule 436.1011(6)(e). Plaintiff, Brang, Inc. (the store) appeals by leave granted[1] the circuit court's order affirming the LCC's affirmation of a determination by an LCC hearing commissioner that recovered items that had been displayed and on sale in the store constituted narcotics paraphernalia in violation of Rule 436.1011(6)(e). We

[1] *Brang, Inc v Liquor Control Comm*, unpublished order of the Court of Appeals, entered August 23, 2016 (Docket No. 333007).

hold that Rule 436.1011(6)(e) is unconstitutionally vague with respect to the meaning of "narcotics paraphernalia." Accordingly, we reverse and remand for further proceedings.

I. BACKGROUND

On September 16, 2013, the LCC issued a complaint against the store alleging that on August 8, 2013, LCC investigators had discovered numerous items in the store, available for purchase by customers, that the LCC characterized as narcotics paraphernalia under and in violation of Rule 436.1011(6)(e).[2] A violation hearing before an LCC hearing commissioner was held on December 11, 2013, and the two LCC investigators who conducted the inspection of the store on August 8, 2013, testified on behalf of the LCC. On the basis of

[2] As contained in the complaint, the alleged violations of Rule 436.1011(6)(e) were separated into 27 numbered paragraphs that grouped together certain products that had been confiscated from the store by the LCC. The 27 paragraphs, or charges, identified and classified the following items or products as narcotics paraphernalia: (1) 46 assorted metal pipes; (2) 12 glass tube pipes; (3) 3 bowl wood pipes; (4) 5 wood metal folding pipes; (5) 2 magnet pipes; (6) 13 one-hitter pipes; (7) 3 splitter lighters and 5 "splitters-EZ-split"; (8) 3 glass pipes and 2 yellow glass pipes; (9) 3 stone pipes and 1 pipe head; (10) 1 pack of 4 glass tubes with 4 accessories; (11) 1 dish of assorted glass screens, 1 pack of assorted rubber accessories, 1 pack of assorted glass screens in baggies, 1 dish of metal screens, and 1 pack of 5 metal pipe fittings; (12) 69 assorted glass pipes; (13) 12 glass tube pipes; (14) 29 glass bongs; (15) 2 "vehicle glass and plastic/metal bong/pipe system[s]"; (16) 2 medium glass pipes; (17) 3 boxes of "Toke Token Papers and 1 box of Randy's wired papers (both opened)"; (18) 1 open box of letter postal scales and 15 box pocket scales; (19) 8 grinders; (20) 1 Tootsie Roll storage container with false bottom; (21) 1 magic flight kit; (22) 1 "stok vaporizer" and 3 "eclipse Vake kits"; (23) 4 open boxes of Zig Zag wraps; (24) 2 theme bongs; (25) 8 large glass bongs; (26) 3 colored plastic bongs; and (27) "1 dish chicken bones 2 pipes, 1 dish 9mm 1 pipe, 1 dish 12 glass pipes, 1 dish 9 glass pipes, 1 dish of 31 [3-inch] glass pipes, 1 dish of 13 [4-inch] and [6-inch] glass pipes and 1 dish of 21 glass pipes 8mm[.]"

their experience and under the totality of the circumstances—including product placement in glass cases, price, function, design, size, and location in conjunction with other items—the investigators opined that the merchandise at issue constituted narcotics paraphernalia. According to the investigators, stickers indicating that the items were for tobacco use only did not mean that the merchandise was not narcotics paraphernalia. The investigators seized the products, packaged them up, and transported them back to an LCC district office.

One of the store's owners testified that the items were merely tobacco accessories and that they were kept in glass cases because they were expensive and because some of the products were very small and susceptible to easy shoplifting if not protected by encasement. He further indicated that more than 100 pounds of loose tobacco was on sale in the store, including some in the glass cases. The owner also testified that the township liquor inspector, who was unaffiliated with the LCC, along with local law enforcement, had often been in the store and voiced no concerns about the merchandise now being described as narcotics paraphernalia. The owner claimed that the items were not for use in association with narcotics. A document, described as an LCC interpretive statement, which was accessible on the LCC's website, was admitted into evidence at the hearing. The interpretive statement, before setting forth a nonexhaustive list of items that could be characterized as narcotics paraphernalia, provided that "[n]arcotics paraphernalia can best be described as any equipment, product, or materials used in concealing, producing, processing, preparing, injecting, ingesting, inhaling or otherwise introducing into the human body controlled substances, which are unlawful under state, federal or

local law." The interpretive statement's references to some of the listed items, e.g., water pipes and pipe screens, contain exceptions when the items are sold in conjunction with loose tobacco or tobacco products.

On January 10, 2014, the LCC commissioner issued an order finding that the evidence substantiated all 27 paragraphs of allegations, or charges, contained in the LCC complaint against the store. The commissioner imposed a fine of $50 for each of the 27 charges ($1,350 total), ordered a one-day suspension (Saturday/weekend) of the store's liquor license, and directed that the seized items be disposed of in accordance with the law. The store then requested a violation appeal hearing, and a three-member LCC Appeal Board (the Board) granted the request. A violation appeal hearing was conducted over two days on September 9 and December 9, 2014. The Board remanded the case back to the hearing commissioner, indicating that it had concerns about whether the merchandise constituted narcotics paraphernalia in light of the evidence, the developments in the law regarding medical marijuana under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and the definition of "drug paraphernalia" under the Public Health Code (PHC), MCL 333.1101 *et seq*.[3]

[3] MCL 333.7453(1) provides that "a person shall not sell or offer for sale drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." MCL 333.7451 states that "drug paraphernalia" is "any equipment, product, material, or combination of equipment, products, or materials, which is specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into

On remand on March 25, 2015, another hearing was conducted by the hearing commissioner, and the parties agreed to incorporate the record from the prior evidentiary hearing. In addition, the LCC presented the testimony of one of its investigators who had not previously testified and who, having worked as a police officer, had gained extensive knowledge and experience regarding narcotics and narcotics paraphernalia. He indicated that he had never smoked tobacco and had no specialized training with respect to tobacco use. However, the investigator opined on the basis of his background, training, and experience and under a totality of the circumstances that all the seized merchandise, except for the rolling papers, was primarily, if not exclusively, used in association with narcotics, not tobacco, and constituted narcotics paraphernalia. The hearing commissioner concluded that the evidence substantiated 25 of the 27 charges in the complaint, dismissing the two charges pertaining to rolling papers. He again imposed a $50 fine for each violation and a one-day license suspension, and he directed the disposal of the seized items.

Once again, an appeal to the Board ensued, and this time the Board, in a 2-1 ruling, affirmed the hearing commissioner's decision following a hearing on October 6, 2015, concluding that he did not err with respect to his findings of fact and conclusions of law. The store appealed in the circuit court, and the court affirmed the Board's ruling, stating that the seized merchandise met "the plain language definition of drug paraphernalia . . . ." The store now appeals by leave granted.

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the human body a controlled substance[.]" MCL 333.7451(a) through (m) set forth a nonexhaustive list of examples, with each example providing that the item must be "specifically designed" for use in connection with a controlled substance.

II. THE CREATION AND AUTHORITY OF THE LCC

The Legislature "may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof." Const 1963, art 4, § 40. Currently in place, statutorily speaking, is the Michigan Liquor Control Code (the Code), MCL 436.1101 *et seq*. Except as otherwise provided by the Code, the LCC "shall have the sole right, power, and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within this state, including the manufacture, importation, possession, transportation and sale thereof." MCL 436.1201(2). Under MCL 436.1215(1), the LCC is authorized to "adopt rules and regulations governing the carrying out of [the Code] and the duties and responsibilities of licensees in the proper conduct and management of their licensed places." Rules of the LCC must be promulgated pursuant to the Administrative Procedures Act (APA), MCL 24.201 *et seq*. MCL 436.1215(1).

III. STANDARDS OF REVIEW

Findings and decisions of the LCC are reviewable pursuant to Const 1963, art 6, § 28. *Semaan v Liquor Control Comm*, 425 Mich 28, 40-41; 387 NW2d 786 (1986); see also *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994). Const 1963, art 6, § 28, provides as follows:

> 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.[4]

We review de novo the construction of an administrative rule. *Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017).

With respect to this Court's review of the circuit court's examination of agency action, we must determine whether the circuit court applied correct legal principles and whether the circuit court misapprehended or grossly misapplied the substantial-evidence test in relation to the agency's factual findings. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 716; 660 NW2d 74 (2002). "This latter standard is essentially a clearly erroneous standard of review . . . ." *Id*. This Court gives great deference to a circuit court's review of the

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[4] Also, MCL 24.306, which is part of the APA, provides:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law.
>
> (2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

factual findings made by an administrative agency, but substantially less deference, if any, is afforded to the circuit court's decisions on matters of law. *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009).

