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[1] From October 10, 2016.

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COURT OF APPEALS CASES

COALITION PROTECTING AUTO NO-FAULT v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (ON REMAND)

Docket No. 314310. Submitted November 9, 2015, at Lansing. Decided August 25, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 991.

The Coalition Protecting Auto No-Fault (CPAN) and others brought an action in the Ingham Circuit Court, seeking to compel the Michigan Catastrophic Claims Association (MCCA) to disclose information concerning claims that the MCCA had serviced, including the claimants' ages, dates of injuries, and total amounts paid. The MCCA had refused to provide this information on the ground that MCL 500.134 expressly exempts the MCCA's records from Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The case was consolidated by stipulation with a separate complaint filed by the Brain Injury Association of Michigan, and it was later joined by several additional individual plaintiffs. In an amended complaint, CPAN asserted that MCL 500.134 was unconstitutional on several grounds and that plaintiffs had a right to inspect the MCCA's records under the common law and under various trust theories. Plaintiffs and the MCCA moved for summary disposition. The court, Clinton Canady, III, J., denied the MCCA's motion and granted summary disposition in plaintiffs' favor except to the extent they sought information about individual claimants. The Court of Appeals granted the MCCA's application for leave to appeal, limited to the issues raised in the application and supporting brief, and plaintiffs cross-appealed. The Court of Appeals, OWENS, P.J., and BORRELLO and GLEICHER, JJ., reversed and remanded for entry of an order awarding summary disposition to the MCCA, holding that the MCCA's records were expressly exempted from disclosure under FOIA by MCL 500.134(4) and (6)(c) of the Insurance Code, MCL 500.100 *et seq*., and that the Legislature's failure to reenact and republish FOIA when it amended MCL 500.134 to exempt MCCA records from disclosure under FOIA did not render MCL 500.134 unconstitutional under Const 1963, art 4, § 5, because the amendatory act did not revise, alter, or amend FOIA but, rather, operated in accordance with FOIA. 305 Mich App 301 (2014). CPAN applied for leave to appeal in the Supreme Court. Instead of granting leave, the Supreme Court scheduled oral argument on whether to grant the applica-

tion or take other action. Following oral argument, in lieu of granting leave to appeal, the Supreme Court vacated the part of the Court of Appeals' decision holding that MCL 500.134(4) does not violate Article 4, § 25 of the Michigan Constitution and remanded the case to the Court of Appeals for reconsideration of the issue, directing the Court to decide whether the MCCA is a "public body" subject to FOIA. 498 Mich 896 (2015).

On remand, the Court of Appeals *held*:

1. The MCCA is a "public body" for purposes of FOIA because it was created by state authority as required by MCL 15.232(d)(*iv*). The MCCA's status as a "person" under FOIA does not prevent it from being a public body because the definition of person also includes governmental entities, which are also identified as public bodies.

2. The Supreme Court's determination in *League Gen Ins Co v Mich Catastrophic Claims Ass'n*, 435 Mich 338 (1990), that the MCCA was a "private association" and not a "state agency" was not determinative in this case because the *League Gen Ins* Court was using the definitions set forth in the Administrative Procedures Act (APA), MCL 24.201 *et seq*., not FOIA. The APA definition of "state agency" is not interchangeable with the term "public body" as used in FOIA because FOIA defines "public body" more broadly than APA defines "state agency."

3. Through the enactment of 1988 PA 349, the Legislature amended MCL 500.134 to exempt MCCA records from disclosure under FOIA. Section 2 of that act stated that the act was intended to ensure that the MCCA was not treated as a public body. Section 2, however, does not render the MCCA a nonpublic body for purposes of FOIA because the Supreme Court has repeatedly held that courts are not to look to legislative history to contradict plain statutory language. The MCCA is a "public body" as that term is defined by FOIA. Therefore, it is a public body for purposes of FOIA, notwithstanding the language of 1988 PA 349, § 2. Indeed, by exempting MCCA records from disclosure under FOIA, the Legislature effectuated the intent set forth in 1988 PA 349, § 2 that the MCCA not be *treated* as a public body under FOIA even though the MCCA meets the definition of a public body under FOIA.

4. The enactment of MCL 500.134(4) did not violate Const 1963, art 4, § 25 because it did not alter, amend, change, or dispense with any provisions of FOIA. FOIA was drafted in a manner that permits other statutes to exempt public bodies from

FOIA's disclosure requirements. Therefore, the Legislature was not required to reenact and republish FOIA under Const 1963, art 4, § 25.

5. The MCCA's records are exempt from disclosure under MCL 500.134(4) and (6)(c). The trial court erred by granting summary disposition to plaintiffs and denying the MCCA's motion for summary disposition.

Reversed and remanded.

GLEICHER, J., concurring in part and dissenting in part, agreed that the MCCA was a public body under FOIA but concluded that the insertion of the FOIA exemption into a statute addressing the operations of insurance associations obscured from public view a significant diminution of FOIA's reach, thereby constituting a piecemeal amendment in contravention of Const 1963, art 4, § 25. No one reading FOIA would know that another exemption existed in the depths of the Insurance Code. The Legislature was permitted to amend or revise FOIA, but only by reenacting and republishing the exemption section of FOIA. Judge GLEICHER would have held that MCL 500.134(4) was unconstitutional for failure to comply with Article 4, § 25.

1. STATUTES — FREEDOM OF INFORMATION ACT — DEFINITIONS — PUBLIC BODY.

The Michigan Catastrophic Claims Association is a "public body" under MCL 15.232(d)(*iv*) of the Freedom of Information Act, MCL 15.231 *et seq*.

2. CONSTITUTIONAL LAW — REQUIREMENT TO REENACT AND REPUBLISH — FREEDOM OF INFORMATION ACT — EXEMPTIONS — INSURERS.

The Legislature's failure to reenact and republish the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., when it enacted MCL 500.134, which exempts the records of certain associations of insurers from disclosure under FOIA, did not render MCL 500.134 unconstitutional under Const 1963, art 4, § 25.

3. STATUTES — FREEDOM OF INFORMATION ACT — EXEMPTIONS — MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION.

MCL 500.134(4) and (6)(c) exempt the records of the Michigan Catastrophic Claims Association from disclosure under the Freedom of Information Act, MCL 15.231 *et seq*.

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson*), *Sinas, Dramis, Brake, Boughton & McIntyre, PC* (by *George T. Sinas*), and *Noah D. Hall* for plaintiffs.

Dykema Gossett PLLC (by *Lori McAllister*, *Joseph K. Erhardt*, *Jill M. Wheaton*, and *Courtney F. Kissel*) for defendant.

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

BORRELLO, J.

ON REMAND

Following oral argument, on October 16, 2015, our Supreme Court, in lieu of granting leave to appeal, vacated in part this panel's decision in *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, 305 Mich App 301; 852 NW2d 229 (2014). The Supreme Court vacated that portion of this Court's opinion "holding that MCL 500.134(4) does not violate art 4, § 25 of the Michigan Constitution." *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, 498 Mich 896 (2015). The Court remanded the matter to this Court for "reconsideration of this issue," and further directed this Court, on remand, "to decide the issue whether the [Michigan Catastrophic Claims Association (MCCA)] is a 'public body' subject to the Freedom of Information Act [FOIA], MCL 15.231 *et seq*., under MCL 15.232(d)." *Id*. Specifically, our Supreme Court instructed this Court on remand to

> [c]ompare MCL 15.232(d)(*iv*) (a "public body" includes "[a]ny other body which is created by state or local authority") and *League Gen Ins Co v Mich Catastrophic Claims Ass'n*, 435 Mich 338, 351; 458 NW2d 632 (1990) (holding that the MCCA is not a "state agency" but a "private association"); see also 1988 PA 349, § 2 (providing "legislative intent" pertaining to the status of the MCCA). The Court of Appeals shall then reconsider whether MCL 500.134(4) violates art 4, § 25 in light of its resolution of that issue. [*Id*.]

Our Supreme Court denied leave to appeal in all other respects. *Id*. For the reasons set forth in this opinion, we hold that the MCCA is a public body for purposes of FOIA, that the enactment of MCL 500.134(4) did not violate Const 1963, art 4, § 25, and that the MCCA's records are exempt from disclosure under MCL 500.134(4) and (6)(c).

I. BACKGROUND

As discussed in this Court's prior opinion, the appeal in this matter arose from the request of plaintiffs—the Coalition Protecting Auto No-Fault (CPAN), the Brain Injury Association of Michigan, Inc. (BIAMI), and several individual plaintiffs—to inspect certain records of defendant, the MCCA, under FOIA.

Explaining the origins of the MCCA, this Court noted:

> The MCCA was created by the Legislature to protect no-fault automobile insurers from catastrophic losses arising from their obligation to pay or reimburse no-fault policyholders' lifetime medical expenses. [*League Gen Ins*, 435 Mich at 340-341.] As a precondition to writing no-fault insurance in Michigan, every insurer must be a member of the MCCA. MCL 500.3104(1). Member insurers are required to pay annual premiums to the MCCA, MCL 500.3104(7), and in turn, the MCCA indemnifies its members for their "ultimate loss sustained under personal protection insurance coverage in excess [of a fixed statutory amount,]" MCL 500.3104(2). [*Coalition Protecting Auto No-Fault*, 305 Mich App at 304 (second alteration in original).]

The factual underpinnings of this appeal began in 2011 with CPAN initiating a FOIA request, asking the MCCA for "information concerning 'all' open and closed claims 'serviced by' the MCCA." *Id*. Included within the information requested by CPAN were "the ages of

claimants, the dates of injuries, when claims were closed, and the total amounts paid." *Id*. The MCCA declined CPAN's request, asserting that it was " 'expressly exempted from FOIA requests' by MCL 500.134," specifically citing MCL 500.134(4) and (6)(c). *Id*. at 304-305.

Shortly thereafter, CPAN initiated a lawsuit against the MCCA, seeking to compel the disclosure of the previously requested and denied information. Concurrently, BIAMI and the named individual plaintiffs filed a separate lawsuit against the MCCA after the MCCA denied a request for information similar to that of CPAN. The cases were consolidated pursuant to a stipulation by the parties, and CPAN was permitted to file an amended complaint. *Id*. at 305.

Although CPAN alleged four counts in its complaint, for purposes of this remand we need only address CPAN's assertion that MCL 500.134 "violated Const 1963, art 4, § 25, because the statute amended FOIA by exempting the MCCA from FOIA without reenacting and republishing FOIA." *Coalition Protecting Auto No-Fault*, 305 Mich App at 305. The MCCA filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). CPAN filed a cross-motion for summary disposition under MCR 2.116(I)(2).[1] The trial court granted partial summary disposition in favor of CPAN, BIAMI, and the individual plaintiffs under MCR 2.116(C)(8), denying the motions "to the extent they sought disclosure of information concerning individual claimants." *Coalition Protecting Auto No-Fault*,

[1] The trial court construed this as a motion for summary disposition under MCR 2.116(C)(8). BIAMI and the individual plaintiffs sought summary disposition under MCR 2.116(C)(9) and (10), but later withdrew their motion under MCR 2.116(C)(10). *Coalition Protecting Auto No-Fault*, 305 Mich App at 306.

305 Mich App at 306. The trial court denied the MCCA's motion for summary disposition. Specifically, the trial court held

> that the MCCA was a "public body" for purposes of FOIA because the MCCA was "created entirely by statute." The court concluded that MCL 500.134 did not exempt the MCCA's records from FOIA, stating:
>
> > MCL 500.134 does not contain any specific references regarding information exempt from disclosure.
> >
> > Secondly, the plain language of section (4) . . . does not indicate that the legislature intended for a "whole sale" carve out exemption of all MCCA records because there is a general cross reference to MCL 15.243 (A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act . . . .[).] The fact that the Legislature used the phrase "pursuant to section 13" of FOIA, rather than specifically indicating that all MCCA records are exempt under 15.243(d) . . . tends to show that the Legislature intended for information to be exempt from FOIA only if such information came within one of the specified exemptions in MCL 15.243. [*Id*. at 306-307.]

The trial court also found that the MCCA's records were subject to disclosure pursuant to alternate theories raised by CPAN and BIAMI, which we need not address in this opinion given the specificity of our Supreme Court's remand order. *Coalition Protecting Auto No-Fault*, 498 Mich at 896.

On March 8, 2013, this Court granted the MCCA's application for leave to appeal and request for a stay of proceedings.[2] CPAN, BIAMI, and the individual plaintiffs also filed a cross-appeal.

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[2] *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, unpublished order of the Court of Appeals, entered March 8, 2013 (Docket No. 314310).

On May 20, 2014, this Court issued an opinion that reversed the ruling of the trial court and remanded "for entry of an order awarding summary disposition in favor of the MCCA." *Coalition Protecting Auto No-Fault*, 305 Mich App at 304. In reversing the trial court, this Court *assumed* that the MCCA "is a public body for purposes of FOIA" and held that "the MCCA is not required to disclose any of its records because the records are expressly exempted from FOIA [by MCL 500.134(4) and (6)(c)]." *Id*. at 309. Citing MCL 15.243(1)(d), this Court noted that FOIA "lists various types of records and information that a public body may exempt from the act's disclosure requirements." *Id*. In addition, as part of the Insurance Code, MCL 500.100 *et seq*., MCL 500.134 "specifically describes and exempts the MCCA's records from FOIA disclosure." *Id*. at 309. In reversing the trial court's ruling, this Court explained:

> Applying the plain language of MCL 500.134(4) and (6), we conclude that the trial court erred as a matter of law by holding that the MCCA's records were not exempt from FOIA. Subsection (4) unambiguously exempts "[a] record of an association or facility" from disclosure, and subsection (6)(c) defines an "association or facility" to include the MCCA. When read together, the subsections provide that "a record of [the MCCA] *shall be exempted* from disclosure pursuant to section 13 of [FOIA]," thus specifically describing and exempting the MCCA's records from disclosure. These provisions work in accordance with § 13 of FOIA, which permits a public body to exempt from disclosure "[r]ecords or information specifically described and exempted . . . by statute." MCL 15.243(1)(d). There is no ambiguity in these provisions: subsections (4) and (6) clearly mandate that if "a record" of the MCCA is at issue, it "shall be exempted from disclosure pursuant to section 13 of [FOIA]." See *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003) ("The

> word 'shall' is generally used to designate a mandatory provision . . . ."). [*Id*. at 310-311.]

This Court also examined the contention on cross-appeal that MCL 500.134(4) could not exempt the records of the MCCA from disclosure because the cited statutory provision violated Article 4, § 25 of the Constitution by amending FOIA without the requisite republication. Const 1963, art 4, § 25 states:

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

In rejecting CPAN's argument, this Court explained:

> MCL 500.134(4) did not revise, alter, or amend FOIA. Rather, FOIA contemplates statutory exemptions. Specifically, § 13(1)(d) provides in pertinent part that "[a] public body may exempt from disclosure as a public record under this act . . . [r]ecords or information specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). By including this language, the Legislature drafted FOIA in such a way that future statutory exemptions would not constitute revisions to or amendments of FOIA, but instead would work pursuant to FOIA. Therefore, when the Legislature enacted MCL 500.134(4), there was no duty to reenact and republish FOIA. [*Coalition Protecting Auto No-Fault*, 305 Mich App at 313-314.]