IV. ADMINISTRATIVE RULES—PRINCIPLES OF CONSTRUCTION

Just as with statutes, the foremost rule in construing an administrative rule, and our primary task, is to discern and give effect to the administrative agency's intent. *Coldwater*, 500 Mich at 167. This Court begins with an examination of the language of the administrative rule, which provides the most reliable evidence of the agency's intent, and if the language is unambiguous, the rule must be enforced as written without any further judicial construction. *Id*. We may go beyond the words of the administrative rule to ascertain the agency's intent only when the rule is ambiguous. *Id*. This Court must give effect to every clause, phrase, and word in an administrative rule and avoid a construction that would render any part of the rule surplusage or nugatory. *Id*. at 167-168. When the rule is ambiguous, we generally defer to the construction of an administrative rule given by the agency charged with administration of the rule; "[h]owever, this deference does not mean that a reviewing court abandons its ultimate responsibility to give meaning to . . . administrative rules." *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003). Deference is not afforded to the agency's interpretation of a rule when the rule is unambiguous or when the agency's interpretation is clearly wrong. *Id*. at 65-66.

MCL 24.232(1) of the APA provides that the "[d]efinitions of words and phrases and rules of construction prescribed in any statute that are made applicable to

all statutes of this state also apply to rules unless clearly indicated to the contrary." And MCL 8.3 states that "[i]n the construction of the statutes of this state, the rules stated in [MCL 8.3a to MCL 8.3w] shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.3a provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

V. DISCUSSION AND RESOLUTION

Again, Rule 436.1011(6)(e) precludes an establishment licensed by the LCC from "[a]llow[ing] narcotics paraphernalia to be used, stored, exchanged, or sold on the licensed premises." There is no administrative rule defining "narcotics paraphernalia." And the LCC's interpretive statement simply cannot be relied on to resolve this case. See MCL 24.232(5).[5] An interpretative statement is not a rule; an interpretive statement is merely explanatory. MCL 24.207(h). We hold that the term "narcotics paraphernalia," standing alone as

[5] MCL 24.232(5) provides:

> A guideline, operational memorandum, bulletin, interpretive statement, or form with instructions is not enforceable by an agency, is considered merely advisory, and shall not be given the force and effect of law. An agency shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or refuse to act if that decision is subject to judicial review. A court shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to uphold an agency decision to act or refuse to act.

it does in Rule 436.1011(6)(e), i.e., without any parameters, is unconstitutionally vague.[6]

"In order to find a law unconstitutionally vague, there must be a showing that (1) it is overbroad, impinging on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed." *Kotmar*, 207 Mich App at 696 (examining the constitutionality of an LCC rule). The instant case does not concern possible intrusions on First Amendment freedoms; rather, our focus is on whether Rule 436.1011(6)(e) provides fair notice and whether it is too indefinite. "Vagueness challenges to . . . administrative rules which do not involve First Amendment freedoms must be examined in light of the facts at hand." *Ron's Last Chance, Inc v Liquor Control Comm*, 124 Mich App 179, 182; 333 NW2d 502 (1983). Due process requires the existence of reasonably precise standards to be employed by administrative agencies in performing their delegated legislative tasks. *Adkins v Dep't of Civil Serv*, 140 Mich App 202, 213-214; 362 NW2d 919 (1985). In *Allison v Southfield*, 172 Mich App 592, 595-596; 432 NW2d 369 (1988), this Court observed:

> A statute or, in this case, a regulation is violative of due process on the ground of vagueness when it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Essentially, the

[6] The store does not specifically argue that the term "narcotics paraphernalia" is unconstitutionally vague; however, the store's complaints about Rule 436.1011(6)(e), e.g., that there is no definition of narcotics paraphernalia and that there are inadequate standards or principles governing its application, are essentially in the nature of a vagueness challenge.

> doctrine of vagueness ensures that a regulation give its readers fair notice of what types of conduct are prohibited. . . . Even if one of the evils sought to be prevented by the vagueness doctrine is the vesting of unstructured discretion and the resultant arbitrary and discriminary enforcement of the law, the doctrine is not triggered unless the wording of the promulgation is itself vague. [Quotation marks and citations omitted.]

Agency standards must be as reasonably precise as the subject matter permits or requires. *Adkins*, 140 Mich App at 214. "A purpose of this requirement is to close the door to favoritism, discrimination and arbitrary uncontrolled discretion on the part of administrative agencies, and provide adequate protection to the interests of those affected." *Id*. at 214 (citation omitted). "[S]tandards must be sufficiently broad to permit efficient administration . . . , but not so broad that the people are unprotected from uncontrolled or arbitrary power in the hands of administrative officials." *Mich Waste Sys v Dep't of Natural Resources*, 147 Mich App 729, 739; 383 NW2d 112 (1985).

Former United States Supreme Court Justice Potter Stewart once famously observed, "I know it when I see it," with regard to identifying "hard-core pornography," while adding that he would not attempt to define the term and questioning whether he could even "succeed in intelligibly doing so." *Jacobellis v Ohio*, 378 US 184, 197; 84 S Ct 1676; 12 L Ed 2d 793 (1964) (Stewart, J., concurring). Our visceral reaction is similar when it comes to identifying "narcotics paraphernalia," giving us pause in finding the term unconstitutionally vague and initially making us wonder whether the language is as reasonably precise as the subject matter requires. However, after careful reflection and for the reasons expressed below, we conclude that the term "narcotics paraphernalia" is

simply too vague for purposes of fair enforcement and that reasonably precise standards could indeed be easily crafted in a promulgated rule to avoid the vagueness problem.

First, we find it problematic and confusing that the LCC treats the term "narcotics paraphernalia" as effectively being interchangeable with the term "drug paraphernalia," such that the LCC necessarily views marijuana paraphernalia as violative of Rule 436.1011(6)(e), as evidenced by the interpretive statement and the positions of the three LCC investigators, the hearing commissioner, and the Board. The LCC has used the language "narcotics paraphernalia" ever since Rule 436.1011 first became effective on February 3, 1981, see 1979 Quarterly Admin Code Supp No. 4, R 436.1011, and at that time our Legislature did not include marijuana in the PHC's definition of "narcotic drug," see MCL 333.7107, as enacted by 1978 PA 368, effective September 30, 1978.[7] All narcotics are drugs, but not all drugs are narcotics. See MCL 333.7107; *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "narcotic" as "a drug (as opium or morphine) that in moderate doses dulls the senses, relieves pain, and induces profound sleep but in excessive doses causes stupor, coma, or convulsions"); *Stedman's Medical Dictionary* (21st ed) (defining "narcotic" as "[a] drug which, used in moderate doses, produces stupor, insen-

[7] In part, MCL 333.7107 provides today, and provided in 1978, that a "narcotic drug" encompasses:

> (a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.
>
> (b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subdivision (a), but not including the isoquinoline alkaloids of opium.

sibility, or sound sleep").[8] In *Michigan v Long*, 463 US 1032, 1044 n 10; 103 S Ct 3469; 77 L Ed 2d 1201 (1983), the United States Supreme Court commented:

> At the time that the 1963 Michigan Constitution was enacted, it is clear that marijuana was considered a narcotic drug. See 1961 Mich Pub Acts, No. 206 § 1(f). Indeed, it appears that marijuana was considered a narcotic drug in Michigan until 1978, when it was removed from the narcotic classification.

Given this background, and although we appreciate that the definition of "narcotic drug" in MCL 333.7107 specifically pertains to Article 7 of the PHC (controlled substances), see MCL 333.7101(1) ("for purposes of this article . . ."), it escapes us why the LCC, if it indeed intended to capture marijuana paraphernalia within Rule 436.1011(6)(e), did not simply use the term *drug* paraphernalia. To be clear, we are not ruling that the LCC did not intend to encompass marijuana paraphernalia in crafting Rule 436.1011, although that is certainly arguable for the reasons earlier expressed. Instead, we are simply recognizing that the decision to specifically reference "narcotics" paraphernalia in Rule 436.1011(6)(e), while ostensibly intending to bar *all* drug paraphernalia, leads to the very indefiniteness, uncertainty, and lack of fair notice and precision that the void-for-vagueness doctrine seeks to eliminate.

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[8] Other courts have made the same observation. For instance, in *United States v Miller*, 179 F3d 961, 965 n 7 (CA 5, 1999), the United States Court of Appeals for the Fifth Circuit noted, "We assume that the Government is aware that marijuana is not a narcotic and that references in its brief are meant to include all drugs, and not just narcotics . . . ." And the dissent in *People v Summit*, 183 Colo 421, 430; 517 P2d 850 (1974), stated that "[a]s candidly conceded by the majority opinion, the overwhelming weight of eminent scientific authority points to the conclusion that marijuana is not a Narcotic drug."

Moreover, aside from serious concerns about the soundness and validity of including marijuana paraphernalia under Rule 436.1011(6)(e), the same indefiniteness, uncertainty, and lack of fair notice and precision exist with respect to paraphernalia connected to other drugs that are not technically recognized as narcotics in the field of medicine and under the PHC. Additionally, the interpretive statement, which the LCC advises licensees to review, speaks in terms of paraphernalia that is used in connection with *unlawful* controlled substances. Rule 436.1011(6)(e) does not indicate whether narcotics paraphernalia includes paraphernalia used in association with a controlled substance that, in some cases, might be used by an individual in a *lawful* manner. Thus, the effect of the MMMA on what constitutes narcotics paraphernalia for purposes of Rule 436.1011(6)(e) creates further uncertainty and confusion, assuming that marijuana can be viewed under the rule as a narcotic in the first place.

The primary reason that we hold that Rule 436.1011(6)(e) is unconstitutionally vague is that it fails to supply any parameters, guidance, standards, criteria, or quantifiers in regard to identifying "narcotics paraphernalia," other than those necessarily arising out of the term itself, thereby making the rule susceptible to arbitrary and discriminatory enforcement. The Legislature, in outlawing the sale of drug paraphernalia under the PHC, has astutely required proof that a vendor know that the merchandise is to be used in relation to a controlled substance, MCL 333.7453(1), and that the product be "specifically designed" for use in connection with a controlled substance, MCL 333.7451. No such precision is found in Rule 436.1011(6)(e). In relevant part, the dictionary broadly defines "paraphernalia" as "articles of equip-

ment" or "accessory items." *Merriam-Webster's Collegiate Dictionary* (11th ed). Articles of equipment or accessory items relative to the use of narcotics could encompass such items as pipes for smoking, scales, rolling papers, razor blades, spoons, baggies, syringes, pacifiers, lighters, mirrors, elastics, etc.—all of which can generally be used for legal purposes, but which can also be employed for illegal purposes, differing with respect to the likelihood of a narcotic-related use or whether the manufacturer intended or envisioned such a use.

Rule 436.1011(6)(e) simply does not provide any criteria or guidance to determine, for example, whether a pipe that can actually be used to smoke tobacco *and* to smoke a narcotic drug constitutes narcotics paraphernalia, thereby causing persons of common intelligence to guess at whether the pipe violates the rule. Does an item need to be primarily or predominantly used in connection with a narcotic in order to be designated as narcotics paraphernalia, or can rare or occasional use suffice? Is it pertinent for identifying narcotics paraphernalia whether the manufacturer specifically designed a product for use in relationship to a narcotic, or is the manufacturer's intent irrelevant? Does a licensee's knowledge, or lack thereof, regarding an item's use or intended use play any role in the equation? Rule 436.1011(6)(e) provides no insight or answer to these questions. And although it is true that the LCC investigators testified that certain products were almost always or primarily used in connection with narcotics, Rule 436.1011(6)(e) itself contains no such standard, quantifier, or demand, resulting in the indefiniteness, uncertainty, and lack of fair notice and precision that even the Board found concerning. In sum, Rule 436.1011(6)(e) is unconstitutionally vague and is therefore void and unenforceable

by the LCC. Accordingly, we reverse the rulings of the circuit court, the Board, and the hearing commissioner and remand for entry of an order dismissing the LCC complaint against the store.

Reversed and remanded for further proceedings consistent this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, the store is awarded taxable costs under MCR 7.219.

HOEKSTRA, P.J., and K. F. KELLY, J., concurred with MURPHY, J.

PATTERSON v BEVERWYK

Docket No. 333301. Submitted August 1, 2017, at Grand Rapids. Decided August 10, 2017, at 9:05 a.m.

Respondent, Michael L. Beverwyk, moved in the Ottawa Circuit Court to terminate the ex parte personal protection order (PPO) the court had issued under MCL 600.2950a on behalf of petitioners, Joe Patterson and Woodward, Inc., that enjoined respondent from engaging in conduct prohibited under MCL 750.411h (stalking), MCL 750.411i (aggravated stalking), and MCL 750.411s (online stalking) (collectively, the stalking statutes). In seeking the PPO, petitioners asserted that respondent harassed and stalked Patterson and other Woodward, Inc., employees for a three-year period after Woodward, Inc., terminated respondent from his position at the company. The PPO precluded respondent from stalking petitioners or appearing at Woodward, Inc.'s facility. Four days later, respondent moved to terminate the PPO. Following an evidentiary hearing, the court, Jon H. Hulsing, J., granted respondent's motion and terminated the PPO. The court reasoned that the PPO should not have been issued on behalf of Woodward, Inc., because the company was not a living or natural person that could be frightened or intimidated as intended by the stalking statutes. The court further reasoned that Patterson failed to establish a factual basis for the PPO because respondent had never spoken directly with Patterson, the one letter respondent sent to Patterson was not concerning, and respondent's last communication with a Woodward, Inc., employee had been in the summer of 2015. Petitioners appealed.

The Court of Appeals *held*:

1. MCL 600.2950a(1) provides that an individual may petition the family division of the circuit court to enter a PPO to restrain or enjoin an individual from engaging in conduct that is prohibited under the stalking statutes; a court may not issue a PPO unless the petition alleges facts that constitute stalking as defined in MCL 750.411h or MCL 750.411i, or conduct that is prohibited under MCL 750.411s. While the term "individual" is undefined in MCL 600.2950a, each of the stalking statutes—MCL 750.411h(1)(c) through (f); MCL 750.411i(1)(c) through (g); and

MCL 750.411s(1), (2), (7), and (8)(k)—refers to unlawful conduct directed at an individual or a victim and statutorily defines the term "victim" as encompassing an "individual." For that reason, only a stalking victim or his or her legally recognized representative has the capacity as an individual to petition for a PPO under MCL 600.2950a. Each stalking statute prohibits conduct that causes a victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested and causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. A company is not an individual or a victim for purposes of MCL 600.2950a—or the stalking statutes incorporated by reference into the PPO statute—because a company is not capable of experiencing the requisite human emotions and feelings a victim must establish before a court may find that stalking or certain conduct occurred under the stalking statutes, a necessary finding before a PPO may be issued under MCL 600.2950a.

2. The trial court correctly terminated Woodward, Inc.'s PPO because the company was not an individual who could seek a personal protection order under MCL 600.2950a. For that reason, the company lacked standing to seek the PPO on behalf of itself. Woodward, Inc., also could not request the PPO on behalf of its employees because only an actual stalking victim or his or her legally recognized representative may file a petition for personal protection, neither of which applied to the company in relation to its employees.

3. Considering the totality of the circumstances, the trial court erred by finding that Patterson was not being stalked and by terminating Patterson's PPO. Regardless of the fact that Patterson only received a nonthreatening letter from respondent and that Patterson had never personally spoken with respondent, respondent engaged in a three-year course of conduct in which respondent stalked the Woodward, Inc., facility and the employees who worked at that facility, including Patterson. In other words, respondent engaged in a willful course of conduct involving repeated or continuing harassment of the company's employees that would have caused a reasonable person to feel frightened, intimidated, or threatened and that actually caused Patterson to feel frightened, intimidated, or threatened. Patterson could not petition for a PPO on behalf of the other Woodward, Inc., employees because only an actual stalking victim or his or her legally recognized representative may file a petition for personal protection, neither of which applied to Patterson in relation to the company's employees.

Order terminating the PPO issued to Woodward, Inc., affirmed, order terminating the PPO issued to Patterson reversed, and case remanded.

INJUNCTIONS — PERSONAL PROTECTION ORDERS — REQUIREMENTS — WORDS AND PHRASES — INDIVIDUAL.

MCL 600.2950a provides that an individual may petition the family division of the circuit court to enter a personal protection order (PPO) to restrain or enjoin an individual from engaging in conduct that is prohibited under certain stalking statutes; only a stalking victim or his or her legally recognized representative has the capacity as an individual to petition for a PPO under MCL 600.2950a; a company is not an individual or a victim for purposes of MCL 600.2950a—or the stalking statutes incorporated by reference into the PPO statute—because a company is not capable of experiencing the requisite human emotions and feelings a victim must establish before a court may find that stalking or certain conduct occurred under the stalking statutes, a necessary finding before a PPO may be issued under MCL 600.2950a (MCL 750.411h; MCL 750.411i; MCL 750.411s).

Warner Norcross & Judd LLP (by *Conor B. Dugan* and *Joe Sadler*) for plaintiffs.