This Court also rejected alternative arguments challenging the constitutional validity of MCL 500.134. *Id*. at 314-316. Hence, this Court ruled, in relevant part:

> In sum, the plain language of MCL 500.134(4) and (6) exempts the MCCA's records from FOIA, and MCL 500.134(4) does not violate Const 1963, art 4, § 24 or Const 1963, art 4, § 25. The trial court therefore erred as a matter of law by holding that the MCCA was required to disclose any of its records under FOIA. [*Id*. at 316.]

CPAN filed a motion for reconsideration challenging, in part, this Court's assumption "without deciding that it was permissible for the Legislature to statutorily exempt itself from the constitutional limitation upon its lawmaking authority by placing in FOIA a provision (MCL 15.243(1)(d)) which allows exemptions to FOIA by inserting those exemptions in other statutes." This Court denied the motion for reconsideration.[3] CPAN next filed an application for leave to appeal in the Michigan Supreme Court. As noted, following oral argument, our Supreme Court vacated in part this Court's opinion "holding that MCL 500.134(4) does not violate art 4, § 25 of the Michigan Constitution" and remanded the case to this Court. *Coalition Protecting Auto No-Fault*, 498 Mich at 896.

On remand, this Court is required to engage in a two-part analysis. First, we are directed to evaluate "whether the MCCA is a 'public body' subject to the Freedom of Information Act . . . under MCL 15.232(d)." *Id*. As part of this step in the analysis, we are instructed to compare MCL 15.232(d)(*iv*) and our Supreme Court's holding in *League Gen Ins*, 435 Mich at 351, in which the Court determined that the MCCA was not a "state agency" but a "private association" for purposes of the Administrative Procedures Act (APA), MCL 24.201 *et seq*. In ascertaining whether the MCCA is a public body, we are also directed to consider 1988 PA 349, § 2. Once we have determined whether the MCCA is a public body, we must proceed to the second part of our analysis; namely, we must reconsider "whether MCL 500.134(4) violates art 4, § 25" of the Michigan Constitution. *Coalition Protecting Auto No-Fault*, 498 Mich at 896.

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[3] *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, unpublished order of the Court of Appeals, entered July 22, 2014 (Docket No. 314310).

II. STANDARD OF REVIEW

Resolution of the issues on remand requires that we interpret and apply the relevant statutory provisions, which involves a question of law that we review de novo. *Klooster v Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). Similarly, whether a statutory provision violates the state constitution involves a question of law that we review de novo. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014).

III. ANALYSIS

A. IS THE MCCA A "PUBLIC BODY" FOR PURPOSES OF FOIA?

In accordance with our Supreme Court's directive on remand, we must first evaluate and determine whether the MCCA is a public body for purposes of FOIA by examining: MCL 15.232(d)(*iv*), our Supreme Court's decision in *League Gen Ins Co*, 435 Mich at 351, and 1988 PA 349, § 2.

1. FOIA

"Under FOIA, a public body must disclose all public records that are not specifically exempt under the act." *Hopkins v Duncan Twp*, 294 Mich App 401, 409; 812 NW2d 27 (2011), citing MCL 15.233(1). The issue in this case is whether the MCCA is a "public body" for purposes of FOIA. To resolve this issue we must interpret and apply the relevant portions of FOIA. "[T]o construe a statute we must first examine its language, according every word and phrase its plain and ordinary meaning and considering the grammatical context." *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 249; 801 NW2d 629 (2010), citing MCL 8.3a. Furthermore,

> [i]t is axiomatic that statutory language expresses legislative intent. A fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. Where the statute unambiguously conveys the Legislature's intent, the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. [*Mich Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008) (quotation marks and citations omitted).]

FOIA defines "public body" as follows:

> "Public body" means any of the following:
>
> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (*ii*) An agency, board, commission, or council in the legislative branch of the state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
>
> (*iv*) *Any other body which is created by state or local authority or which is primarily funded by or through state or local authority*. [MCL 15.232(d) (emphasis added).]

While Subparagraphs (*i*) through (*iii*) are inapplicable in this case, MCL 15.232(d)(*iv*) has been characterized as a " 'catchall' provision." *Jackson v Eastern Mich Univ Foundation*, 215 Mich App 240, 244; 544 NW2d 737 (1996). "Set in the disjunctive," Subparagraph (*iv*) "indicates that 'any other body' is a public body, and thus subject to the FOIA, *if it is either (1) created by state or local authority*, *or* (2) primarily funded by or through state or local authority." *Id*. at 244-245 (emphasis added).

While the MCCA may not be funded through state authority, the MCCA is a body that was created by statute and, therefore, is the product of "state authority." A "body" is defined in relevant part as "[a]n artificial person created by a legal authority. See [corporation]," and "[a]n aggregate of individuals or groups." *Black's Law Dictionary* (10th ed). The MCCA is an aggregate group of insurance corporations, i.e., a group of "artificial persons." Thus, it is a "body" as that term is generally understood. See *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008) (noting that unless otherwise defined by statute, words should be afforded their plain and ordinary meaning).

Furthermore, the MCCA was created by state authority. Specifically, the Legislature, an apparatus of the state, exercised its constitutional authority when it created the MCCA in 1978,[4] following the enactment of the no-fault act,[5] "to serve as the means for reimbursing each member insurer for all 'ultimate loss sustained under personal protection insurance coverages in excess of [a specified amount for identified years of policy coverage] in each loss occurrence.' " *League Gen Ins*, 435 Mich at 340-341, quoting MCL 500.3104(2). Consequently, the MCCA is a body that was created by state authority; therefore, for purposes of FOIA, the MCCA is a "public body." MCL 15.232(d)(*iv*).

The MCCA conflates the disjunctive provisions of MCL 15.232(d)(*iv*) to suggest that a "public body" requires both creation "by state or local authority" *and* a primary receipt of funding "by or through state or local authority" rather than reading the provisions as providing alternative definitions. But the provisions cannot be conflated given the inclusion of the word "or"

[4] See 1978 PA 136; MCL 500.3104(1).

[5] MCL 500.3101 *et seq*.

within the subparagraph. Based on the principles of plain and unambiguous statutory language, the Legislature's use of the term "or" within MCL 15.232(d)(*iv*) "refers to a choice or alternative between two or more things," *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997), and not a merging of two distinct requirements. As this Court has previously recognized, the words "and" and "or" "are not interchangeable and their strict meaning should be followed when their accurate reading does not render the sense dubious and there is no clear legislative intent to have the words or clauses read in the conjunctive." *Id*. at 50-51 (quotation marks and citations omitted).

The MCCA also argues that it cannot be a "public body" under MCL 15.232(d)(*iv*) because it also falls within FOIA's definition of "person" set forth in MCL 15.232(c) as follows:

> "Person" means an individual, corporation, limited liability company, partnership, firm, organization, *association*, governmental entity, or other legal entity. Person does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility. [MCL 15.232(c) (emphasis added).]

The MCCA is correct that, as an association, it falls within FOIA's definition of "person" under MCL 15.232(c). However, contrary to the MCCA's argument, its status as a person does not preclude its simultaneous characterization as a public body. A person, in accordance with MCL 15.232(c), includes a "governmental entity." Yet various governmental entities, such as state agencies, departments, boards, or employees within the executive and legislative branches, with specific exceptions, are also identified as falling within

the definition of "public body" under MCL 15.232(d)(*i*), (*ii*), (*iii*) and (*v*). Hence, the MCCA's reliance on the principle of *expressio unius est exclusio alterius*[6] is misplaced. Merely because the term "person" is not included within the statutory provision defining a "public body," it cannot be assumed that the overlap or concurrence in the identification of entities within the respective definitions of those terms necessitates mutual exclusion. Rather, "when a statute specifically defines a given term, that definition alone controls." *Vargo v Sauer*, 457 Mich 49, 58; 576 NW2d 656 (1998).

The MCCA cites an opinion by the Attorney General, OAG, 1979-1980, No. 5,750, p 897 (July 29, 1980), in support of its contention that a private entity or association cannot simultaneously be a public body. The MCCA cites a portion of the opinion that states:

> Nonprofit corporations are private legal entities which operate in the nongovernmental, private sector. While nonprofit corporations often provide a variety of services to government and the public, the rendering of such services does not convert a nonprofit corporation into a public entity. [*Id*. at 899.]

Initially, we note that Attorney General opinions are not binding on this Court. *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 83 n 6; 858 NW2d 751 (2014). Moreover, the MCCA omitted the recognition within the same opinion that " '[t]he character of a corporation as public or private is determined by the terms of its charter and the general law under which it was organized and not upon the character of its stockholders. . . .' " OAG, 1979-1980,

[6] "[T]he doctrine of *expressio unius est exclusio alterius* . . . means the express mention of one thing implies the exclusion of another." *Mid-American Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014) (quotation marks and citation omitted).

No. 5,750, p 899, quoting 18 Am Jur 2d, Corporations, § 8, p 554. Hence, the Attorney General recognized that "[t]he legislature has authorized the formation of certain public legal entities . . . to facilitate joint governmental efforts for the furnishing of various services . . . ." *Id*. In this case, as discussed earlier, the Legislature formed the MCCA; thus, it is a product of state authority and a public body for purposes of FOIA.

In sum, because the MCCA was created by statute, it is a product of state authority and qualifies as a public body for purposes of FOIA. MCL 15.232(d)(*iv*).

2. *LEAGUE GENERAL INSURANCE*

Our Supreme Court's holding in *League Gen Ins*, 435 Mich at 338, does not alter our conclusion that the MCCA is a public body for purposes of FOIA.

In *League Gen Ins*, the plaintiffs were no-fault insurance providers and mandatory members of the MCCA. *Id*. at 340-341. The insurers brought suit, challenging the MCCA's calculation and collection of premium assessments and asserting that the MCCA was a state agency and therefore subject to the provisions of the APA. *Id*. at 341-342. The insurers argued that the MCCA had failed to comply with the APA's rulemaking requirements, rendering the assessments invalid. *Id*. This Court affirmed the trial court's ruling that the MCCA was a state agency subject to the APA because

> (1) the MCCA was created by statute, (2) the Commissioner of Insurance appoints the directors and serves as ex officio member of the board of directors, (3) the MCCA levies mandatory assessments against its members, and (4) it has the power to adopt rules and hear complaints. [*League Gen Ins*, 435 Mich at 345.]

Thereafter, before our Supreme Court granted leave to appeal, the Legislature amended the APA to specifically exclude the MCCA from the definition of "state agency." *Id*. at 342, citing 1988 PA 277. Our Supreme Court then granted leave to appeal to determine whether the MCCA was a state agency for purposes of the APA before the amendment. *Id*. at 343.

Our Supreme Court explained that, in MCL 24.203(2), the APA defined an "agency" as "a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." *Id*. The Court held that this statutory language required the presence of two characteristics to constitute a state agency, stating:

> [T]he proper interpretation of this statute requires the presence of two characteristics for an "agency." The entity at issue must be a "state" unit or position and must be created by the constitution, by statute, or by agency action. If these two requirements are met, and it is not specifically exempted, an "agency" is subject to the provisions of the APA. [*Id*.]

Whether the MCCA was a state agency for purposes of the APA turned on the first prong of this analysis—i.e., whether the MCCA was a "state" unit or position. In resolving this question, the *League Gen Ins* Court reviewed *In re Advisory Opinion re Constitutionality of 1966 PA 346*, 380 Mich 554; 158 NW2d 416 (1968), wherein the Court "had to ascertain whether the 'state' housing development authority was an instrumentality of state government." *League Gen Ins*, 435 Mich at 344. In doing so, the *Advisory Opinion* Court " 'look[ed] behind the name to the thing named' " to " 'examine its character, its relations, and its functions to determine, indeed, whether it is an agency or instrumentality of

State government.' " *League Gen Ins*, 435 Mich at 344-345, quoting *Advisory Opinion*, 380 Mich at 571.

The *League Gen Ins* Court concluded that "[t]aken as a whole, the characteristics of the MCCA lead us to recognize it as a private association." *League Gen Ins*, 435 Mich at 350. The Court explained:

> As noted previously, the commissioner has no voting power on the board and is not statutorily empowered to remove board members. Furthermore, although the MCCA's plan of operation is subject to the commissioner's approval . . . this action is no different from the commissioner's review of the rates and plans of private insurers. [*Id*. (citations omitted).]

As part of its analysis, the Court examined the "function of the entity" and rejected the notion that the MCCA served a public function, explaining:

> As we have already recognized, the association's formation may have bestowed an incidental benefit upon the public by facilitating availability of automobile insurance. Nonetheless, its primary purpose was to protect smaller insurers from the potentially severe financial repercussions of the no-fault act. The MCCA was enacted to create an association of insurance companies that could more evenly bear the expense of a catastrophic claim, as opposed to an individual company. We believe that this attempt to attain a less burdensome structure for handling catastrophic no-fault claims was intended primarily for private, not public, benefit. [*Id*. at 350-351.]

League Gen Ins is not dispositive of the status of the MCCA for purposes of FOIA. Importantly, the criteria that must be met for an entity to be a "state agency" under the APA, MCL 24.203(2), are narrower than those required to attain the status of a "public body" under FOIA, MCL 15.232(d). As noted earlier, the APA requires "the presence of two characteristics" to qualify as a state agency—i.e., the entity must be "a 'state' unit

or position and must be created by the constitution, by statute, or by agency action." *League Gen Ins*, 435 Mich at 343.

In contrast, FOIA defines "public body" more broadly. Under FOIA, a body qualifies as a "public body" if it is merely created by state authority. MCL 15.232(d)(*iv*). Thus, unlike *League Gen Ins*, under a FOIA analysis, there is no need to engage in a searching inquiry into the characteristics and function of the MCCA. In short, the APA's definition of a "state agency" is not concomitant or interchangeable with the term "public body" as used in FOIA. As recognized in *Grimes v Mich Dep't of Transp*, 475 Mich 72, 85; 715 NW2d 275 (2006), "reliance on an unrelated statute to construe another is a perilous endeavor to be avoided by our courts." FOIA and the APA are self-contained in that they do not refer to one another, and both statutes contain their own definitions of terms. Because the issue now before this Court pertains to the status of the MCCA under FOIA, it would be improper to extrapolate and expand the definition of a public body under FOIA to coincide with the APA's definition of a state agency because there is nothing in the statutory language to suggest that the relevant statutory provisions are or were intended to be construed in the same manner given their divergent and specific definitions and purposes.

In sum, *League Gen Ins* does not govern the outcome of this case, and it does not alter our conclusion that the MCCA is a public body for purposes of FOIA pursuant to the plain language of MCL 15.232(d)(*iv*).

3. 1988 PA 349, § 2

Our Supreme Court also instructed this Court on remand to evaluate the MCCA's status as a public body

in conjunction with 1988 PA 349, § 2, which amended MCL 500.134. MCL 500.134 is part of Chapter 1 of the Insurance Code; Chapter 31 of the Insurance Code, MCL 500.3101 *et seq.*, is the no-fault act. Before the 1988 amendment, MCL 500.134 provided as follows:

> Every certificate of authority or license in force immediately prior to the effective date of this act and existing under any act herein repealed is valid until its original expiration date, unless earlier terminated in accordance with this act. [1956 PA 218.]

In 1987, this Court issued *League Gen Ins Co v Catastrophic Claims Ass'n*, 165 Mich App 278; 418 NW2d 708 (1987), rev'd 435 Mich 338 (1990), wherein this Court held that the MCCA was a "state agency" for purposes of the APA. Before our Supreme Court reversed that decision in *League Gen Ins*, 435 Mich at 338, the Legislature enacted 1988 PA 349. Section 1 of that public act amended MCL 500.134 to read in relevant part as follows:

> (1) Every certificate of authority or license in force immediately prior to January 1, 1957 and existing under any act repealed by this act is valid until its original expiration date, unless earlier terminated in accordance with this act.
>
> (2) Any plan of operation adopted by an association or facility, and any premium or assessment levied against an insurer member of that association or facility, is hereby validated retroactively to the date of its original adoption or levy and shall continue in force and effect according to the terms of the plan of operation, premium, or assessment until otherwise changed by the commissioner or the board of directors of the association or facility pursuant to this act.
>
> (3) *An association or facility or the board of directors of the association or facility is not a state agency and the money of an association or facility is not state money.*

> (4) A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws.
>
> (5) Any premium or assessment levied by an association or facility, or any premium or assessment of a similar association or facility formed under a law in force outside this state, is not a burden or special burden for purposes of a calculation under section 476a and any premium or assessment paid to an association or facility shall not be included in determining the aggregate amount a foreign insurer pays to the commissioner under section 476a.
>
> (6) As used in this section, *"association or facility" means* an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to, the following:
>
> * * *
>
> (c) *The catastrophic claims association* created under chapter 31. [Emphasis added.]

On remand, our Supreme Court directed this Court to consider 1988 PA 349, § 2 (Section 2), which provides:

> The amendment to section 134 of Act No. 218 of the Public Acts of 1956, being section 500.134 of the Michigan Compiled Laws, pursuant to this amendatory act is *intended to codify, approve, and validate the actions and long-standing practices taken by the associations and facilities mentioned in this amendatory act retroactively to the time of their original creation*. *It is the intent of this amendatory act to rectify the misconstruction of the applicability of the administrative procedures act of 1969 by the court of appeals in* [*League Gen Ins*, 165 Mich App 278,] *with respect to the imposition of rule promulgation requirements on the catastrophic claims association as a state*

> *agency, and to further assure that the associations and facilities mentioned in this amendatory act, and their respective boards of directors, shall not hereafter be treated as a state agency or public body*. [Emphasis added.]

The MCCA argues that Section 2 indicates that the MCCA is not a public body for purposes of FOIA. However, Section 2 does not control over the plain statutory language set forth in MCL 15.232(d)(*iv*) that defines a public body for purposes of FOIA. Indeed, our Supreme Court has repeatedly held that courts are not to look to legislative history to contradict plain statutory language. For example, in *People v Gardner*, 482 Mich 41, 55; 753 NW2d 78 (2008), the Court held that it was error to construe "the *unambiguous* terms of [a] statute by reference to legislative history." Similarly, in *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000), the Court explained that this Court erred when it looked to drafters' notes to interpret an unambiguous clause in the state Constitution, explaining: "The Court of Appeals, however, did not analyze the language of art 9, § 31, but rather primarily examined drafters' notes relating to the amendment. This reliance on extrinsic evidence was inappropriate because the constitutional language is clear."

In this case, as discussed in more detail earlier in this opinion, the term "public body" is clearly defined by the unambiguous language in MCL 15.232(d)(*iv*). Therefore, judicial construction is not permitted, and to the extent that Section 2 conflicts with the plain language of that statute, it is not controlling. *Gardner*, 482 Mich at 55; *American Axle & Mfg*, 461 Mich at 362; see also *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010) ("Judicial construction of an unambiguous statute is neither required nor permitted."); *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012)

(clear statutory language must be enforced as written); *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008) ("[S]pecific provisions . . . prevail over any arguable inconsistency with the more general rule . . . .") (alteration in original).

Moreover, nothing in MCL 500.134 states that the MCCA is not a "public body" for purposes of FOIA. While the Legislature included specific language in MCL 500.134(3) indicating that the MCCA is not a "state agency," the Legislature did not include a similar provision indicating that the MCCA is not a public body. Had the Legislature intended to exclude the MCCA from the definition of a public body for purposes of FOIA, it could have included a statutory provision in MCL 500.134 indicating as much. Instead, the Legislature enacted MCL 500.134(4) and excluded the MCCA's records from FOIA, which tends to support that, at the time of the amendment, the Legislature was aware that the MCCA was a public body subject to FOIA. See *Robinson v Detroit*, 462 Mich 439, 459-460; 613 NW2d 307 (2000) (noting that "the judiciary has always adhered to the principle that the Legislature, having acted, is held to know what it has done"). Indeed, by exempting the MCCA's records from FOIA, the Legislature effectuated its intent, set forth in 1988 PA 349, § 2, by ensuring that the MCCA would not be "treated" as a public body.

4. SUMMARY

FOIA broadly defines a public body to include "[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority." MCL 15.232(d)(*iv*). The MCCA is a public body for purposes of FOIA because it is a body that was created by state authority when the Legisla-

ture amended the no-fault act and created the MCCA. Our Supreme Court's holding in *League Gen Ins*, 435 Mich at 338, does not affect our conclusion that the MCCA is a public body for purposes of FOIA because that case involved a different statutory scheme that has no bearing on FOIA's definition of a public body. Finally, nothing in 1988 PA 349, § 2 alters our conclusion that the MCCA falls within the plain language of MCL 15.232(d)(*iv*).

B. CONST 1963, ART 4, § 25

Having concluded that the MCCA is a public body for purposes of FOIA, we proceed to determine whether MCL 500.134(4) violates Const 1963, art 4, § 25. See *Coalition Protecting Auto No-Fault*, 498 Mich at 896.

At the outset, we note that "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. Further, when considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003) (citations omitted). Further, every "reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004) (quotation marks and citations omitted). The party initiating the challenge assumes the burden of proving that a statute is unconstitutional. *DeRose v DeRose*, 469 Mich 320, 349; 666 NW2d 636 (2003).

Const 1963, art 4, § 25 provides:

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

This constitutional provision has a longstanding history, having appeared in the state's 1850 Constitution. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 469; 208 NW2d 469 (1973).[7] Justice COOLEY, writing for our Supreme Court, articulated the purpose of the clause as follows:

> The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that the legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. [*People ex rel Drake v Mahaney*, 13 Mich 481, 497 (1865).]

To that end, the language in § 25 is clear: "It says succinctly and straightforwardly that no law . . . shall be revised, altered or amended by reference to its title only. The constitutional language then proceeds to state how [the revision] shall be done (*i.e.*, the section[s]) of the act in question shall be amended by reenacting and republishing at length)." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich at 470. A review of relevant caselaw illustrates how courts have applied Article 4, § 25 over the years.

Mahaney was one of the first cases to address the clause. *Mahaney*, 13 Mich at 496-497. In *Mahaney*, our Supreme Court articulated that amendment "by impli-

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[7] An advisory opinion "is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits"; however, an advisory opinion can be persuasive. *AFT Mich v Michigan*, 303 Mich App 651, 667 n 4; 846 NW2d 583 (2014) (quotation marks and citations omitted).

cation" and amendments to an "act complete in itself" do not violate Article 4, § 25. *Id*. The Court reviewed an act that established " 'a police government for the city of Detroit.' " *Id*. at 490. The act abolished the offices of "city marshal and assistant marshal of the city of Detroit" and transferred the duties of those offices to "the superintendent of police . . . in accordance with the provisions of this act." *Id*. (quotation marks omitted). Writing for the Court, Justice COOLEY explained that the new law did not violate Article 4, § 25, stating:

> The act before us does not assume in terms, to revise, alter or amend any prior act, or section of an act, but by various transfers of duties it has an amendatory effect by implication, and by its last section it repeals all inconsistent acts. We are unable to see how this conflicts with the provision referred to. If, whenever a new statute is passed, it is necessary that all prior statutes, modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. [*Id*. at 496-497.]

Justice COOLEY also explained in *Mahaney* that an "act complete in itself" was not anathema to Article 4, § 25, stating:

> An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. *But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent*. [*Id*. at 497 (emphasis added).]

In contrast, in *Mok v Detroit Bldg & Savings Ass'n No 4*, 30 Mich 511 (1875), the Court held that a building and savings association act of 1869 improperly amended a similar act of 1853. Justice COOLEY, again writing for the Court, explained that the act of 1869 purported to amend the act of 1853 without reenactment and republication of the latter, explaining:

> But while the act of 1869 referred parties in this circuitous manner to that of 1853 for the requirements in organization, *it undertook at the same time to dispense with some things required by that act, and to make some changes*.
>
> * * *
>
> The act of 1853 has been . . . incorporated in and made a part of the act of 1869, but with several changes and modifications, and these not made by the re-enactment of the sections changed or modified, but only by indicating the extent of the changes, leaving the parties concerned to fit the new act to the old as best they may. [*Id*. at 521, 523 (emphasis added).]

Following *Mok*, cases similar to *Burton v Koch*, 184 Mich 250; 151 NW 148 (1915), overruled in part by *Alan v Wayne Co*, 388 Mich 210; 200 NW2d 628 (1972), "created an aberration of the doctrine of amendment by implication by the practice of hair spliting [sic] the meaning of the constitution so that only the specific act *directly* amended need be published while others that were affected need not be published." *Alan*, 388 Mich at 279. However, in the seminal case of *Alan*, 388 Mich at 281, our Supreme Court overruled *Burton* and reaffirmed *Mok*.

In *Alan*, the Revenue Bond Act, 1933 PA 94 (hereinafter, Act 94), authorized a locality to issue a limited

type of bond for public improvements that would be repaid through revenue generated solely from the public improvement financed by the bond. *Alan*, 388 Mich at 246. In *Alan*, the Court addressed whether § 11 of the Building Authority Act, 1948 PA 31 (hereinafter, Act 31), could create a tax bond exception to Act 94. *Id*. at 268. The Court held that Act 31 could not create such an exception without reenactment and republication, explaining:

> If an act is to be referred to or incorporated by reference then it will be treated as incorporated without any changes unless the sections intended to be altered or amended are reenacted and published at length as required by Const 1963, art 4, § 25. [*Id*. at 277.]

The *Alan* Court explained that the case was dissimilar to *Mahaney* in that Act 31 did not present a "so-called 'amendment by implication.' " *Alan*, 388 Mich at 270, citing *Mahaney*, 13 Mich at 496. The *Alan* Court held that the "amendment by implication" exception should be limited to

> those limited kinds of cases where because of a special fact situation a court is faced with two accidentally absolutely conflicting statutes requiring a determination that one or the other applies (and thus an amendment or repeal of the other by implication follows in the fact circumstances). These kinds of cases do not result from any deliberate misleading by the Legislature or failure to make all reasonable efforts to make clear in the statutes what is intended, but rather, as we said in *Mok*, "[i]t is probable that if the requirement has at any time been disregarded by the legislature, the default has proceeded from inadvertence merely." [*Alan*, 388 Mich at 285-286, quoting *Mok*, 30 Mich at 517 (citation omitted).]

However, "[i]f a bill under consideration is intended whether directly or indirectly to *revise, alter, or amend* the operation of previous statutes, then the constitu-

tion, unless and until appropriately amended, requires that the Legislature do in fact what it intends to do by operation." *Alan*, 388 Mich at 285.

Two cases are illustrative of the application of Article 4, § 25 post-*Alan*. In *Midland Twp v State Boundary Comm*, 401 Mich 641, 650; 259 NW2d 326 (1977), at issue was the Home Rule City Act (HRCA), MCL 117.1 *et seq*., which established "the procedures for the incorporation, consolidation or alteration of [city] boundaries." Thereafter, in separate legislation in 1968, the Legislature passed the Boundary Commission Act (BCA), creating the State Boundary Commission (the Commission) and providing it with certain authorities. *Id*. at 650, citing 1968 PA 191; MCL 123.1001 *et seq*. Subsequently, in 1970, the Legislature amended the HRCA to extend the Commission's powers to include annexations. *Id*. at 650, citing 1970 PA 219; MCL 117.9. Certain plaintiffs challenged the legislation, arguing *inter alia* that the 1970 HRCA annexation amendment violated Article 4, § 25, because the Legislature did not reenact and republish certain portions of the BCA of 1968. *Id*. at 656-657.

On appeal, the Supreme Court held that the 1970 annexation amendment did not run afoul of Article 4, § 25, explaining that

> the 1970 amendment . . . , while incorporating by reference provisions of the 1968 act, does not "dispense with" or "change" any provision of the 1968 act . . . . By its terms, the 1970 amendment makes no change or dispensation of any requirement of the 1968 act.
>
> . . . [I]n contrast with *Mok*, there is no express amendment of the 1968 act. [*Id*. at 659-661.]

In contrast, in *Nalbandian v Progressive Mich Ins Co*, 267 Mich App 7; 703 NW2d 474 (2005), this Court held that an amendment of the Michigan Vehicle Code

improperly altered a provision of the Insurance Code without reenactment and republication of the Insurance Code. The Insurance Code allowed insurance companies to "consider speed limit violations in assessing 'insurance eligibility points' for the purpose of determining whether and at what premium rates to provide insurance to drivers." *Id*. at 9. In 1987, the Legislature amended the Michigan Vehicle Code, enacting MCL 257.628(11), wherein the Legislature created a "55 mph speed zone exception." *Nalbandian*, 267 Mich App at 9, citing 1987 PA 154. The amendment disallowed "the imposition of any insurance eligibility points for ten mile per hour (or less) speed limit violations" in circumstances where a driver was ticketed for speeding ten miles per hour or less in a 55-mph zone. *Id*. On appeal, this Court was tasked with determining whether the 55-mph speed-zone exception revised or altered the Insurance Code without reenactment and republication. *Id*. at 9-10.

Relying on *Alan*, 388 Mich 210, this Court held that the Michigan Vehicle Code was not an amendment by implication, explaining:

> [The Michigan Vehicle Code amendment] was not a general act that, as a result of some special fact situation, presents an accidental conflict with the . . . Insurance Code. The conflict between the two is not one resulting from mere inadvertence. To the contrary, [the amendment] quite clearly resulted from a legislative knowledge of the Insurance Code's 2-point rule and an intent to abrogate that rule with respect to 55 mile per hour speed zone violations. [*Nalbandian*, 267 Mich App at 14.]