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

MURPHY, J. Petitioners, Joe Patterson and Woodward, Inc., appeal as of right the trial court's order terminating their personal protection order (PPO) against respondent, Michael Lee Beverwyk, following an evidentiary hearing on respondent's motion to terminate the PPO. The PPO had been issued following an ex parte hearing under MCL 600.2950a, which, upon petition by "an individual," authorizes entry of a PPO to restrain or enjoin another individual from engaging in conduct prohibited in the Michigan Penal Code under MCL 750.411h (stalking), MCL 750.411i (aggravated stalking), or MCL 750.411s (online stalk-

ing) (collectively, the stalking statutes).[1] These three criminal statutes all refer to conduct directed at an "individual" or a "victim," statutorily defining the term "victim" as encompassing an "individual." MCL 750.411h(1)(c) through (f); MCL 750.411i(1)(c) through (g); MCL 750.411s(1), (2), (7), and (8)(k). The trial court ruled that respondent had not engaged in stalking with respect to Patterson and that Woodward, a corporation involved in aerospace and industrial markets with a facility in Zeeland, could not be a "victim" and is not an "individual" under the statutes, effectively determining that Woodward lacked standing to obtain a PPO under MCL 600.2950a. The trial court found that the PPO had been improvidently granted. On appeal, petitioners argue that MCL 600.2950a permits a corporation to seek and to obtain a PPO, that Patterson was a stalking victim, necessitating continuance of the PPO, and that, even if not a victim, Patterson could request the issuance of a PPO to protect others working in the Woodward plant. We hold that Woodward lacked standing to seek a PPO under MCL 600.2950a because the statute requires a petitioner to be a human being and does not generally allow for the filing of PPO petitions by someone other than the stalking victim himself or herself, unless the nonvictim is filing the petition in a legally recognized representative capacity. We further hold that Patterson could not seek a PPO on behalf of others at Woodward who had not themselves filed a petition for a PPO. The trial court, however, clearly erred by finding that Patterson was not a stalking victim and abused its discretion by failing to continue the PPO as to Patterson. Accordingly, we affirm in part and reverse and remand in part.

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[1] The statute also provides for PPOs in circumstances involving sexual assault victims, MCL 600.2950a(2) and (3); however, that component of the statute is not relevant to this case.

I. BACKGROUND

On April 29, 2016, petitioners filed a petition for a PPO against respondent, alleging that he was stalking petitioners, as the term "stalking" is defined in MCL 750.411h(1)(d) and MCL 750.411i(1)(e), and requesting the issuance of an ex parte PPO. An affidavit executed by Patterson was attached to the petition. He averred that he was the vice president and general manager of Woodward, and in a section of the affidavit titled "Summary of Allegations," he asserted the following:

> 4. [Respondent] is involved in a years-long attempt to harass and intimidate Woodward and its members [employees], apparently as revenge for his firing three (3) years ago. His behavior has recently escalated from a harassing letter-writing campaign to physically stalking our facility in a threatening manner. [Respondent] has, on at least (8) occasions this year, come to the Woodward facility on Centennial Street in Zeeland. He has parked nearby and watched the facility for some unknown purpose, or else circled the facility with his car. [Respondent's] current behavior, in light of his troubled past, is greatly concerning to us.
>
> 5. [Respondent's] stalking is either intended to harass or is being undertaken as part of a plan to do further harm to Woodward. Either he wants us to know that we are being stalked, and to be cowed and intimidated by it, or else he does not intend us to know, because he is planning to further victimize our members and he is stalking his intended victims (whoever they may be). Either way, he is a threat to the entire Woodward team.
>
> 6. Of particular concern is the obsessive nature of [respondent's] conduct. He has spent the better ***of three years*** sending emails and materials to numerous Woodward members and senior leaders, most of whom played no role in his departure from Woodward. When hoped-for responses were not provided, his behavior escalated and he began stalking our facility. Even after warnings from

> the police, he cannot or will not stop stalking us. No reasonable person would pursue this course of conduct, which seems certain to end with [respondent] in jail.
>
> 7. There is a pall of fear and trepidation spreading over the entire facility. I am aware of multiple members inquiring whether they are still safe at work. Some have asked to be escorted to their cars at night. At least one has purchased a gun to use for protection against [respondent]. I expect such reactions so long as [respondent] continues to stalk our facility.

The affidavit proceeded to set forth averments concerning alleged acts of bullying and harassment, nonsexual in nature, committed by respondent against Woodward employees during respondent's employment with Woodward, which conduct was especially egregious in regard to one particular female co-worker, and which conduct eventually led to respondent's termination. Patterson's affidavit next contained averments providing specific details about respondent's posttermination letters, his alleged stalking activities, and the fear and anxiety suffered by employees as a result of respondent's conduct. In support, Patterson attached a letter from the aforementioned female employee detailing respondent's menacing conduct during his employment, including acts of stalking directed at her, and an intercompany e-mail indicating that respondent, while employed by Woodward, had posted news articles on a bulletin board in the facility regarding men who had been accused of murdering or abusing a girlfriend or wife. Patterson additionally attached troubling letters from respondent to Woodward's manager of human resources, who had recommended his firing;[2] an e-mail to Woodward's

[2] The final two sentences in one letter read, "I'm a firm believer in karma and what you put out there, good or bad you will get back ten fold. Enjoy your miserable life ahead of you."

chairman of the board regarding respondent's termination;[3] and some "anonymous" handwritten letters denigrating the female employee whom respondent had harassed.

On April 29, 2016, the date the PPO petition was filed, the trial court entered an ex parte PPO against respondent, precluding him from stalking petitioners and otherwise appearing at the Woodward facility. On May 3, 2016, respondent, acting *in propria persona*, filed a motion to terminate the PPO. Respondent attached a document in which he declared that several of the averments in Patterson's affidavit were "not true" or constituted exaggerations. He also stated that he did not know Patterson either professionally or personally. On May 11, 2016, petitioners filed a response to respondent's motion to terminate the PPO, arguing that there was ample evidence to support the PPO, that respondent failed to establish that the PPO was unreasonable or lacked justification, that respondent effectively admitted many of Patterson's affidavit averments by not specifically responding to them, and that respondent's denials were not credible.

On May 13, 2016, an evidentiary hearing was conducted on respondent's motion to terminate the PPO. Patterson and respondent testified at the hearing, providing testimony that mostly mimicked their allegations and responses in the documents already discussed. Respondent did concede that he had been in the vicinity of the Woodward facility in his vehicle on numerous occasions, giving rides to friends and acquaintances who worked at a business next to Wood-

[3] The e-mail reflected that it came from someone other than respondent; however, petitioners claimed that respondent was the person actually behind the e-mail.

ward. He could not, however, recall or provide any specific names, referring to them as "[m]ostly Asian people."

According to Patterson, there had only been one letter addressed directly to him from respondent. Patterson did not testify to any other communications or correspondence between himself and respondent, and Patterson acknowledged that he had never personally met or spoken to respondent. With respect to the letter addressed to Patterson, he described its contents as follows:

> Basically arguments and history about why he was terminated and why he was wrongfully terminated and how it really should've been the other individual that was lying and really should've been disciplined as opposed to him. Kind of a justification for maybe reinstatement.

Patterson replied, "No," when asked by the trial court whether the letter stated anything inappropriate.

Patterson testified about the documents that he had attached to the PPO petition, his familiarity with the substantive nature of those documents, and the circumstances surrounding their delivery to Woodward personnel. Patterson stated that Woodward had implemented additional security measures to address the concerns regarding respondent's conduct and that respondent had been detected in the area of Woodward's facility, apparently by surveillance cameras, 8 to 10 times between October 2015 and April 2016. Patterson testified that Woodward had hired an attorney crisis consultant to communicate with respondent in an effort to defuse the situation and to help respondent move on with his life. However, despite numerous conversations or exchanges between the consultant and respondent, no progress was made. Patterson indicated that Woodward had involved the local police

department, which had delivered a no-trespass letter to respondent on Woodward's behalf. The no-trespass letter was later mailed back to Woodward, torn in pieces. Patterson testified that on multiple occasions he had personally observed respondent's vehicle being operated or just sitting parked within view of the business. Not once did Patterson see respondent exit his vehicle; he would just sit in his car. Patterson asserted that he had never seen or dealt with anything like this before in his life and that he feared for his own safety, given that he was a representative of Woodward. Patterson further claimed that many of Woodward's employees were fearful of respondent, taking various precautionary safety measures, including, in one instance, obtaining a concealed pistol license.[4] Patterson conceded that, to the best of his knowledge, respondent had not entered upon Woodward's property following his termination.

About midway through the evidentiary hearing, the trial court indicated to petitioners' counsel its belief that Woodward could not obtain a PPO because it was not a living or natural person and that the statutory scheme was intended "to protect people, not artificial people." Petitioners' counsel responded:

> Certainly. Your Honor, I don't think we need to take your Honor's time today quibbling on that point of law. Mr. Patterson is going to be able to lay a factual foundation for a [PPO] in his favor.