The *Nalbandian* Court also concluded that the amendment was not "an act complete in itself" such that reenactment and republication of the Insurance Code was not required. *Id*. at 14-15. Instead,

> [the amendment] is a piecemeal amendment to an existing comprehensive statutory scheme . . . . [The amendment] attempt[ed] to amend the old law by intermingling new and different provisions with the old ones found in the Insurance Code. Thus, 1987 PA 154 was not an act complete in itself, and Const 1963, art 4, § 25 applied to its enactment. [*Nalbandian*, 267 Mich App at 16 (quotation marks and citations omitted; third alteration in *Nalbandian*).]

Turning to the present case, in 1988 the Legislature amended MCL 500.134, a provision of the Insurance Code. 1988 PA 349. As noted earlier, the amendment added Subsections (2) through (6); relevant to this case is Subsection (4), which provides as follows:

> A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws. [MCL 500.134(4).]

At the same time, the Legislature defined the term "association" to include the MCCA. MCL 500.134(6). Thus, stated simply, the 1988 amendment exempted the MCCA's records from FOIA disclosure.

At the time of the amendment, FOIA provided in relevant part as follows:

> A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (d) Records or information specifically described and exempted from disclosure by statute. [MCL 15.243(1); see also 1976 PA 442.]

This case does not involve an "amendment by implication" as discussed in *Mahaney* and later in *Alan*. The legislative amendment adding MCL 500.134(4) did not

create a “special fact situation” resulting in “two accidentally absolutely conflicting statutes.” *Alan*, 388 Mich at 285. Indeed, there is no conflict between MCL 500.134(4) and FOIA. The 1988 amendment adding MCL 500.134(4) is dissimilar to the amendments in *Mok* and *Nalbandian*. The 1988 amendment did not undertake to “dispense with some things required” by FOIA, it did not “make some changes” to FOIA, nor did it incorporate FOIA and “accommodate it by indirect amendments.” *Mok*, 30 Mich at 521, 529. Similarly, the MCL 500.134(4) is not a “piecemeal amendment to an existing comprehensive statutory scheme,” and the statutory provision did not “attempt to amend [an] old law by intermingling new and different provisions with the old ones found” in FOIA. *Nalbandian*, 267 Mich App at 16 (quotation marks and citation omitted).

Instead, MCL 500.134(4) is akin to the amendment in *Midland Twp*, 401 Mich at 660-661. Similar to the amendment in *Midland Twp*, in this case, the Legislature did not “dispense with” or “change” any provision of FOIA when it revised the Insurance Code and enacted MCL 500.134(4). Rather, MCL 500.134(4) works in concert with FOIA because “§ 13(1)(d) [of FOIA] provides in pertinent part that ‘[a] public body may exempt from disclosure as a public record under this act . . . [r]ecords or information specifically described and exempted from disclosure by statute.’ ” *Coalition Protecting Auto No-Fault*, 305 Mich App at 313-314, quoting MCL 15.243(1)(d) (alterations in *Coalition*). Thus, the legislative amendment “does not, expressly or otherwise, dispense with or change the provisions of [FOIA]” because FOIA was drafted in a manner that permits other statutes to exempt public bodies from FOIA’s disclosure requirements. *Midland Twp*, 401 Mich at 661.

In sum, because MCL 500.134(4) did not alter, amend, change, or dispense with any provisions of FOIA, the Legislature was not required to reenact and republish FOIA under Const 1963, art 4, § 25.

IV. CONCLUSION

The MCCA was created by state authority, and it is therefore a "public body" for purposes of FOIA. The Legislature did not violate Const 1963, art 4, § 25 when it enacted MCL 500.134(4). Accordingly, although the MCCA is a public body, as we concluded in our prior opinion, its records are exempt from disclosure under MCL 500.134(4) and (6)(c), and the trial court erred by granting summary disposition in favor of plaintiffs and by denying the MCCA's motion for summary disposition. See *Coalition Protecting Auto No-Fault*, 305 Mich App at 326-327.

Reversed and remanded for entry of an order awarding summary disposition in favor of the MCCA. A public question being involved, no costs awarded. MCR 7.219(A). We do not retain jurisdiction.

Owens, P.J., concurred with Borrello, J.

Gleicher, J. (*concurring in part and dissenting in part*). Two provisions before us, one statutory and one constitutional, serve a common purpose: to promote transparency in government. The core objective of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, "is to provide the people of this state with full and complete information regarding the government's affairs." *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 462; 789 NW2d 178 (2010). Our Constitution's provision prescribing the manner in which statutes may be amended, Const 1963, art 4, § 25,

prevents the Legislature from cloaking alterations of previously enacted laws in garb "calculated to mislead the careless as to its effect[.]" *People v Mahaney*, 13 Mich 481, 497 (1865).

By inserting a FOIA exemption into a statute addressing certain operational mechanics of insurance "associations," the Legislature obscured from public view its significant diminution of the FOIA's reach. Because this piecemeal amendment contravenes our Constitution, I respectfully dissent.

The FOIA is "a broadly written statute designed to open the closed files of government." *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 463 Mich 353, 359; 616 NW2d 677 (2000). Public bodies must disclose "public record[s]" sought under the act unless a specific statutory exemption shields the record from full disclosure. MCL 15.233(1). A "[p]ublic record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e). The FOIA separates public records into two categories: "[t]hose that are exempt from disclosure under section 13," and "[a]ll public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act." MCL 15.232(e)(*i*) and (*ii*).[1] The majority correctly recognizes that the Michigan Catastrophic Claims Association (MCCA) is a "public body." It necessarily follows that, unless exempted under § 13, the MCCA's public records are subject to disclosure under the FOIA.

Section 13 of the FOIA provides a comprehensive list of public records exempt from disclosure. The exemptions range far and wide, from certain trade secrets

[1] Section 13 is MCL 15.243.

voluntarily provided to state agencies, MCL 15.243(1)(f), to "[m]edical . . . facts" concerning an individual whose identity would be revealed by disclosure, MCL 15.243(1)(*l*), to "[i]nformation that would reveal the exact location of archaeological sites," MCL 15.243(1)(o). Notwithstanding the breadth of the exemptions' subject matters, the exceptions themselves are tightly circumscribed. For example, to warrant exemption, a trade secret must fulfill three separate and distinct criteria.[2] Although information revealing the "exact location of archaeological sites" need not be revealed, "[t]he department of history, arts, and libraries may promulgate rules . . . to provide for the disclosure of the location of the" sites to further "preservation or scientific examination."

The general thrust of the FOIA is strongly prodisclosure. Its exemptions are judiciously drawn and are to be "narrowly construed, and the party asserting the exemption bears the burden of proving that the exemption's applicability is consonant with the purpose of the FOIA." *Detroit Free Press, Inc v Dep't of Consumer & Indus Servs*, 246 Mich App 311, 315; 631 NW2d 769

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[2] MCL 15.243(1)(f) provides:

> Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy [are exempt from disclosure] if:
>
> (*i*) The information is submitted upon a promise of confidentiality by the public body.
>
> (*ii*) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
>
> (*iii*) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

(2001). The FOIA does not exempt records created by the MCCA from public disclosure. Nor does the FOIA extend blanket immunity from disclosure of public records to any specific "public body." Rather, the FOIA permits the Legislature to exempt "[r]ecords or information *specifically described*" from disclosure. MCL 15.243(1)(d) (emphasis added).

The Legislature adopted the automobile no-fault act, MCL 500.3101 *et seq*., in 1972. In 1978, the Legislature amended the no-fault act by establishing the MCCA "as the means for reimbursing each member insurer for all 'ultimate loss sustained under personal protection insurance coverages in excess of $250,000.00 in each loss occurrence.' " *League Gen Ins Co v Mich Catastrophic Claims Ass'n*, 435 Mich 338, 340-341; 458 NW2d 632 (1990), citing MCL 500.3104(2). Aptly, the Legislature located this amendment of the no-fault act within the no-fault act. The duties and obligations of the MCCA are also found within the no-fault act. MCL 500.3104.

In 1988, the Legislature amended Section 134 of the Insurance Code, MCL 500.134, by enacting PA 349. The act's preamble[3] states that it was intended "to regulate the incorporation or formation of domestic insurance and surety companies and associations" and to "provide their rights, powers, and immunities and to prescribe the conditions on which companies and associations organized, existing, or authorized under this act may exercise their powers . . . ."[4] 1988 PA 349, title. Among the added provisions was § 134(4), which provides:

[3] A preamble is language that comes before the enacting clause of a statute; typically a preamble provides reasons for the enactment. See *Black's Law Dictionary* (7th ed). The preambulary language in a Michigan public act is referred to as the act's "title."

[4] "A preamble is not to be considered authority for construing an act, but it is useful for interpreting statutory purpose and scope." *King v Ford Motor Credit Co*, 257 Mich App 303, 311-312; 668 NW2d 357 (2003).

> A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws. [MCL 500.134(4).]

Instead of amending the FOIA's listed exemptions to include "a record of" the MCCA, the Legislature inserted a brand-new FOIA exemption into a portion of the Insurance Code generally addressing a variety of organizational issues relevant to "associations" governed by the code.

Const 1963, art 4, § 25 provides simply:

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

Specifically referencing the FOIA, MCL 500.134(4) purports to exempt "[a] record of an association" from public disclosure. The Legislature located this obvious amendment of the FOIA in a statute unconnected to the FOIA, failed to add the exemption to the FOIA, and neither reenacted nor published at length § 13 of the FOIA which it (1) referenced by its title only and (2) "revised, altered [and] amended" by adding a brand-new category of information excused from disclosure. Prevention of this type of legislative legerdemain is precisely the object of Article 4, § 25.

"Our primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of 'common understanding.' " *UAW v Green*, 498 Mich 282, 286-287; 870 NW2d 867 (2015). "We identify the common understanding of constitutional text by applying the plain meaning of the text at the time of ratification." *Id*. at 287. The task is made

somewhat easier here, as Article 4, § 25 of the 1963 Constitution is virtually identical to Article 4, § 25 of the 1850 Constitution. "Except for some punctuation and some rearrangement of words in the latter half of the provision, this language has continued through to this date (also see Const 1908, art 5, §§ 21, 22)." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 469-470; 208 NW2d 469 (1973). The seminal opinion construing this constitutional provision, also found in many other state constitutions,[5] was authored by Justice THOMAS M. COOLEY.

In *Mok v Detroit Bldg & Savings Ass'n No 4*, 30 Mich 511, 516 (1875), Justice COOLEY explained that "the evil" which Article 4, § 25 "was meant to remedy was one perpetually recurring, and often serious."

> Alterations made in the statutes by mere reference, and amendments by the striking out or insertion of words, without reproducing the statute in its amended form, were well calculated to deceive and mislead, not only the legislature as to the effect of the law proposed, but also the people as to the law they were to obey, and were perhaps sometimes presented in this obscure form from a doubt on the part of those desiring or proposing them of their being accepted if the exact change to be made were clearly understood. Harmony and consistency in the statute law, and such a clear and consecutive expression of the legislative will on any given subject as was desirable, it had been found impracticable to secure without some provision of this nature; and as the section requires nothing in legislation that is not perfectly simple and easily followed, and nothing that a due regard to clearness, certainty and simplicity in the law would not favor, it is probable that if the requirement has at any time been disregarded by the legislature, the default has proceeded from inadvertence merely. [*Id*. at 516-517.]

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[5] See 1A Singer & Singer, Sutherland Statutory Construction (7th ed), § 22:16, pp 299-305.

The constitutional provision, Justice COOLEY continued, "requires each act of legislation to be complete in itself, and forbids the enactment of fragments which are incapable of having effect or of being understood until fitted in to other acts after by construction or otherwise places have been made for them. No such legislation can be sustained." *Id*. at 529.

Fast-forwarding 130 years, this Court applied Article 4, § 25 in a case bearing remarkable similarity both to *Mok* and to the matter now before us. In *Nalbandian v Progressive Mich Ins Co*, 267 Mich App 7; 703 NW2d 474 (2005), we determined that the Legislature contravened the Constitution by amending § 2103(4)(a)(*iii*) of the Insurance Code, MCL 500.2103(4)(a)(*iii*), without reenacting or republishing the code. The pertinent section of the Insurance Code permitted insurance companies to calculate premium rates based on "insurance eligibility points" assessed for an insured's speed limit violations. *Id*. at 9. Two eligibility points could be assessed against a driver who violated the speed limit by 10 miles per hour or less. *Id*. "Notwithstanding that then-existing provision, the Legislature amended the vehicle code in 1987, and added a provision disallowing the imposition of any insurance eligibility points for ten mile per hour (or less) speed limit violations in one specific instance[.]" *Id*. Thus, the practical effect of the amended vehicle code provision was an amendment of the Insurance Code. Drawing primarily on Justice COOLEY's reasoning in *Mok*, this Court rejected the argument that the Legislature had accidentally amended the vehicle code. We stressed:

> The conflict between the two is not one resulting from mere inadvertence. To the contrary, vehicle code § 628(11)[, MCL 257.628(11),] quite clearly resulted from a legislative knowledge of the Insurance Code's 2-point rule

> and an intent to abrogate that rule with respect to 55 mile per hour speed zone violations. The 55 mph speed zone exception constitutes a "fragment[ary]" attempt to "accommodate [the 2 point rule] by [an] indirect amendment[ ]" that can only be understood or given effect by "fitt[ing]" the two acts together. . . . " 'No such legislation can be sustained.' " [*Alan v Wayne Co*, 388 Mich 210, 272; 200 NW2d 628 (1972)], quoting *Mok*, [30 Mich] at 529. "[W]hen the Legislature intends to amend a previous act, it must do so in conformance with the plain and unequivocal requirements of . . . Const 1963, art 4, § 25." *Alan*, [388 Mich] at 275. [*Id*. at 14 (citation omitted; alterations in *Nalbandian*).]

The majority attempts to distinguish *Nalbandian* and *Mok* by asserting that the amendment to the Insurance Code exempting the MCCA from the FOIA "did not undertake to 'dispense with some things required' by [the] FOIA, it did not 'make some changes' to [the] FOIA, nor did it incorporate [the] FOIA and 'accommodate it by indirect amendments.' " Though the majority has accurately quoted *Mok*, it misunderstands the effect of MCL 500.134(4). Contrary to the majority's conclusions, the statute does indeed " 'make some changes' to the [the] FOIA"; the Legislature admitted as much by expressly referencing the exemption section of the FOIA when it amended § 134(4). Indeed, § 134(4) works a sea change in the FOIA as it privileges from disclosure the entirety of the information held by a "public body," rather than "specifically describ[ing]" the records or information exempted. See 15.243(1)(d).

The majority's next statement—that § 134(4) "is not a 'piecemeal amendment to an existing comprehensive statutory scheme' "—is simply untrue. Indisputably, the FOIA is a "comprehensive statutory scheme." By exempting the MCCA from the FOIA, the Legislature modified the FOIA in a fragmentary fashion. No one

reading the FOIA's exemptions would understand that yet another exemption exists in the depths of the Insurance Code. In my view, this form of statutory amendment fully qualifies as "piecemeal."[6]

Nor am I persuaded that because § 13(1)(d) of the FOIA permits the Legislature to create additional exemptions, § 134(4) passes constitutional muster. Article 4, § 25 plainly provides that the Legislature may not revise, alter, or amend a law by reference to its title only, as was done here. Rather, "[t]he section or sections of the act altered or amended" must be "reenacted and published at length." The Legislature failed to take this constitutionally necessary step. The majority has not explained how the Legislature may arrogate unto itself a constitutional bypass by inserting some "magic words" into a statute.