At the end of the evidentiary hearing, the trial court informed the parties that it would take the matter

[4] On cross-examination of Patterson, respondent, who was not represented by counsel, asked whether the employee who had obtained a concealed-carry weapons license was permitted to carry a gun on the grounds of the facility, but the trial court barred that line of questioning as irrelevant.

under advisement, and on May 18, 2016, the court issued a written opinion and order. The court first quoted the language in MCL 600.2950a, emphasizing its reference to a petition being filed by "an individual." The trial court next quoted the definition of "stalking," as found in MCL 750.411h(1)(d), emphasizing the statute's reference to the terms "individual" and "person." The court then proceeded to rule as follows:

> The court concludes that an anti-stalking injunction may only be issued on behalf of a human. Corporations or other artificial entities are incapable of being frightened, intimidated, etc.[5] Rather, it is the agents of that artificial entity who may petition for a . . . [PPO.] The filing of a PPO on behalf of Woodward, Inc. is improper. Thus, the court will proceed to analyze whether Mr. Patterson has established the basis for the issuance of a PPO. The court concludes that he has not. The court concludes that the *ex parte* PPO issued by the court was improvidently granted and is terminated at respondent's request after a hearing was held.
>
> Patterson acknowledges that he has never spoken to respondent nor has it been established that respondent attempted to communicate with Patterson, save one letter sent in 2015. Patterson acknowledged that the content of that letter was not concerning. Patterson admitted that the last communication from respondent received by anyone at Woodward was in the summer of 2015. Patterson went on to testify that he was "generally" intimidated by respondent in that Patterson was the plant manager. Finally, Patterson admitted that the filing of the PPO was done on behalf of Woodward and its members after consulting with the local police department and corporate counsel after respondent was seen in the area of Woodward's facility.
>
> Since respondent's termination in 2013, it has not been established that respondent has entered or otherwise

[5] The statutory definition of "stalking" speaks, in part, of conduct that actually causes a victim to feel frightened or intimidated. MCL 750.411h(1)(d).

> trespassed on Woodward's property. There has not been any unexplained damage to any of Woodward's property. It has not been established that respondent has damaged other members' property. It may have been established that specific individuals have historically been "stalked" by respondent, however, none of those individuals appeared at the hearing and none of those individuals, to this court's knowledge, have obtained a PPO against respondent.
>
> While the issuance of a PPO on behalf of Woodward is improper, Woodward may have other injunctive remedies that it may wish to pursue.[6] Of course, future behavior may justify *individuals* to petition the court for a protection order.
>
> This court is not minimizing what may be legitimate concerns on behalf of the "members" of Woodward. However, the issuance of a PPO results in a significant loss of liberty and these orders may not be given simply to "make people feel better." The PPO is TERMINATED.

Petitioners appeal as of right.

II. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision whether to issue a PPO. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). A trial court abuses its discretion when its ruling falls outside the range of principled outcomes. *Id*. Underlying factual findings are reviewed for clear error. *Id*. We review de novo issues of statutory construction. *Id*. at 325-326. Whether a party has stand-

[6] Our opinion pertains solely to Woodward's standing to seek a PPO under MCL 600.2950a and, like the trial court, we leave open the possibility that other injunctive remedies may be available to Woodward to address the situation.

ing is also subject to de novo review. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013).

B. PRINCIPLES OF STATUTORY CONSTRUCTION

In *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), the Michigan Supreme Court articulated the well-established principles governing the construction of a statute:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [Citations omitted.]

C. DISCUSSION

MCL 600.2950 concerns PPOs involving current or former spouses, individuals in dating relationships, and housemates, while MCL 600.2950a, as relevant here, regards stalking behavior and conduct that is not limited to certain existing relationships. MCL 600.2950a(1) provides:

> [B]y commencing an independent action to obtain relief under this section, . . . an *individual* may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under section 411h, 411i, or 411s of the Michigan penal code, 1931 PA

> 328, MCL 750.411h, 750.411i, and 750.411s. Relief under this subsection shall not be granted unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s, of the Michigan penal code . . . . Relief may be sought and granted under this subsection whether or not the individual to be restrained or enjoined has been charged or convicted under section 411h, 411i, or 411s of the Michigan penal code . . . . [Emphasis added.]

Although MCL 600.2950a has a definitional subsection, MCL 600.2950a(32), the term "individual" is not defined in that subsection. MCL 750.411h concerns stalking, MCL 750.411i pertains to aggravated stalking, and MCL 750.411s essentially regards online stalking. And each of these statutes refers to unlawful conduct directed at an "individual" or a "victim," statutorily defining the term "victim" as encompassing an "individual." MCL 750.411h(1)(c) through (f); MCL 750.411i(1)(c) through (g); MCL 750.411s(1), (2), (7), and (8)(k).[7]

Except as otherwise provided in MCL 600.2950 and MCL 600.2950a, an action for a PPO is governed by the Michigan Court Rules, with MCR 3.701 *et seq*., applying to PPOs against adults. MCR 3.701(A). "The court must rule on a request for an ex parte [PPO] within 24 hours of the filing of the petition." MCR 3.705(A)(1). "The petitioner for a PPO bears the burden of proof." *Lamkin v Engram*, 295 Mich App 701, 706; 815 NW2d 793 (2012). And this burden also applies when a petitioner seeks to establish "a justification for the continuance of a PPO at a hearing on the respondent's

[7] A "victim" is "an individual who is the target of a willful course of conduct involving repeated or continuing harassment." MCL 750.411h(1)(f); MCL 750.411i(1)(g). Under MCL 750.411s(8)(k), a "victim" is "the individual who is the target of the conduct elicited by the posted message or a member of that individual's immediate family."

motion to terminate the PPO . . . ." *Hayford*, 279 Mich App at 326. A respondent may file a motion to terminate a PPO, MCR 3.707(A)(1)(b), in which case the "court must schedule and hold a hearing on [the] motion to . . . terminate [the PPO] within 14 days of the filing of the motion," MCR 3.707(A)(2). See also MCL 600.2950a(13) and (14).

1. THE PPO AND WOODWARD

Again, only an "individual" may petition a trial court for a PPO under MCL 600.2950a or be a "victim" under the stalking statutes that are incorporated by reference in MCL 600.2950a, and we conclude that Woodward, a corporation, is not an individual for purposes of MCL 600.2950a and the stalking statutes. Therefore, Woodward lacked standing to seek a PPO under MCL 600.2950a.[8]

MCL 600.2950a(1) provides an individual with the opportunity and ability to petition a court for a PPO in order to restrain or enjoin another individual from engaging in stalking, as prohibited under the Michigan Penal Code, requiring the PPO petition to allege facts that constitute criminal stalking. We conclude that the import of the language in MCL 600.2950a is clear. The

[8] As an initial observation, it is arguable that petitioners waived their claim that Woodward can obtain a PPO under MCL 600.2950a, given that counsel indicated, at the evidentiary hearing, that petitioners would not take up the trial court's time "quibbling" over the court's view that Woodward, as a business entity, could not obtain a PPO under the statute. See *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002) (a party cannot complain on appeal about a matter to which it acquiesced below, signifying a waiver). Minimally, the issue was not preserved at the time. We shall, however, overlook the preservation failure and proceed to examine the issue, given that it presents "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).

Legislature, for purposes of the applicability of MCL 600.2950a, envisioned situations in which an individual, who is being stalked, petitions a court for a PPO in order to halt the stalking of said petitioner. Accordingly, the term "individual," as used in MCL 600.2950a, must be construed consistently with the terms "victim" and "individual" as employed in the stalking statutes.

MCL 750.411h(1)(d) and MCL 750.411i(1)(e) both define "stalking" as "a willful course of conduct involving repeated or continuing *harassment* of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." (Emphasis added.) And MCL 750.411h(1)(c) and MCL 750.411i(1)(d) both define "harassment" as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing *unconsented contact* that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress."[9] (Emphasis added.) In turn, "unconsented contact" is "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." MCL 750.411h(1)(e) and MCL 750.411i(1)(f). The online-stalking statute requires conduct that "causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411s(1)(d).

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[9] "Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(c) and MCL 750.411i(1)(d).

As reflected in these statutory definitions, a stalking victim must show or exhibit certain *human* emotions and feelings, such as terror, fright, intimidation, or emotional distress. Therefore, an "individual" seeking a PPO under MCL 600.2950a, which incorporates the stalking statutes, must also show or exhibit certain *human* emotions and feelings as part of his or her effort to obtain a PPO. Indeed, a PPO petition must "allege[] facts that constitute stalking as defined in" any one of the three pertinent stalking statutes. MCL 600.2950a(1). This analysis necessarily excludes nonhuman entities, such as Woodward, from seeking and obtaining a PPO under MCL 600.2950a. Woodward, a corporation, simply cannot experience terror, fright, intimidation, or emotional distress.