The Legislature certainly may amend or revise the FOIA. When it created a new FOIA exemption in a statutory section unrelated to the FOIA—while nevertheless referring to the FOIA—the Legislature overlooked its constitutional obligation to undertake a more labor-intensive amendatory step: reenacting and republishing the exemption section of the FOIA. A citizen (or legislator) reading the FOIA would have no reason to know that a covert FOIA exemption hides within the Insurance Code. This is the amendatory obfuscation that Article 4, § 25 forbids. As Justice COOLEY put it:

> The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators

[6] The Michigan Supreme Court declared in *Alan*, 388 Mich at 281, "*Mok* stands for the rule that you *cannot* amend statute C even by putting in statute B specific words to amend statute C, unless you republish statute C as well as statute B under Const 1963, art 4, § 25." If one substitutes the FOIA for "statute C" and MCL 500.134(4) for "statute B," the flaw in the majority's reasoning becomes obvious.

> themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. [*Mahaney*, 13 Mich at 497.]

I would hold that because MCL 500.134(4) offends our Constitution's Reenact and Publish Clause, Const 1963, art 4, § 25, it cannot be enforced.

ZAWILANSKI v MARSHALL

Docket No. 330495. Submitted June 8, 2016, at Lansing. Decided July 12, 2016. Approved for publication August 25, 2016, at 9:05 a.m.

Plaintiff brought this action in the Livingston Circuit Court for custody of the child born to her and defendant. Plaintiff and defendant never married. Defendant died during the pendency of the action, and petitioner, the child's paternal grandmother, petitioned the court for liberal grandparenting time with the child. Petitioner had been the child's primary caregiver while plaintiff was recovering from a serious automobile accident, and petitioner had developed a close bond with the child. Plaintiff agreed with petitioner that grandparenting time was appropriate, but the two could not agree on an amount of grandparenting time satisfactory to them both. The parties submitted the issue to the Friend of the Court (FOC) for an investigation. The referee issued a recommendation that petitioner be awarded the same amount of grandparenting time as the parenting time a noncustodial parent would be awarded. The court, David J. Reader, J., denied plaintiff's objections to the order, expressly adopted the order, and denied plaintiff's motion for reconsideration. Plaintiff appealed.

The Court of Appeals *held*:

Michigan's grandparenting-time statute, MCL 722.27b, allows a grandparent, under certain circumstances, to petition for grandparenting time with a child. Under MCL 722.27b(4)(b), a fit parent's decision to deny a grandparent grandparenting time is presumed to be in the child's best interests; that is, a fit parent's decisions, including the denial of grandparenting time, are presumed not to create for the child a substantial risk of mental, physical, or emotional harm. When a fit parent denies grandparenting time, the grandparent seeking the time must overcome the presumption that the parent's denial will not create a substantial risk of harm to the child. In this case, petitioner agreed that plaintiff was a fit mother, and plaintiff agreed that petitioner should be allowed grandparenting time with the child. The sole point of contention was the amount of grandparenting time to be awarded; petitioner wished a liberal grandparenting-time schedule while plaintiff proposed a more limited schedule. The referee

recommended that petitioner be awarded as much grandparenting time as a noncustodial parent would be awarded parenting time. The FOC's investigation, the referee's recommendation, and finally, the trial court's adoption of the referee's recommendation, failed to acknowledge the fundamental right of a fit parent to make decisions about the companionship, care, custody, and management of the parent's child. Most importantly, the referee and the trial court agreed to award petitioner the equivalent of a noncustodial parent's parenting time without finding that petitioner had overcome the fit-parent presumption. In this situation, petitioner had to show that plaintiff's denial of the amount of grandparenting time exceeding plaintiff's proposal created a substantial risk of harm to the child, but no evidence was presented on that question. Therefore, the trial court erred by adopting the referee's recommendation that petitioner be awarded the same amount of grandparenting time as a noncustodial parent would be awarded parenting time.

Vacated and remanded.

Legal Services of South Central Michigan (by *Kellie Maki Foster*) for plaintiff.

Gentry Nalley, PLLC (by *Kevin S. Gentry*), for petitioner.

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

PER CURIAM. Plaintiff-mother appeals by right an order denying her objections to an interim order awarding petitioner-grandmother grandparenting time in an amount equivalent to the parenting time awarded a noncustodial parent. For the reasons discussed, we vacate the court's order and remand the matter to the trial court for proceedings consistent with this opinion.

I. FACTS

Plaintiff and defendant-father were never married, and in 2011 plaintiff initiated a custody case with respect to their child. Petitioner is defendant's mother.

After defendant's death on March 25, 2014, petitioner moved for grandparenting time in the existing custody case. MCL 722.27b(1)(c); MCL 722.27b(3)(a).

In the summer of 2010, before defendant's death, plaintiff was seriously injured in an automobile accident when the child at issue was four months old. Present in the car with plaintiff was her eldest child, half-brother to the child at issue. Both plaintiff and the older child suffered traumatic brain injuries. Plaintiff was in a coma for three months, after which she required intensive inpatient rehabilitation. Although defendant had custody of the child during this time, petitioner was the primary caregiver. The record shows that a close bond developed between petitioner and the child.

Beginning in the fall of 2010, petitioner took the child for a weekly, one-hour visit to the rehabilitation center where plaintiff was recovering. However, in the fall of 2011, after not having seen the child for several weeks, plaintiff petitioned the court for custody, parenting time, and child support. Following a Friend of the Court (FOC) investigation, the court awarded plaintiff and defendant joint physical and legal custody of the child and plaintiff limited weekly parenting time, anticipating that plaintiff's parenting time would increase as she continued to recover from her injuries. Four months later, plaintiff petitioned for an increase in parenting time in accordance with the court's expectations.

When petitioner's son died in March 2014, plaintiff's parents informed petitioner that they were taking the child to live with plaintiff and that they would be in touch with petitioner. Less than a week later, petitioner filed a guardianship application. In exchange for petitioner's withdrawal of the application, plaintiff agreed to allow grandparenting time every Tuesday

and Thursday from 9:30 a.m. until 7:30 p.m. and one Friday a month from 5:00 p.m. until 8:00 p.m. Plaintiff agreed to submit the matter of a grandparenting-time schedule to the FOC for investigation.

After its investigation, the FOC issued a report that recommended changing petitioner's three-hour grandparenting time on one Friday each month to an overnight from 5:00 p.m. Friday until 5:00 p.m. Saturday, "provided [petitioner] is engaged in regular individual counseling." The report also recommended that petitioner's grandparenting time on Tuesdays and Thursdays continue through the summer months but be modified once the child started preschool in the fall. The following month, petitioner filed the motion for grandparenting time that is the basis of the instant appeal.

The sole point of contention between petitioner and plaintiff is the amount of grandparenting time appropriate under the circumstances. Petitioner requested the Friday overnights recommended by the FOC report, as well as additional overnights every other weekend from 5:00 p.m. Friday until 5:00 p.m. Sunday. She further requested that the grandparenting time on Tuesdays and Thursdays remain unchanged during the school year, proposing that she would be responsible for transporting the child to and from preschool. In addition, petitioner asked the court to allow her to enroll the child in the counseling that the report recommended. As an alternative to this schedule, plaintiff offered twice-weekly visits from the end of the school day until 7:30 p.m., or from 5:30 p.m. until 7:30 p.m. if there was no school, and a monthly overnight from 5:00 p.m. Friday until 5:00 p.m. Sunday, the latter contingent on petitioner's verifying that she was undergoing regular counseling for her grief and loss.

Plaintiff proposed that the parties could agree to additional time and that the weekly grandparenting time should be sufficiently adjustable to allow plaintiff to schedule trips, vacations, and other family activities.

At the hearing on her petition before an FOC referee, petitioner did not dispute plaintiff's ability to care for the child, emphasizing instead the level of care that she had provided for the child for most of the child's life and the resulting bond that existed between them. Plaintiff's testimony stressed her ability to care for her children, her concern that she reestablish herself in the role of mother and parental authority, and her fear that granting the amount of grandparenting time requested would effectively aid petitioner in undermining plaintiff's role.

Stressing that petitioner was the one constant in the child's life, the referee recommended that petitioner "be given the parenting time that a normal noncustodial parent would receive": alternate weekends from 6:00 p.m. Friday until 6:00 p.m. Sunday, four nonconsecutive weeks of summer vacation, holiday "parenting time" in accordance with the Livingston County FOC guidelines, and a midweek visitation from 5:30 p.m. until 7:30 p.m. on a mutually agreeable day. The referee explained that this schedule would not elevate petitioner to joint legal custodian of the minor, but was a schedule that would "best serve the child's best interests, and again, ensure continuation of a bond that's been established between the Petitioner and the child and will also allow the child to know his paternal family." An interim order corresponding to the referee's recommendations was entered. The trial court denied plaintiff's objections, expressly adopting

the referee's grandparenting-time recommendation. Plaintiff moved for reconsideration, but the motion was denied.

II. ANALYSIS

Plaintiff contends that the trial court erred by affirming, over her objections, an award of grandparenting time in an amount equivalent to the parenting time awarded a noncustodial parent without petitioner having overcome the fit-parent presumption of MCL 722.27b(4)(b).

"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 the instant case, the referee presumed that plaintiff was a fit parent but found that petitioner had overcome the fit-parent presumption. The referee based her finding on the fact that an FOC report recommended grandparenting time.

We first note that the referee did not have to presume that plaintiff was a fit parent; the record shows that testimonial evidence of her fitness was introduced, and even petitioner conceded the point. Next, the FOC report upon which the referee based her conclusion that petitioner rebutted the fit-parent presumption recommended grandparenting time because the parties agreed in principle on the desirability of grandparenting time and had asked the FOC to recommend a grandparenting-time schedule. It seems illogical to interpret the fact that the report did what it was supposed to do—recommend a grandparenting-time schedule at the request of both parties—as evidence that petitioner rebutted the fit-parent presumption.

Further, the referee's finding that petitioner overcame the fit-parent presumption ignores the fact that plaintiff agreed in principle that petitioner should have grandparenting time and proposed a grandparenting-time schedule, albeit one that included less grandparenting time than petitioner was currently enjoying. Therefore, in order to overcome the fit-parent presumption given that plaintiff was deny-

ing some, but not all, grandparenting time, petitioner had to show that plaintiff's denial of the amount of grandparenting time exceeding plaintiff's proposal created a substantial risk of harm to the child. See MCL 722.27b(4)(b). No evidence was presented on this question.

We must affirm orders concerning grandparenting time unless the trial court, among other things, made a clear legal error on a major issue. *Keenan*, 275 Mich App at 679. We conclude that the referee committed clear legal error, and the trial court confirmed that error by failing to apply the fit-parent presumption to plaintiff's grandparenting-time decision and by failing to require that petitioner rebut the presumption that plaintiff's proposed grandparenting-time schedule would not create a substantial risk of harm to the minor. MCL 722.27b(4)(b). The referee deprived plaintiff of the benefit of the fit-parent presumption not only by ignoring the fact that plaintiff had agreed to grandparenting time and had offered petitioner a grandparenting-time schedule, but also by concluding against the great weight of the evidence that petitioner had rebutted the fit-parent presumption. *Fletcher*, 447 Mich at 879. This error was not harmless; it unreasonably deprived plaintiff of her constitutionally protected right to make decisions about "the companionship, care, custody, and management" of her child. *In re Sanders*, 495 Mich at 409.

We vacate the trial court's order and remand the matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

SAWYER, P.J., and HOEKSTRA and WILDER, JJ., concurred.

MADSON v JASO

Docket No. 331605. Submitted August 2, 2016, at Lansing. Decided August 25, 2016, at 9:10 a.m. Leave to appeal sought.

Defendant, Latoya Jaso, petitioned the Lenawee Circuit Court, Family Division, to modify a parenting-time order to reinstate her parenting time after her release from jail. The original custody order had granted defendant and plaintiff, Ronnie Madson, Jr., joint legal custody of the parties' minor child, and it granted plaintiff physical custody of the minor child with parenting time for defendant as agreed upon by the parties. The order was later modified to establish a specific parenting-time schedule for defendant. In December 2014, the court, Margaret M. S. Noe, J., modified the order and granted plaintiff extended parenting time because defendant was in jail. An evidentiary hearing was held after defendant's release from jail, and in October 2015, defendant's parenting time was restored without limitation. Plaintiff objected to the order and did not comply with it. In December 2015, the court determined that defendant was owed make-up parenting time because of plaintiff's lack of compliance with the order; the court ordered that defendant have five days of uninterrupted parenting time with the child and alternating weekly parenting time after that five-day period; the order also established a Christmas holiday schedule. Plaintiff did not comply with that order or a subsequent order in which the court ordered plaintiff to immediately turn over the minor child for defendant's make-up parenting time. In February 2016, the court indicated it would hold plaintiff in contempt if he did not comply with the order, ordered the parties to obtain a custody evaluation in preparation for a custody trial, and awarded plaintiff parenting time on alternating weekends to allow defendant her make-up parenting time. Plaintiff appealed that order, and the Court of Appeals dismissed the appeal for lack of jurisdiction, explaining that the postjudgment order granting plaintiff limited parenting time was not a final order appealable by right as defined in MCR 7.202(6) because it could not be considered an order affecting the custody of a minor under MCR 7.202(6)(a)(iii). *Madson v Jaso*, unpublished order of the Court of Appeals, entered March 7, 2016 (Docket No. 331605). The Court of Appeals denied plaintiff's

motion for reconsideration. *Madson v Jaso*, unpublished order of the Court of Appeals, entered April 18, 2016 (Docket No. 331605). Plaintiff filed an application for leave to appeal, and the Michigan Supreme Court vacated the March 7, 2016 order of the Court of Appeals and remanded the case to the Court of Appeals for further consideration regarding whether the parenting-time order may have affected custody of the minor within the meaning of MCR 7.202(6)(a)(iii) or was otherwise appealable by right under MCR 7.203(A). 499 Mich 960 (2016).

The Court of Appeals *held*:

1. MCR 7.203(A)(2)—which grants the Court of Appeals jurisdiction of an appeal of right from an order of a court or tribunal from which an appeal of right to the Court has been established by law or court rule—did not grant plaintiff an appeal of right in this case because there is no law or court rule that establishes an appeal of right in the Court of Appeals from a make-up parenting-time order.

2. Under MCR 7.203(A)(1), the Court of Appeals has jurisdiction of an appeal of right from an order that meets the definition of a final order under MCR 7.202(6). MCR 7.202(6)(a)(i)—which provides that in a civil case, a final order includes the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties—did not provide plaintiff with an appeal of right because the trial court order was a provisional, postjudgment parenting-time order and did not dispose of all the claims and rights of the parties.