Petitioners maintain that an "individual," as that term is used in MCL 600.2950a, does not have to be a "victim" under the stalking statutes in order to seek and obtain a PPO, thereby allowing Woodward to petition for a PPO, even though it was actually Woodward employees who were the victims of stalking. In support of this contention, petitioners argue that MCL 600.2950a employs the term "individual," whereas the stalking statutes refer to a "victim," and that the Legislature thus intended different treatment considering the use of different terminology. However, as already indicated in this opinion, the term "individual" is used interchangeably with the term "victim" in the stalking statutes, with the statutory definition of "victim" encompassing an "individual." MCL 750.411h(1)(f); MCL 750.411i(1)(g); MCL 750.411s(8)(k). Moreover, we do not read MCL 600.2950a as generally permitting even a human being who is not being stalked to file a PPO petition on behalf of another individual who is being stalked, unless the nonvictim is filing the petition in a legally

recognized representative capacity.[10] Aside from the fact that Woodward is an artificial entity that cannot request a PPO on its own behalf, there is nothing in the record to suggest that any of Woodward's employees had authorized Woodward, or Patterson for that matter, to file the petition on their behalf, assuming that such authorization would even be legally recognizable. As the first word in its title provides, a PPO is "personal." Again, emotions such as terror, fright, intimidation, or emotional distress must be alleged and established as to the stalking victim, and absent a stalking victim's agreement to allow a legally recognized representative to file a PPO petition on the victim's behalf, no PPO can issue. A stalking victim must absolutely be the individual requesting a PPO, either personally or by way of a legally recognized representative.

In further support of their position that a PPO petitioner need not be a victim under the stalking statutes and can be a corporation, petitioners quote MCL 450.1261(b) of Michigan's Business Corporation Act (BCA), MCL 450.1101 *et seq*., which provides that a corporation can "[s]ue and be sued in all courts and participate in actions and proceedings, judicial, administrative, arbitrative, or otherwise, in the same manner *as natural persons*." (Emphasis added.) Petitioners, however, neglect to acknowledge the prefatory language in MCL 450.1261, which indicates that a corporation's authority under the statute, including the power to sue in the same manner as a natural person, is "subject to any limitation provided . . . in any other statute of this state . . . ." For the reasons expressed, MCL 600.2950a and the incorporated

[10] For example, an attorney has the authority to sign a PPO petition on behalf of a client. MCR 3.703(B)(6).

stalking statutes do not permit Woodward to seek and obtain a PPO, effectively limiting the general corporate powers otherwise accorded to Woodward under the BCA. In sum, the trial court did not err in its construction of MCL 600.2950a and in its termination of the PPO with respect to Woodward.

2. THE PPO AND PATTERSON

For purposes of analyzing whether the trial court erred by terminating the PPO with respect to Patterson, we turn our attention to the definition of stalking. Again, MCL 750.411h(1)(d) and MCL 750.411i(1)(e) both define "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

The trial court declined to continue the PPO as to Patterson, considering that only one letter from respondent was directly addressed to Patterson, that this single letter, in itself, was not troubling to Patterson, that Patterson and respondent had never even personally spoken to each other, that Patterson was only generally intimidated by respondent because of his position at the plant, that Patterson's filing was more on behalf of Woodward and Woodward employees, and not so much for himself, that respondent never trespassed on Woodward's real property, that respondent never damaged any property belonging to Woodward or its employees, and that the last communication from respondent received by anyone

at Woodward was in the summer of 2015 (the PPO petition was filed in April 2016).[11]

We hold that the trial court failed to take into consideration the totality of the circumstances, including, especially, respondent's recurring presence just outside the Woodward facility, which can reasonably be viewed as a troubling escalation of respondent's conduct. Respondent was fired for harassing and bullying Woodward employees, one in particular, and his posting of news articles on a company bulletin board about men murdering or abusing spouses or girlfriends was particularly upsetting, menacing, and disturbing.[12] Following termination, respondent engaged in a campaign of writing letters and sending documents and communications to various persons employed by Woodward. When respondent did not succeed in obtaining any response acceptable to respondent for his self-perceived maltreatment by Woodward, he began appearing regularly around the plant, although not directly on Woodward property. The involvement of police and a crisis consultant by Woodward was to no avail; respondent continued with his conduct, tearing up a no-trespass letter and mailing it back to Wood-

[11] Contrary to petitioners' argument, we do not view the trial court's ruling as a determination that respondent did not generally engage in stalking the Woodward plant or any of its employees; rather, the court couched its ruling in terms of whether Patterson alone had been stalked, even though the court made some broad observations and findings in doing so. Regardless, as discussed later, our holding essentially dispenses of petitioners' argument, and again, the question of whether Woodward employees were stalked, other than Patterson, is not relevant to this case because those employees were not covered by the petition.

[12] At the evidentiary hearing, when asked why he had posted the materials on the bulletin board, respondent testified, "I wanted to remind myself that I should watch what I say or how I act around certain people at work."

ward. Additional security measures were implemented because Woodward personnel were extremely concerned about the gravity of the situation. We emphasize that we are talking about a course of conduct that transpired over a three-year period, not simply a brief time span following a disgruntled employee's termination. Patterson saw respondent's vehicle near the Woodward plant numerous times, absent anyone ever exiting the vehicle, and security monitoring also established respondent's regular presence near the facility. Respondent's excuse or reason for being near and around the plant, i.e., that he was giving rides to people to a facility next to Woodward, was extremely dubious and bordered on ridiculous, given that he could not even provide a single name regarding his purported passengers and that his claim was entirely inconsistent with the evidence that he would just sit in his vehicle.

When one takes a step back and looks at all of the events that transpired over the three-year period, it becomes clear that respondent was now stalking the Woodward plant and the employees who worked at the facility, one of whom was Patterson. Stated otherwise, under the totality of the circumstances, respondent was engaged in a willful course of conduct involving repeated or continuing harassment of Woodward employees, including Patterson, that would have caused a reasonable person to feel frightened, intimidated, or threatened and that actually caused Patterson to feel frightened, intimidated, or threatened. MCL 750.411h(1)(d) and MCL 750.411i(1)(e). Although Patterson only personally received one fairly innocuous letter from respondent, Patterson, along with other Woodward employees, was subjected to respondent's stalking conduct. The potential for workplace violence

cannot be overstated.[13] In sum, the trial court clearly erred by finding that Patterson was not being stalked, and it abused its discretion by failing to continue the PPO with respect to Patterson.

3. THE PPO AND WOODWARD EMPLOYEES

Petitioners contend that Patterson could petition for a PPO on behalf of other employees at Woodward, renewing their argument that the "individual" seeking a PPO under MCL 600.2950a need not be a "victim" under the stalking statutes. We have already rejected this legal premise. If other Woodward employees wish to obtain a PPO for themselves, they will need to file the necessary petition.

III. CONCLUSION

The trial court did not err by ruling that Woodward could not legally seek and obtain a PPO under MCL 600.2950a in light of the fact that Woodward is a business entity, not a human being. Also, Woodward could not obtain a PPO on behalf of its employees as their representative because they did not personally join in the PPO petition, and there is no indication that they authorized Woodward to act and file the petition on their behalf, assuming that such authorization would have been legally recognizable. The trial court did abuse its discretion by not continuing the PPO as to Patterson, considering that the evidence plainly demonstrated that respondent was engaged in stalking Woodward employees working at the plant, which necessarily included Patterson, and that Patterson

[13] We also conclude that respondent was not engaged in any constitutionally protected activity or conduct that served a legitimate purpose. MCL 750.411h(1)(c) and MCL 750.411i(1)(d).

was in fear because of the stalking. We remand for entry of an order denying respondent's motion to terminate the PPO in regard to Patterson.

Affirmed in part and reversed and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded under MCR 7.219(A).

HOEKSTRA, P.J., and K. F. KELLY, J., concurred with MURPHY, J.

PEOPLE v SPENCER

Docket No. 337045. Submitted August 1, 2017, at Grand Rapids. Decided August 10, 2017, at 9:10 a.m.

Jay D. Spencer was charged in the 62-A District Court with larceny by conversion of $20,000 or more, MCL 750.362 and MCL 750.356(2)(a); obtaining money by false pretenses in the amount of $20,000 or more but less than $50,000, MCL 750.218(5)(a); and embezzlement by an agent or trustee of $20,000 or more but less than $50,000, MCL 750.174(5)(a). The complainant loaned $241,000 from his IRA—through a trust company acting as a custodian of the trust—to Mackinac Advisory Services, LLC (MAS). The loan agreement specified that MAS would use the funds to acquire and rehabilitate six named properties and that MAS would pay the complainant $257,870 within 120 days of the loan disbursement. Although defendant did not have an ownership interest in MAS, he executed and signed a promissory note on behalf of MAS and also executed a mortgage on the properties given by MAS to secure the note; the complainant signed a direction-of-investment letter. Defendant later directed the movement of at least $20,000 of the complainant's IRA money into a company owned and managed by defendant, and defendant used those funds to pay for personal items unrelated to the purchase and rehabilitation of the specified houses. Defendant and MAS did not return the complainant's money after the 120-day period expired. The court, Pablo Cortes, J., bound defendant over on the false-pretenses and embezzlement charges but not on the larceny-by-conversion charge. The Kent Circuit Court, Donald A. Johnston, J., denied the prosecution's motion to amend the information to reinstate the charge of larceny by conversion, concluding that the testimony and evidence presented at the preliminary examination did not support the charge. The Court of Appeals granted the prosecution's application for leave to appeal.