3. Under MCL 722.1102(d) of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., a child-custody proceeding is defined as a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Physical custody concerns care-giving authority and which parent a child is living with, and legal custody concerns decision-making authority related to a child's welfare and life. The UCCJEA language—which refers separately to physical custody, legal custody, and parenting time—supports the conclusion that parenting time is a distinct concept to be considered in the context of physical and legal custody.

4. It is not necessary for a trial court order to expressly state that it involves a custody determination to affect custody. Under MCR 7.202(6)(a)(iii), a final order in a domestic relations action is a postjudgment order affecting the custody of a minor. MCR 7.202(6)(a)(iii) does not limit the term "custody" to physical custody; an order under that subrule is appealable by right when it produces an effect on, or influences in some way, the legal

custody or physical custody of a minor. A trial court order affects custody when it has an effect on where a minor child will live, and for that reason an order denying a motion to change custody is a final order for purposes of MCR 7.202(6)(a)(iii) and appealable by right. The court rule does not provide an appeal of right from an order granting make-up parenting time. If a trial court order affecting legal custody—for example, an order determining whether a child may attend summer camp, whether to expose the child to religion, or whether to expose the child to certain television programs—were appealable by right under MCR 7.202(6)(a)(iii) as a postjudgment order, that understanding would so expand the court rule as to nullify the qualifying language "affecting the custody of a minor." The Michigan Supreme Court would have included parenting-time orders in the court rule had it intended those orders to be appealable by right.

5. The trial court's make-up parenting-time order was not a final order for purposes of MCR 7.202(6)(a)(iii), and plaintiff accordingly did not have an appeal of right under MCR 7.203(A)(1) from the order. The order did not change the parties' custody of the minor child because plaintiff retained sole physical custody of the minor child, did not change the child's established custodial environment, and did not resolve where the minor child would live. Rather, the order granted make-up parenting time to defendant because of plaintiff's failure to comply with the parenting-time order for months. While the order granted defendant extensive make-up parenting time, that order was separate from the issue of custody, which was already scheduled to be evaluated.

Appeal dismissed.

PARENT AND CHILD — POSTJUDGMENT ORDERS AFFECTING CUSTODY — APPEALS OF RIGHT — MAKE-UP PARENTING TIME.

A postjudgment order affecting the custody of a minor is an order that produces an effect on, or influences in some way, the legal custody or physical custody of a minor; an order for make-up parenting time does not affect the custody of a child, is not a final order under MCR 7.202(6)(a)(iii), and is therefore not appealable by right under MCR 7.203(A)(1).

Speaker Law Firm (by *Liisa R. Speaker* and *Jennifer M. Alberts*) for plaintiff.

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

PER CURIAM. This case is before us on remand from our Supreme Court for further consideration of our March 7, 2016 order, which dismissed plaintiff's claim of appeal for lack of jurisdiction. The Supreme Court has directed us to "issue an opinion specifically addressing the issue whether the order in question may affect [the] custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Madson v Jaso*, 499 Mich 960 (2016). We conclude that this Court lacks jurisdiction over this provisional, postjudgment order for make-up parenting time and, accordingly, dismiss plaintiff's appeal.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff, Ronnie Madson, Jr., and defendant, Latoya Jaso, who were never married, are the parents of a minor child born in 2009. In December 2011, the circuit court entered an order providing that the parties would share joint legal custody and plaintiff would have physical custody of the child; parenting time would be at times agreeable to the parties. In June 2014, in response to defendant's request for a more formal parenting-time arrangement, the circuit court set forth a schedule under which defendant would have one mid-week overnight and alternating weekends with the child.

The parents then made separate reports to Child Protective Services regarding abuse of the child, but the allegations were not substantiated. In October 2014, plaintiff moved to amend the parenting-time order, but the motion was not heard because defendant was jailed in November 2014 for nonpayment of child support.

In December 2014, the circuit court entered an ex parte order, granting plaintiff extended parenting time. When defendant was released from jail, she petitioned the court for reinstatement of her parenting time. The circuit court referred the matter to the Friend of the Court in February 2015, and the referee held an evidentiary hearing in May 2015.

Six months later, in October 2015, the Friend of the Court referee recommended that defendant's parenting time be restored and that nothing should prevent her from having normal, regular parenting time with the child. Plaintiff did not comply with the order and objected to it.

At a December 2015 hearing, the circuit court ruled that defendant was owed make-up parenting time. The court ordered that defendant was first entitled to five days of uninterrupted parenting time and that the parties would then alternate parenting time in future weeks. The court also established a Christmas holiday schedule, but plaintiff did not comply with the order. The following day, the circuit court issued an order directing plaintiff to immediately turn the child over to defendant for make-up parenting time. Plaintiff again did not comply with the order. Instead, plaintiff obtained a personal protection order against defendant from the county where he lived.

At a January 2016 hearing, the circuit court observed that it would resolve the matter in the child's best interests, warned plaintiff it would issue an arrest warrant for him for contempt if he did not abide by the order, and directed the parties to obtain a custody evaluation from a psychologist in anticipation of a custody trial. In the interim, plaintiff was awarded parenting time on alternating weekends.

Plaintiff filed a claim of appeal in this Court, maintaining that the instant make-up parenting-time order was one that affected custody. This Court dismissed the appeal on its own motion for lack of jurisdiction.[1] Plaintiff moved for reconsideration, which this Court denied.[2]

Plaintiff applied for leave to appeal in our Supreme Court, arguing that this Court's decisions with respect to jurisdiction were inconsistent and requesting that the case be remanded to this Court as on leave granted. Plaintiff stated that he was not asking the Supreme Court to grant leave to appeal given the potential for delay and indicated that the circuit court and this Court had already caused delays in this matter.[3] Amicus curiae Michigan Coalition of Family Law Appellate Attorneys[4] filed an amicus brief in the Supreme Court and called for clarity regarding jurisdiction in domestic relations appeals.

On June 24, 2016, our Supreme Court vacated this Court's March 7, 2016 order of dismissal and remanded the case to this Court for further consideration. The order provides, in pertinent part:

> On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue whether the

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[1] *Madson v Jaso*, unpublished order of the Court of Appeals, entered March 7, 2016 (Docket No. 331605).

[2] *Madson v Jaso*, unpublished order of the Court of Appeals, entered April 18, 2016 (Docket No. 331605).

[3] We note that this Court dismissed plaintiff's claim of appeal just 18 days after it was filed. Despite this Court's standard observation in a dismissal order that appellant could file an application for leave to appeal in this Court, plaintiff instead moved for reconsideration. After reconsideration was denied, plaintiff still did not file an application seeking review on the merits from this Court, but instead chose to file an application in our Supreme Court.

[4] The Coalition is an informal group of appellate attorneys whose practices primarily involve domestic relations appeals.

> order in question may affect [the] custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Lenawee Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the plaintiff-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Lenawee Circuit Court Family Division's order is not appealable by right, it may then dismiss the plaintiff-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand)*, 312 Mich App 591[; 880 NW2d 242] (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1[; 822 NW2d 278] (2012). We do not retain jurisdiction. [*Madson*, 499 Mich 960.]

II. STANDARD OF REVIEW

Whether this Court has jurisdiction over an appeal is an issue of law subject to review de novo. *Wardell*, 297 Mich App at 131. Likewise, the interpretation of a court rule is a question of law that is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. ANALYSIS

The question of jurisdiction in this case rests on two court rules, MCR 7.202 and MCR 7.203. When interpreting a court rule, this Court relies on the following principles:

> The rules of statutory interpretation apply to the interpretation of court rules. The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may

> consult a dictionary to determine that meaning. [*Varran*, 312 Mich App at 599 (citations omitted).]

MCR 7.203(A) contains two subparts, and the latter is quickly addressed. MCR 7.203(A)(2) provides that this Court has jurisdiction of an appeal of right from an order of a court or tribunal from which an appeal of right to this Court has been established by law or court rule. No law or court rule establishes an appeal of right to this Court from an order setting forth make-up parenting time; therefore, MCR 7.203(A)(2) does not apply.

Accordingly, we turn to MCR 7.203(A)(1), which provides an appeal of right from an order that meets the definition of a "final order" under MCR 7.202(6). Subpart (a) of that court rule includes the following definitions of a final order in a civil case:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,
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> * * *
>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor . . . . [MCR 7.202(6)(a).]

MCR 7.202(6)(a)(i) does not apply here. The current order being appealed does not dispose of all the claims and rights of the parties. Rather, the order was one of a series of provisional, postjudgment parenting-time orders issued before the custody evaluation that would take place prior to the custody trial; accordingly, it is not a final order under MCR 7.202(6)(a)(i).[5]

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[5] The first final order in this case was the December 2011 order that awarded the parties joint legal custody of the child and awarded physical custody to plaintiff.

The dispositive issue, therefore, is whether the instant parenting-time order is an order "affecting the custody of a minor" within the meaning of MCR 7.202(6)(a)(iii). In examining this issue, we consider the nature and scope of the order being appealed to determine the essence of that order. The order does not change the parties' custody of the minor child, because the court's order regarding custody still stands; plaintiff retains sole physical custody. The order grants make-up parenting time to defendant as a result of plaintiff's withholding of parenting time for months. That the order does not have a specific end date does not mean that it is not an interim order. Also, because the order resulted from plaintiff withholding make-up parenting time, the circuit court did not examine the MCL 722.23 best-interest factors in the context of a custody decision.[6] Indeed, the circuit court properly considered the make-up parenting time separate and apart from custody.

Michigan appellate courts have wrestled with the application of MCR 7.202(6)(a)(iii). Our Courts have generally held that an order need not expressly indicate that it is a custody determination to affect custody. See *Thurston v Escamilla*, 469 Mich 1009 (2004). The court rule does not require the order be permanent to fall within MCR 7.202(6)(a)(iii). *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007).

Determining whether an order falls within MCR 7.202(6)(a)(iii) is not a straightforward endeavor. This Court's jurisdiction of right over orders affecting child custody has been recognized in cases involving the denial of a motion to change domicile, *Thurston*, 469

[6] Nor did it examine the MCL 722.27a(6) factors designed for parenting-time determinations when a parent is convicted of certain criminal sexual conduct offenses and the victim was the parent's child.

Mich 1009, the denial of a motion to change the children's school, *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), and the grant of a motion for grandparenting time, *Varran*, 312 Mich App 591. Conversely, this Court has dismissed claims of appeal for lack of jurisdiction on the basis that the orders appealed do not affect the custody of a minor in cases involving a determination that the children must continue to attend the same elementary school until further order of the circuit court, *Zalewski v Garrison*, unpublished order of the Court of Appeals, entered November 6, 2014 (Docket No. 323543), a ruling to hold in abeyance for six months a decision regarding custody and parenting time based on the parents' progress, *Hutchison v Leadbetter*, unpublished order of the Court of Appeals, entered May 3, 2016 (Docket No. 332503), and the denial of a parent's request to change a child's school enrollment from one school to another, *Marik v Marik*, unpublished order of the Court of Appeals, entered July 12, 2016 (Docket No. 333687). These cases illustrate that the question of jurisdiction under MCR 7.202(6)(a)(iii) is not without complication. The difficulty is exacerbated by ambiguity in the language of the court rule. We therefore urge the Supreme Court either to amend the court rule to resolve the confusion or to clarify its intent in an opinion.

In attempting to discern our Supreme Court's intent in the court rule, this Court has previously examined the plain language of MCR 7.202(6)(a)(iii). The court rule does not define "affecting," so this Court in *Wardell*, 297 Mich App at 132, referred to a dictionary definition of the term "affect," stating "[m]ost generally, to produce an effect on; to influence in some way," *Black's Law Dictionary* (9th ed). The *Wardell* Court noted that an order affecting custody includes one in which the trial court's ruling has an effect on where the

child will live. *Wardell*, 297 Mich App at 132. The Court focused on the physical location of the child, and determined that an order denying a motion to change custody is a final order for purposes of MCR 7.202(6)(a)(iii). *Id*. at 132-133. The Court reasoned as follows:

> In a custody dispute, one could argue, as plaintiff does, that if the trial court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied. [*Id*.]

The order in this case did not resolve which parent would have custody of the child, nor did it resolve where the child would live. Rather, it set forth make-up parenting time because plaintiff had unilaterally withheld that time from defendant.

This Court cited *Wardell* in *Rains v Rains*, 301 Mich App 313, 321-322; 836 NW2d 709 (2013), wherein the plaintiff had appealed the denial of her motion to change the domicile of the minor child from Detroit to Traverse City and the resulting modification of her parenting time. In response to the motion, the defen-

dant had moved for a change in custody. *Id*. at 314-315. The *Rains* Court decided that the relevant inquiry was whether a trial court's order " 'influences where the child will live,' regardless of whether the trial court's ultimate decision keeps the custody situation 'as is.' " *Id*. at 321, citing *Wardell*, 297 Mich App at 132-133. The *Rains* Court determined that the trial court's denial of the plaintiff's motion to relocate necessarily influenced where the child would live and implicitly denied the defendant's motion to change custody. *Id*. at 323. This Court added that "[i]f a change in domicile will substantially reduce the time a parent spends with a child, it would potentially cause a change in the established custodial environment." *Id*. at 324.

In this case, plaintiff retained physical custody of the child, although the court did order extensive make-up parenting time for defendant. That the order in the interim substantially reduced the amount of time plaintiff could spend with the child is not dispositive; the order granted defendant make-up parenting time, which was separate from the issue of custody, the evaluation of which was to occur within weeks. There is no indication that the order had the potential to cause a change in the child's established custodial environment. Further, this case does not appear to have relegated plaintiff "to the role of a 'weekend' parent," *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008), because the circuit court issued the order to allow defendant make-up parenting time after plaintiff unilaterally withheld it. Plaintiff makes the argument that the practical effect of the order flipped the parties' custody arrangement without the benefit of a hearing. However, in contrast to *Rains*, here the trial court's decision did not implicitly deny a motion to change custody.

We acknowledge that Michigan recognizes both physical and legal custody. See *Foxall v Foxall*, 319 Mich 459, 460-461; 29 NW2d 912 (1947). Additionally, the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., defines child-custody determination, MCL 722.1102(c), and child-custody proceeding, MCL 722.1102(d), as respectively including a determination or proceeding involving legal custody, physical custody, or parenting time. See, e.g., MCL 722.1102(d) (" 'Child-custody proceeding' means a proceeding in which legal custody, physical custody, *or parenting time* with respect to a child is an issue.") (emphasis added). This Court relied on that definition when reviewing a parenting-time determination as part of a custody decision in *Shade v Wright*, 291 Mich App 17, 22; 805 NW2d 1 (2010).[7] Later, in *In re AJR*, 496 Mich 346, 354-363; 852 NW2d 760 (2014), our Supreme Court discussed the divisibility of the concept of custody, observing that physical custody concerns a child living with a parent, while legal custody concerns decisions that significantly affect the child's life. *In re AJR* reinforces that physical and legal custody are distinct concepts. Further, the language used in MCL 722.1102(c) and (d) of the UCCJEA ("legal custody, physical custody, or parenting time") supports the conclusion that parenting time is also a distinct concept to be considered in the context of legal and physical custody. It follows that, had our Supreme Court intended the court rule to embrace both distinct concepts, it would have so stated.