The Court of Appeals *held*:

1. MCL 250.362 provides that larceny by conversion occurs when a person obtains possession of another's property with lawful intent but subsequently converts the other's property to the person's own use. Larceny by conversion is not a viable charge

when an owner intends to part with the legal title associated with his or her property as well as possession of the property. Larceny by conversion may be established when an owner loans funds to a third party in accordance with an agreement that those specific funds be used to purchase the particular goods or property identified in the agreement and the owner does not receive the specified goods or property or, in the alternative, a return of his or her funds. Although the owner passes possession of the funds to a third party, legal title remains with the original owner of the funds until the condition on which the agreement was made—that is, the third party's purchase of particular goods or property with the owner's specific funds—is fulfilled.

2. As evidenced by the direction-of-investment letter, promissory note, and mortgage, the complainant's loan of funds was conditioned on the agreement that those funds would be used to acquire and rehabilitate six specific properties. The complainant clearly intended to pass possession of the $241,000 to MAS. However, the complainant retained legal title to at least $20,000 of the original loan amount—in other words, legal title of those funds did not pass to MAS—because the funds were not used as specifically directed by the loan agreement; instead, defendant converted that $20,000 or more to his own use. Accordingly, the evidence presented at the preliminary examination established probable cause to believe that defendant had committed larceny by conversion, and the circuit court abused its discretion when it denied the prosecution's motion to amend the information to reinstate that charge. Amendment of the information did not unfairly surprise defendant or deprive him of adequate notice of the charge because the preliminary examination was held on that same charge.

Reversed and remanded.

CONVERSION — LARCENY BY CONVERSION — ELEMENTS — CONDITIONAL LOAN AGREEMENT — LEGAL TITLE OF LOANED PROPERTY.

Larceny by conversion is not a viable charge when an owner intends to part with the legal title associated with his or her property as well as possession of the property; larceny by conversion may be established when an owner loans funds to a third party in accordance with an agreement that those specific funds be used to purchase particular goods or property identified in the agreement and the owner does not receive the specified goods or property or, in the alternative, a return of his or her funds; although an owner passes possession of funds to a third party, legal title remains with the original owner of the funds until the condition on which

> the agreement was made—that is, the third party's purchase of the particular goods or property with the owner's specific funds—is fulfilled.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Napieralski & Walsch, PC (by *Peter P. Walsh*), for defendant.

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

MURPHY, J. The prosecution appeals by leave granted[1] the circuit court's order denying its motion to amend the information to reinstate a count of larceny by conversion of $20,000 or more, MCL 750.362; MCL 750.356(2)(a), which count the district court had dismissed following defendant's preliminary examination. The district court did bind defendant over to the circuit court on charges of obtaining money by false pretenses in the amount of $20,000 or more but less than $50,000, MCL 750.218(5)(a), and embezzlement by an agent or trustee of $20,000 or more but less than $50,000, MCL 750.174(5)(a). The false-pretenses and embezzlement counts are not at issue on appeal. We hold that the circuit court abused its discretion when it denied the prosecution's motion to amend the information because there was sufficient evidence establishing probable cause to believe that defendant committed the offense of larceny by conversion and amendment of the information would not have unfairly surprised or

[1] *People v Spencer*, unpublished order of the Court of Appeals, entered March 9, 2017 (Docket No. 337045).

prejudiced defendant. Accordingly, we reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

Our summarization of the case is based on evidence presented by the prosecution at defendant's preliminary examination, which evidence defendant is of course free to challenge at trial. Using funds held in his individual retirement account (IRA), the complainant—through a trust company acting as custodian of the IRA—loaned $241,000 to Mackinac Advisory Services, LLC (MAS), pursuant to an agreement specifying that the funds were to be used by MAS for the acquisition and rehabilitation of six identified real properties in the Grand Rapids area and that MAS, in return, would pay the complainant $257,870 within 120 days of the loan disbursement. The repayment obligation in the amount of $257,870 was not dependent on the success of the business venture. The agreement was reflected in a direction-of-investment letter signed by the complainant, a promissory note executed by defendant on behalf of MAS, and a mortgage on the properties given by MAS to secure the note, which was also signed by defendant. Defendant held no ownership interest in or employment position with MAS; however, the individual who formed and owned MAS testified that defendant facilitated MAS's transactions as its real estate agent and that defendant was authorized to direct the disbursement of funds on behalf of MAS for purposes of purchasing properties and for construction projects related to the properties.[2]

[2] The note and the mortgage documents did indicate that defendant was MAS's CEO, which was untrue, but MAS's owner did not have any qualms about defendant executing the documents on behalf of MAS.

While the details are confusing regarding the particular flow and use of the $241,000 after it was transferred from the complainant's IRA under the loan agreement, we need not concern ourselves with most of these intricacies. Pertinent here is evidence that defendant eventually directed the movement of at least $20,000 of the $241,000 into accounts held by Mackinac Realty Group, a company solely owned and managed by defendant, and that defendant then used those funds to pay for personal items and expenses unassociated with the acquisition and rehabilitation of real estate as contemplated in the underlying agreement. Although some of the IRA money lent to MAS was actually used for its designated purpose, no payment was made to the complainant or his IRA upon expiration of the 120-day period. The complainant did obtain a civil judgment against his financial advisor, who had orchestrated the loan and transaction; against MAS's owner; and against defendant.

II. PROCEDURAL HISTORY

In February 2016, the prosecution charged defendant with larceny by conversion over $20,000, and he was bound over to the circuit court after waiving his right to a preliminary examination. However, the circuit court later granted defendant's motion to dismiss the charge, concluding that the charge was not viable under the caselaw and the factual circumstances. The circuit court next denied the prosecution's motion for reconsideration, but it did indicate that the prosecution could refile the charge in the future if new evidence came to light supporting the offense of larceny by conversion. The prosecution did not appeal the circuit court's ruling in this Court.

Although no new evidence was truly developed, in July 2016, the prosecution filed a three-count complaint, once again charging defendant with larceny by conversion, along with the false pretenses and embezzlement charges. Following a preliminary examination, the district court bound defendant over to the circuit court on the offenses of embezzlement and false pretenses, but not on the crime of larceny by conversion, expressing deference to the circuit court's previous ruling on the charge. In a motion to amend the information, see *People v Goecke*, 457 Mich 442, 455-456; 579 NW2d 868 (1998),[3] the prosecution asked the circuit court to reinstate the charge of larceny by conversion. The circuit court, consistently with its earlier ruling in the initial prosecution of defendant, denied the prosecution's motion, finding that the facts simply did not support a charge of larceny by conversion under the caselaw construing the statutory offense. The prosecution appeals by leave granted.

III. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion to amend an information. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). And a trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "A trial court . . . necessarily abuses

[3] The *Goecke* Court agreed with the argument "that where a district court binds a defendant over on one of two counts, review of the dismissed count is obtainable by a motion to amend the information [filed in the circuit court]." *Goecke*, 457 Mich at 455-456.

its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). "In addition, because the standard of review is abuse of discretion, the defendant is protected by the time-honored principle that the circuit court may not substitute its judgment for that of the magistrate." *Goecke*, 457 Mich at 462. Insofar as the circuit court's decision involves the interpretation of a statute, this Court's review is de novo. *People v Chavis*, 468 Mich 84, 91; 658 NW2d 469 (2003).

B. STATUTORY-CONSTRUCTION PRINCIPLES

With respect to the principles that govern our interpretation of a statute, in *People v Flick*, 487 Mich 1, 10-11; 790 NW2d 295 (2010), the Michigan Supreme Court observed:

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. [Citations and quotation marks omitted.]

And in regard to construing statutory offenses contained in the Michigan Penal Code, MCL 750.1 *et seq*., such as, under MCL 750.362, larceny by conversion, MCL 750.2 provides:

> The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

C. AMENDING AN INFORMATION AND PRELIMINARY EXAMINATIONS

"The court before, during, or after trial may permit the prosecutor to amend the information . . . unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H). "Where a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial . . . ." *Goecke*, 457 Mich at 462.

In *Goecke*, *id*. at 469-470, our Supreme Court explained the general nature of a preliminary examination:

> For purposes of preliminary examination, the proofs adduced must only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed it. If the district court determines that "probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it," the defendant must be bound over for trial. MCR 6.110(E). Some evidence must be presented regarding each element of the crime or from which those elements may be inferred. It is not, however, the function of the examining magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt of the defendant's guilt; that is the province of the jury. [Citation omitted.]