[7] Notably, *Shade* involved the denial of the defendant's motion to change physical custody along with the modification of the parenting-time schedule, so *Shade* was not limited to a dispute over parenting time. *Shade*, 291 Mich App at 20. Further, the trial court in *Shade* had held a de novo hearing. *Id*. Therefore, *Shade* is distinguishable from this case because in this case the circuit court had not held a hearing or ruled on custody before issuing the make-up parenting-time order.

More recently, this Court addressed the distinction between legal and physical custody in *Varran*, 312 Mich App 591, in a matter involving grandparenting time. In the absence of a definition of "custody" in MCR 7.202(6)(a)(iii), this Court referred to the following dictionary definition of custody:

> [Custody is the] care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority), and an award of custody [usually] grants both rights. [*Id*. at 604, quoting *Black's Law Dictionary* (10th ed) (formatting altered by *Varran*).]

The *Varran* Court also referred to *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013), which had noted that the Child Custody Act, MCL 722.21 *et seq*., distinguishes between physical custody (where the child resides) and legal custody (decision-making authority regarding important decisions relating to the child's welfare). *Varran*, 312 Mich App at 604. The *Varran* majority explained that MCR 7.202(6)(a)(iii) does not limit the term "custody" to physical custody and, therefore, reasoned that an order appealable by right includes "an order that produces an effect on or influences in some way the legal custody *or* physical custody of a minor." *Id*. Under that construction, the Court concluded that the order regarding grandparenting time interfered with a parent's fundamental right to make decisions concerning the care, custody, and control of the child and was therefore a postjudgment order affecting the legal custody of a minor. *Id*. at 606. *Varran*, however, is distinguishable. Because *Varran* involved a grandparenting-time order, which is "markedly different" from a custody dispute between two parents, see *Falconer v Stamps*, 313 Mich App 598, 646-647; 886 NW2d 23 (2015), it simply is not

on all fours with the case at bar—a case involving make-up parenting time between two parents.

Using a change of legal custody as a basis for establishing this Court's jurisdiction for an appeal of right would broaden the definition of "custody" in MCR 7.202(6)(a)(iii). An expansive definition could include all manner of decisions regarding the child, allowing appeals of right from a variety of decisions (e.g., whether to allow a child to attend one specific summer camp over another; whether to allow a child to participate in travel soccer; whether one parent or the other would pick up the child from school; or from decisions regarding "how to treat the child if he is not feeling well; whether to expose the child to religion and religious practices; and to what persons, television programs, and movies to expose the child," *Varran*, 312 Mich App at 607). An expansion of this Court's jurisdiction to include legal custody orders within the meaning of a "postjudgment order" would so expand MCR 7.202(6)(a)(iii) as to nullify the qualifying language "affecting the custody of a minor." To extend the court rule to encompass all postjudgment decisions regarding minors in domestic relations appeals would be to return to the jurisdictional standard before the amendment of the court rule.[8]

Had our Supreme Court intended parenting-time orders be appealable by right, it would have included parenting time in the court rule. Absent that language, we decline to read "parenting time" into the plain

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[8] Before 1994, most postjudgment domestic relations orders were appealable by right. The Staff Comment to the February 1994 amendment of MCR 7.203 indicates that the court rule change "eliminates appeals of right as to certain types of judgments or orders. . . . In domestic relations cases, the only postjudgment orders that will be appealable by right are those involving the custody of minors." MCR 7.203, 444 Mich clxvi, clxx (staff comment).

language of the rule. See *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 410-411; 809 NW2d 669 (2011) (maintaining that courts should not read words into a statute).

The order appealed in this case sets forth a framework for a *future* custody decision, pending the psychologist's report and a custody trial. Once the custody order enters, an appeal of right may be taken. In the meantime, the circuit court has issued an interim order regarding make-up parenting time. Presumably, the case has moved forward in the circuit court in accordance with its order for a custody evaluation and a custody hearing. Further, the issue may at this time be moot,[9] as months have passed and the court may have issued further orders regarding parenting time. All of these factors weigh in favor of our ruling that jurisdiction by an appeal of right is improper here.

In declining jurisdiction pursuant to MCR 7.202(6)(a)(iii), we have not barred access to the appellate courts because an application for leave to appeal is available to challenge a trial court's parenting-time decision. An application for leave to appeal in this Court receives review and analysis by district commissioners, who are experienced court staff attorneys, before submission to a judicial panel, which generally considers the merits in the context of deciding in an order whether to grant or deny leave or order other peremptory relief. Consequently, parties filing applications receive access to appellate review in this Court. To the extent the issue is not now moot, plaintiff here is free to file a delayed application for leave to appeal

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[9] An issue is moot and generally will not be reviewed if this Court can no longer fashion a remedy for the alleged error. *Silich v Rongers*, 302 Mich App 137, 151-152; 840 NW2d 1 (2013).

the circuit court's parenting-time decision and obtain appellate review of that application in accordance with these procedures.

IV. CONCLUSION

We dismiss this claim of appeal for lack of jurisdiction. We have chosen not to exercise our discretion to treat the claim of appeal as an application for leave to appeal and grant the application, see *Pierce v Lansing*, 265 Mich App 174, 183; 694 NW2d 65 (2005), but instead we dismiss this claim, an option included in our Supreme Court's remand order, *Madson*, 499 Mich 960. We have determined that this Court lacks jurisdiction over this parenting-time order, and the appeal is properly dismissed.

Dismissed.

SAWYER, P.J., and HOEKSTRA and O'BRIEN, JJ., concurred.

OZIMEK v RODGERS

Docket No. 331726. Submitted August 2, 2016, at Lansing. Decided August 25, 2016, at 9:15 a.m. Leave to appeal denied 501 Mich ___.

Vanessa Ozimek filed a postjudgment motion in the Wayne Circuit Court seeking to change the school her minor child attended. Ozimek and Lee Rodgers, who were never married, are parents of the child. Ozimek and Rodgers share joint legal and physical custody of the minor, and Ozimek has primary physical custody of the child. At the time the initial custody order was entered in July 2014, Ozimek and Rodgers lived in Taylor, Michigan, and Riverview, Michigan, respectively. The child was enrolled in an Allen Park school of choice. The child had always attended school in a district in which neither Ozimek nor Rodgers lived. In May 2015, Ozimek and the child relocated to Livonia, Michigan, and in July 2015, Ozimek moved to change the child's school from Allen Park to a school in Livonia. The parties could not agree on whether the child should change schools, and the trial court, Richard B. Halloran, Jr., J., decided Ozimek had not proved by clear and convincing evidence that a change in schools was in the child's best interests. Ozimek appealed in the Court of Appeals. She argued that the trial court's order was appealable by right because it affected the child's legal custody; that is, the trial court's ruling limited her decision-making authority with regard to important decisions concerning the child. The Court of Appeals dismissed Ozimek's appeal for lack of jurisdiction, reasoning that the trial court order did not affect the custody of a minor. *Ozimek v Rodgers*, unpublished order of the Court of Appeals, entered March 8, 2016 (Docket No. 331726). The Court of Appeals also denied Ozimek's motion for reconsideration. *Ozimek v Rodgers*, unpublished order of the Court of Appeals, entered April 22, 2016 (Docket No. 331726). Ozimek sought leave to appeal in the Supreme Court, and it ordered that the Court of Appeals' order of dismissal be vacated and that the case be remanded to the Court of Appeals for further consideration.

The Court of Appeals *held*:

MCR 7.203(A)(1) provides a party with an appeal of right from an order meeting the definition of a "final order" under

MCR 7.202(6). According to MCR 7.202(6)(a)(i), the definition of a "final order" in a civil case includes the first order disposing of all the claims in the case and adjudicating the rights of all the parties. And under MCR 7.202(6)(a)(iii), the definition of a "final order" includes, in a domestic relations action, a postjudgment order affecting the custody of a minor. In this case, the order denying Ozimek's request to change the minor's school was not a final order because it did not dispose of all the claims and adjudicate the rights of all the parties. The order denying Ozimek's request was also not an order that affected the custody of a minor because use of the word "custody" in MCR 7.202(6)(a)(iii) does not include "legal custody." This conclusion is buttressed by the 1994 amendment of MCR 7.203(A)(1) in which the Supreme Court expressly limited appeals of right in domestic relations cases—where no such limitation had previously appeared—to those appeals of a trial court's ruling that affected a child's custody. If Ozimek's argument were to be accepted—that "custody," as used in MCR 7.202(6)(a)(iii), includes legal custody—a party would have an appeal of right whenever the party was aggrieved by a trial court's disposition of a case involving a parent's exercise of his or her authority to make important decisions concerning his or her child. That outcome would thwart the Supreme Court's objective in limiting appeals in domestic relations cases. An order denying a motion to change a child's school is not an order affecting the custody of a minor within the meaning of MCR 7.202(6)(a)(iii).

Appeal dismissed for lack of jurisdiction.

PARENT AND CHILD — DOMESTIC RELATIONS CASES — APPEALS OF RIGHT — ORDERS AFFECTING THE CUSTODY OF A MINOR.

MCR 7.202(6)(a)(iii) does not provide a party with an appeal of right from an order that only affects the legal custody of a minor; accordingly, an order denying a motion to change a child's school is not an order affecting the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), and it is not appealable by right under MCR 7.203(A)(1).

Anne Argiroff, PLC (by *Anne Argiroff*), for Vanessa Ozimek.

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

PER CURIAM. This case is before us on remand from our Supreme Court for further consideration of our

March 8, 2016 order dismissing plaintiff's claim of appeal for lack of jurisdiction. The Supreme Court has directed us "to issue an opinion specifically addressing the issue whether the order in question may affect the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Ozimek v Rodgers*, 499 Mich 978 (2016). We conclude that this Court does not have jurisdiction over the circuit court's order denying plaintiff's motion to change the child's school, and accordingly we dismiss plaintiff's appeal.

I. BASIC FACTS

Plaintiff, Vanessa Ozimek, and defendant, Lee Rodgers, who were never married, are the parents of a son who currently is nine years old. The parties share joint legal and physical custody of the child under an order issued July 30, 2014. Plaintiff has primary physical custody, and defendant has parenting time every Thursday after school and every other weekend. Defendant resides with his partner in Riverview, Michigan, and plaintiff initially resided in Taylor, Michigan. The child was enrolled in Arno Elementary, an Allen Park school of choice, when he became school-aged.[1] In May 2015, plaintiff and the child moved to Livonia with plaintiff's fiancé. In July 2015, plaintiff moved to switch the child's school from Arno Elementary in Allen Park to Grant Elementary in Livonia.

Because the parties could not agree on whether the child should switch schools, the court decided the dispute after attempted mediation and several evi-

[1] The parties chose Arno because they were living in nearby districts with what they believed were inferior school systems. The child has always attended school in a district where neither parent lives.

dentiary hearings. In the interim, defendant moved to modify parenting time, and that motion was denied. In its decision regarding the proposed change in schools, the trial court found that an established custodial environment existed with both parents. The court opined that the change in schools would alter the established custodial environment because it would become extremely difficult for defendant to maintain his parenting-time schedule. The court reasoned that it had no reason to upset the current situation because each party provided the minor child with a stable and satisfactory home environment. The court noted several factors in its decision, including that the child had attended Arno Elementary for his entire scholastic career, that the child had many friends at the school, and that the child's relationships with his stepsiblings, who lived at defendant's house, would suffer if he changed schools. The court further observed that if the child were to attend Livonia schools, he would attend Grant Elementary for just one year, then another school for two years, only to move to a third school.

Plaintiff filed a claim of appeal and contended that child custody has both legal and physical components. She asserted that the order denying her motion to change the child's school district affected legal custody and therefore was appealable as a matter of right under MCR 7.202(6)(a)(iii). This Court dismissed the appeal on the basis that the order denying a change in the child's school was not a final order affecting the custody of a minor within the meaning of MCR 7.202(6)(a)(iii).[2]

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[2] *Ozimek v Rodgers*, unpublished order of the Court of Appeals, entered March 8, 2016 (Docket No. 331726).

Plaintiff moved for reconsideration, expanding on her argument that the denial of her motion affected the child's legal custody; that is, it affected her decision-making authority regarding an important decision concerning the child. This Court denied the motion for reconsideration.[3]

Plaintiff sought leave to appeal in our Supreme Court. The Michigan Coalition of Family Law Appellate Attorneys and the Legal Services Association of Michigan filed an amici curiae brief asking for a ruling that postjudgment orders deciding school-enrollment disputes between joint legal custodians are appealable by right under MCR 7.202(6)(a)(iii). The Supreme Court issued an order vacating this Court's order of dismissal and remanding for further consideration. The order provides, in pertinent part:

> On remand, we direct the Court of Appeals to issue an opinion specifically addressing the issue whether the order in question may affect the custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A). If the Court of Appeals determines that the Wayne Circuit Court Family Division's order is appealable by right, it shall take jurisdiction over the plaintiff-appellant's claim of appeal and address its merits. If the Court of Appeals determines that the Wayne Circuit Court Family Division's order is not appealable by right, it may then dismiss the plaintiff-appellant's claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application. See *Varran v Granneman (On Remand)*, 312 Mich App 591[; 880 NW2d 242] (2015), and *Wardell v Hincka*, 297 Mich App 127, 133 n 1[; 822 NW2d 278] (2012). We do not retain jurisdiction. [*Ozimek*, 499 Mich 978.]

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[3] *Ozimek v Rodgers*, unpublished order of the Court of Appeals, entered April 22, 2016 (Docket No. 331726).

II. STANDARD OF REVIEW

Whether this Court has jurisdiction over an appeal is an issue of law subject to review de novo. *Wardell*, 297 Mich App at 131. Likewise, the interpretation of a court rule is a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. JURISDICTION UNDER MCR 7.202(6)(a)(iii) AND MCR 7.203(A)

Jurisdiction in this case involves two court rules, MCR 7.202 and MCR 7.203. This Court relies on the following principles when interpreting a court rule:

> The rules of statutory interpretation apply to the interpretation of court rules. The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. [*Varran*, 312 Mich App at 599 (citations omitted).]

Addressing first MCR 7.203(A)(2), the rule indicates that this Court has jurisdiction of an appeal from an "order of a court or tribunal from which appeal of right to [this Court] has been established by law or court rule." No law or court rule establishes an appeal of right in this Court from an order denying a change in a child's school; therefore, MCR 7.203(A)(2) does not apply.

The question then becomes whether jurisdiction exists under MCR 7.203(A)(1), which provides an appeal of right from an order that meets the definition of a "final order" under MCR 7.202(6). MCR 7.202(6)(a) includes the following definitions of a final order in a civil case:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,
>
> * * *
>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor . . . . [MCR 7.202(6)(a).]

MCR 7.202(6)(a)(i) does not apply here. The current order being appealed does not dispose of all the claims and rights of the parties; it merely denies plaintiff's motion to change the minor child's school.[4] Therefore, it is not a final order under MCR 7.202(6)(a)(i).