D. DISCUSSION AND HOLDING

The crux of the dispute in this case is whether a person commits the crime of larceny by conversion when the person, as the recipient of a loan, converts the loan proceeds to his or her own use and employs them in a manner that is inconsistent or conflicts with specific restrictions or conditions demanded by the

lender in the underlying loan agreement regarding how the loan proceeds are to be used upon disbursement. MCL 750.362 provides:

> Any person to whom any money, goods or other property, which may be the subject of larceny, shall have been delivered, who shall embezzle or fraudulently convert to his own use, or shall secrete with the intent to embezzle, or fraudulently use such goods, money or other property, or any part thereof, shall be deemed by so doing to have committed the crime of larceny and shall be punished as provided in the first section of this chapter.[4]

In *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001), this Court recited the following elements of larceny by conversion:

> (1) the property at issue must have some value, (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property with the intent to embezzle or fraudulently use it, and (5) at the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of that property. [Quotation marks and citation omitted.]

"The purpose of the larceny by conversion statute is to cover one of the situations left unaccounted for by common-law larceny, that is, where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own

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[4] MCL 750.356(2) provides, in relevant part:

> If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00 or 3 times the value of the property stolen, whichever is greater, or both imprisonment and a fine:
>
> (a) The property stolen has a value of $20,000.00 or more.

use." *People v Christenson*, 412 Mich 81, 86; 312 NW2d 618 (1981). See also *Mason*, 247 Mich App at 72. Larceny by conversion constitutes "a crime against possession and not against title; one cannot convert his own funds." *Christenson*, 412 Mich at 87. Accordingly, when an owner intends to part with his or her title to property as well as possession, a charge of larceny by conversion is not viable. *Id*. In this case, there is no dispute that the complainant intended to pass possession of the $241,000 in IRA funds to MAS. The question is whether there was an intent to part with *title* to the money when the loan was disbursed.

The principal cases discussed by the parties are *Christenson*, 412 Mich 81, *People v Franz*, 321 Mich 379; 32 NW2d 533 (1948), *Mason*, 247 Mich App 64, and *People v O'Shea*, 149 Mich App 268; 385 NW2d 768 (1986). In *Franz*, *Mason*, and *O'Shea*, this Court and our Supreme Court held that the evidence supported a charge or conviction of larceny by conversion. "In *Franz*, . . . there was an oral contract whereby the defendant agreed to purchase iron for the complainant who had given to the defendant the sum of $4,080," but "[n]o delivery of iron was made . . . ." *O'Shea*, 149 Mich App at 273 (concisely summarizing the facts in *Franz*). In *O'Shea* itself, *id*. at 270-272, the complainant and the defendant had entered into a written contract pursuant to which the defendant accepted, and later deposited, a $125 check as a down payment for upholstering fabric; however, neither fabric nor a refund was ever delivered to the complainant. The *Mason* case involved five transactions, evidenced by written contracts, wherein the defendant failed to refund money that the complainants had given him as down payments on the purchase of mobile homes that were never delivered to the complainants. *Mason*, 247 Mich App at 66-69. These cases stand for the proposition

that the offense of larceny by conversion may be committed when a defendant fails to use money delivered by a complainant for an agreed-upon designated purpose in the context of the complainant's purchase of goods or property, with the defendant also failing to refund the money to the complainant.

The instant case does not involve a sales or purchase agreement, but rather a loan agreement. However, just as in *Franz*, *Mason*, and *O'Shea*, there was evidence that, pursuant to an agreement, money was delivered by the complainant, the money reached the hands of defendant, that money was designated for a specific purpose or use that was not fulfilled, at least not fully, and the complainant's money was not refunded. We find the following passage from *Mason* instructive on the issue of intent to pass title:

> We gather from the *O'Shea* Court's emphasis on the facts of the case before it as well as the facts of the contrary cases that we must look at the facts surrounding each complainant's transfer of money to Mason to determine whether they each intended to retain title to the money. As in *O'Shea*, we think it plain under the circumstances of the five cases being appealed, including the contracts for sale, that each complainant *intended to retain legal title to the down payment money, though not possession of it, until each complainant received the home each sought to purchase*. It would make little sense for each of these complainants to intend to give their hard-earned money to Mason to keep irrespective of whether they ever received the home for which they bargained, especially with no contractual provision to that effect. [*Mason*, 247 Mich App at 74-75 (emphasis added).]

By analogy, we hold that there was evidence that the complainant intended to retain legal title to the loan proceeds, though not possession of the funds, until such time that the loan proceeds were actually used to

pay for the acquisition and rehabilitation of the six properties. As reflected in the direction-of-investment letter signed by the complainant and his testimony at the preliminary examination, it was his intent that the money from his IRA that was loaned to MAS and disbursed by or at the behest of defendant was specifically to be used to purchase and rehabilitate the six identified Grand Rapids properties.

In *Christenson*, the case upon which defendant mainly relies, the Supreme Court reversed the defendant's convictions of three counts of larceny by conversion. The defendant in *Christenson* sold and erected modular homes. He had entered into written contracts with the three complainants, who had made progress payments to the defendant under the contracts as he delivered and erected their modular homes. However, certain progress payments were not specifically forwarded to the manufacturer of the modular homes as required by the contracts. Instead, the defendant, who eventually filed for bankruptcy, had used those progress payments to pay other debts. *Christenson*, 412 Mich at 85-86. The Court held that there was no evidence that the complainants had intended to retain title to the progress payments made to the defendant, and therefore, title had passed to the defendant, making it impossible for him to have committed the crime of larceny by conversion. *Id*. at 88. The Court did not stop there and proceeded to state:

> Even if we were to accept the argument that defendant was not the intended owner of the progress payments and that he was merely a trustee of the funds, we do not find that the element of conversion has been established. The prosecutor contends that conversion is established by the fact that the complainants gave the money to defendant for a specific purpose, *i.e*., to pay for

> the home or for site preparation, but defendant did not use it for that purpose.
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> * * *
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> It is clear in this case that defendant used partial payments for work in place to pay debts that were not the specific debts incurred in construction of the work in place. He subsequently was unable to pay the latter debts because of his impending bankruptcy. However, there was no agreement that defendant apply the specific funds he received from complainants for particular work to pay the laborers and materialmen responsible for that work. There was no requirement that defendant establish a separate trust account for each complainant in which he would deposit that *particular* complainant's funds.
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> It is beyond dispute that defendant had the contractual obligation to pay the debts of the work in place for which he received progress payments from the complainants. However, there was nothing to preclude defendant from paying for those debts with funds other than the identical moneys he received from complainants. The fact that defendant's bankruptcy intervened to preclude such payment does not render defendant guilty of larceny by conversion. [*Id*. at 88-90.]

The *Mason* panel, distinguishing *Christenson*, stated that "[i]n *Christenson*, the homeowners who made progress payments to the defendant did so because the defendant had, in fact, made progress on the construction project and, therefore, was entitled to this partial payment" under the contracts. *Mason*, 247 Mich App at 76. This Court further observed that the defendant in *Christenson* would have been guilty of larceny by conversion had he specifically agreed to use the progress payments to pay certain debts, including the one owed to the manufacturer of the modular homes. *Id*. The *Mason* panel explained that such would be the case because "[t]he defendant, though in actual

possession of the money, never would have obtained legal title to the money under those facts because he could not do with it as he wished, *a limitation that generally does not exist for title owners of property*." *Id*. at 76-77 (emphasis added). Instead, "because the homeowners and the defendant agreed neither that the defendant would use the progress payments only to satisfy the particular debts at issue nor that he would keep the money for that purpose in a special account, the Supreme Court was compelled to reverse the defendant's conviction." *Id*. at 78-79.

The present case is distinguishable from *Christenson* for the very same reason, i.e., there was evidence of an agreement that did not allow MAS to do whatever it wished with the loan proceeds. Rather, the loan was specifically conditioned on the agreement that it would be used to acquire and rehabilitate the six identified properties. Therefore, title would not have passed unless and until the loan was used for its intended purpose. Because there was evidence that title to at least $20,000 of the $241,000 loan did not pass to MAS or defendant, as it was not used as intended and directed under the loan agreement, and that defendant converted that $20,000 or more to his own use contrary to the loan agreement, there was sufficient evidence establishing probable cause to believe that defendant committed the crime of larceny by conversion. And considering that the preliminary examination was held on the very charge the prosecution sought to have reinstated in its motion to amend the information, we cannot find that defendant would be unfairly surprised or prejudiced by allowing the requested amendment. *Goecke*, 457 Mich at 462. Accordingly, the circuit court abused its discretion by denying the prosecution's motion to amend the information to reinstate the charge of larceny by conversion, mainly because the

court committed an error of law relative to its construction of MCL 750.362 and the caselaw interpreting the statute.

Reversed and remanded for entry of an order granting the prosecution's motion to amend the information to reinstate the charge of larceny by conversion. We do not retain jurisdiction.

HOEKSTRA, P.J., and K. F. KELLY, J., concurred with MURPHY, J.