We next consider whether the order denying the motion to change the child's school is an "order affecting the custody of a minor" within the meaning of MCR 7.202(6)(a)(iii). We begin by examining the origin of the language in the court rule. Before 1994, MCR 7.203, the court rule governing this Court's jurisdiction over appeals of right, did not limit appeals of right in domestic relations matters. It provided that this Court had jurisdiction over a final order of the circuit court without limiting orders in domestic relations cases.[5] In 1994, our Supreme Court amended MCR 7.203 to

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[4] The first final order was the July 2014 order awarding the parties joint legal and physical custody of the child.

[5] In 1993, MCR 7.203(A) provided that appeals by right could be filed from

> (1) a final judgment or final order of the circuit court, court of claims, and recorder's court, except a judgment or order of the circuit court or recorder's court on appeal from any other court; or
>
> (2) a final judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law.

provide that a final order did "not include an order entered after judgment has been entered in a domestic relations action, except for an order affecting the custody of a minor[.]"[6] The staff comment to the February 1994 amendment indicates that the court rule change "eliminates appeals of right as to certain types of judgments or orders. . . . In domestic relations cases, the only postjudgment orders that will be appealable by right are those involving the custody of minors." MCR 7.203, 444 Mich clxvi, clxx (staff comment). In light of the restricting language, it is apparent that our Supreme Court intended to reduce the types of domestic relations cases from which a litigant could claim an appeal of right.

To support her argument that the court rule should be interpreted to include the denial of a motion to change a child's school, plaintiff relies on *Lombardo v Lombardo*, 202 Mich App 151, 152; 507 NW2d 788 (1993), in which the appellant-mother challenged the trial court's denial of her motion to enroll the child in a program for gifted students. *Lombardo*, however, is not helpful in this case because the claim of appeal in *Lombardo* was filed in 1991, before the current version of the court rule limiting appeals of right to those postjudgment orders affecting custody. In addition, the *Lombardo* decision contains no discussion of the language at issue in this case.

Plaintiff also cites *London v London*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2015 (Docket No. 325710), to bolster her position that the order in this case is a final order. The Court in *London* noted a long history of treating orders

[6] In 2002, the provision was removed from MCR 7.203 and added to MCR 7.202(7) (now MCR 7.202(6)) (see the staff comment to the 2002 amendment of MCR 7.203).

regarding school and custody as appealable by right, citing several cases. For example, in *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009), the appellant-mother challenged the trial court's order changing the child's education from homeschooling with her to public school because it would directly affect the amount of time she spent with the child. In contrast, the court's order in this case did not change the child's school, nor did it directly affect the amount of either parent's parenting time. When an order does not change the amount of time either parent spends with the child, it simply cannot be said to have affected custody. Also, *London* cited *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010), in which the appellant-mother appealed the trial court's order refusing to change the children's school district to a new district 60 miles away because the change in school districts would have affected the appellee's parenting time.[7] In contrast, the trial court's decision in this case did not affect the amount of parenting time or the number of overnights enjoyed by either parent.

In *London*, the trial court denied the defendant's motion to modify parenting time, a decision that implicated the number of overnights and therefore directly affected where and with which parent the children would stay. The *London* Court further observed—unnecessarily, because it had already determined that the order affected custody—that a *change* in school districts would "seem" to affect custody. *London*, unpub op at 1-2 (emphasis added). The Court stated that "[s]uch a change obviously impacts where the

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[7] *Pierron* initially was dismissed for lack of jurisdiction on the ground that the order did not affect the custody of the minors, but this Court reinstated the claim of appeal upon reconsideration.

children will attend school. It also affects whether they will attend latchkey, how far they will travel to school, whether they will attend the same school as their stepsiblings, and whether they will attend a school in the community in which they reside most school nights." *Id*. at 2. In this case, the trial court denied the motion to change school districts. The court's decision did not change the number of overnights, nor did it change the child's school. Although that decision obviously affects where the child will attend school, it is not an order "affecting custody" of the child.

Plaintiff also cites *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013),[8] which noted that the Child Custody Act, MCL 722.21 *et seq*., distinguishes between physical custody (the location where the child resides) and legal custody (the decision-making authority regarding important decisions relating to the child's welfare). Compare MCL 722.26a(7)(a) with MCL 722.26a(7)(b). That the concept of custody can involve physical and legal elements does not mean, however, that this Court should assume that the term "custody" in MCR 7.202(6)(a)(iii) embraces both facets.

Whether a trial court's ruling regarding school choice is reviewable by this Court is not in dispute. Rather, the question in this case is a procedural one: whether the dispute over school choice is reviewable as a matter of right or whether the issue must be brought by an application for leave to appeal. Parents have the right to control the education of their children, see *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899

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[8] *Grange* was not a domestic relations case. The question before this Court in *Grange* was whether a child of divorced parents can be "domiciled" in more than one location for purposes of receiving benefits under the no-fault act.

(2004), and it follows that the choice of a child's school is an important decision affecting the welfare of a child. But in the absence of express language describing "custody," this Court must determine whether that term incorporates legal custody as well as physical custody.

In interpreting the rule, this Court must give effect to the Supreme Court's intent in drafting MCR 7.202(6)(a)(iii). See *Varran*, 312 Mich App at 599. As noted, before the 1994 amendment, MCR 7.203 did not restrict appeals of right in domestic relations matters. The 1994 amendment limited claims of appeal so that the only postjudgment orders in domestic relations cases appealable by right are those affecting the custody of minors. When the Supreme Court amended the rule in 1994, it clearly intended to limit the type of orders appealable by right. To interpret the court rule as appellant proposes would be counter to that obvious intent. Reinforcing that conclusion is the fact that the court rule does not expressly indicate that it includes the concept of "legal" custody. Had the Supreme Court intended for the court rule to include "legal" custody, it would have included the term. Absent that specific language, this Court should not broadly interpret the court rule.

This Court has not traditionally included legal custody considerations in the interpretation of MCR 7.202(6)(a)(iii) and has dismissed for lack of jurisdiction cases challenging school choice decisions that do not alter parenting time and thus do not influence where the child will live.[9] This Court, however, has not

[9] Two examples of such cases were cited by appellant: *Goriee v Daud-Goriee*, unpublished order of the Court of Appeals, entered March 4, 2015 (Docket No. 326227), and *Tison v Tison*, unpublished order of the Court of Appeals, entered March 4, 2015 (Docket No. 326158).

always been consistent in its dismissal of cases involving a choice of schools. For instance, *Mellema v Mellema*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2016 (Docket No. 329206), involved a motion to change the children's school district in the broader context of the plaintiff's move from Fremont to Grandville (roughly 40 miles apart). In its decision, the *Mellema* Court concluded that, in general, a party may appeal by right an order regarding the denial of a motion to change school districts, citing *Varran*'s reference to legal custody. *Id*. at 5-7. Given the lack of clarity regarding whether legal custody should be included in the definition of custody in MCR 7.202(6)(a)(iii), we urge our Supreme Court to weigh in on the issue. Further, should practitioners wish to promote an expanded court rule, our Supreme Court would be the proper venue for that request.

Until such time as the court rule is clarified, however, we opine that the addition of legal custody to the custody definition in MCR 7.202(6)(a)(iii), as championed by plaintiff, would so broaden the court rule that few, if any, postjudgment orders in domestic relations cases would be disallowed. With regard to a change in schools, this issue could arise every new school year.[10] An argument could be made, as well, that child support orders affect the decision-making authority regarding important decisions relating to the child's welfare, so that those orders also would be appealable by right. Legal custody could be implicated in countless decisions regarding a child, such as which vaccinations a child should receive, which parent should pay for a

[10] In this case, provided the child continues to attend Arno Elementary, the issue will arise again at the conclusion of the 2017-2018 school year when the child will complete his fifth-grade year and graduate from Arno Elementary.

psychologist fee, which daycare center a child should attend, which party should pay for a child's transportation to parenting time, or whether a child should be enrolled in football. If legal custody is included in the definition in MCR 7.202(6)(a)(iii), parents conceivably could challenge orders that change the home environment in any way. Using legal custody as a basis for this Court's jurisdiction would permit a far-reaching array of cases to be appealed by right in this Court. Since the 1994 court rule amendment, this Court has made considerable progress toward eliminating a crushing backlog of appeals and decreasing the time it takes to resolve appeals. If all orders involving legal custody issues are to be appealable by right and are to receive the same priority status as actual custody disputes, this Court's forward progress in expediently resolving appeals will be swiftly thwarted.

IV. CONCLUSION

This Court does not have jurisdiction over this case, given that an order denying a motion to change schools is not an order affecting the custody of a minor within the meaning of MCR 7.202(6)(a)(iii). Further, we decline to exercise our discretion to treat the claim of appeal as an application for leave to appeal, see *Pierce v Lansing*, 265 Mich App 174, 183; 694 NW2d 65 (2005), and instead we dismiss the claim for lack of jurisdiction.

Dismissed.

SAWYER, P.J., and HOEKSTRA and O'BRIEN, JJ., concurred.

O'CONNELL v DIRECTOR OF ELECTIONS

Docket No. 334365. Submitted August 24, 2016, at Lansing. Decided August 25, 2016, at 9:20 a.m. Leave to appeal denied 499 Mich 1002 (2016).

Judge PETER D. O'CONNELL brought an action in the Court of Claims against the Director of Elections, the Bureau of Elections, and the Department of State, seeking an order of mandamus compelling the director to place Judge O'CONNELL's name as an incumbent judge of the Court of Appeals, Fourth District, on the November 8, 2016 ballot. Judge O'CONNELL was reelected in November 2012 by the Fourth District of the Court of Appeals to serve a third six-year term of office, which will expire on January 1, 2019. Judge O'CONNELL is prohibited from running for reelection in the November 2018 general election because he will have attained the age of 70 years by that date. Judge MICHAEL F. GADOLA was appointed to the Court of Appeals, Fourth District, in January 2015 to fill a vacancy created when Judge WILLIAM C. WHITBECK retired from that position before his term expired on January 1, 2017. Because his term of office would expire on that January 2017 date, Judge GADOLA would have to run for reelection in the November 2016 election to retain his position. In February 2016, Judge O'CONNELL submitted an affidavit of candidacy for reelection as an incumbent judge of the Court of Appeals, Fourth District, for the position that was held by Judge GADOLA; Judge O'CONNELL did not gather the petition signatures that are required under MCL 168.409b(1) of nonincumbent persons running for the Court of Appeals. Judge GADOLA filed the same affidavit for reelection as an incumbent for the position to which he was appointed. The director rejected Judge O'CONNELL's affidavit, and Judge O'CONNELL filed a mandamus action, asserting that the director had a clear legal duty to place his name on the ballot as an incumbent. The court, CYNTHIA D. STEPHENS, J., denied Judge O'CONNELL's complaint, reasoning that because he had failed under the Michigan Constitution to establish that he was an incumbent and had not filed the required nominating petitions as a nonincumbent, he was not entitled to placement on the November 2016 election ballot. Judge O'CONNELL appealed.

The Court of Appeals *held*:

1. A complaint for mandamus may be granted when the party seeking the writ has a clear legal right to performance of the specific duty sought, the defendant has the clear legal duty to perform the act requested, the act is ministerial, and no other remedy exists, legal or equitable, that might achieve the same result. The phrase "a clear legal right" refers to a right that is clearly founded in, or granted by, law.

2. When interpreting the Michigan Constitution, a court must apply the rule of common understanding and focus on the will of the people who ratified it; in other words, the court must apply the most obvious common understanding of the provision, the one that reasonable minds and the great mass of the people themselves would have given it at the time of ratification.

3. Const 1963, art 6, § 9, provides that judges of the Court of Appeals hold office for six years and that the terms of office for the judges in each district must be arranged by law to provide that not all terms will expire at the same time. By defining and regulating "the terms of office" for the judges of the Court, the drafters intended that judicial offices would be segregated and distinguished by distinct terms of office.

4. MCL 168.409b(1) provides that in order for a qualified person to have his or her name placed on a primary ballot, the person must file with the Secretary of State certain nominating petitions containing required signatures; the petition requirement does not apply to an incumbent judge of the Court of Appeals. Instead, Const 1963, art 6, § 22, provides that any judge of the Court of Appeals may become a candidate in the primary election for the office of which he or she is the incumbent by filing an affidavit of candidacy. The word "the" is a definite article that generally has a specifying or particularizing effect. While MCL 8.3b provides that in a statute the singular of a word includes the plural and vice versa, the drafters of the Michigan Constitution meant the article "the" in the traditional, singular sense when they drafted § 22 because it contains phrases like "the office" and "the same office" that encompass several other provisions—Article 6, §§ 23 and 24—when taken in context with each other. The § 22 language—referring to the office of which the judge is the incumbent—is clear that only one judge is the incumbent for the Court of Appeals, Fourth District, judicial office scheduled for the November 2016 election. The Court of Claims correctly concluded that Judge GADOLA is the incumbent for that office following the expiration of the term to which he was appointed. Judge O'CONNELL was not entitled to a writ of mandamus because

the director did not have a clear legal duty to place Judge O'CONNELL's name on the November ballot.

5. Other constitutional provisions support the conclusion that Judge GADOLA is the incumbent for his office in the November 2016 election. Const 1963, art 6, § 24—which provides that the name of each incumbent judge who is a candidate for nomination or election to the same office, and the designation of his or her office, must be printed on the ballot—reinforces that the incumbency label applies only to a candidate for election to the same office and designates that office. The Court of Claims correctly concluded that Article 6, §§ 22 and 24 compel the conclusion that the judge holding a judicial office for a term that is assigned solely to that office is the incumbent for election to that office; it is axiomatic that two people cannot occupy the same office at the same time. Under Article 6, § 23 of the Michigan Constitution, the governor has authority to appoint a replacement when a vacancy occurs in the office of judge of a court of record—like the Court of Appeals—by death, removal, resignation, or vacating of the office; the appointed person holds that office until 12:00 noon of the first day of January that next succeeds the first general election held after the vacancy occurred, and the successor is elected for the remainder of the unexpired term. Section 23 refers to the office in relation to a specific term, and in conjunction with §§ 22 and 24, it clearly provides that the appointee who seeks election to the unexpired term—here, Judge GADOLA—would be the incumbent judge for that term of office. The § 23 language "[w]henever a new office of judge in a court of record . . . is created by law, it shall be filled by election as provided by law" refers to the addition of a judicial office to an existing bench of a court of record such as the Court of Appeals, while the language "a new office of a judge" evidences the ratifiers' intent to tie the term "office" to a particular judicial seat rather than to a generalized class of elected judges. The plain meaning of § 23 supports the conclusion that incumbency status is reserved for the judge running for reelection to a term consecutive to his or her own term.

Affirmed.

ELECTIONS — COURT OF APPEALS JUDGES — WORDS AND PHRASES — INCUMBENT.

Under Const 1963, art 6, § 22, any judge of the Court of Appeals may become a candidate in the primary election for the office of which he or she is the incumbent by filing an affidavit of candidacy; the term "incumbent" applies only to the judge who is running for reelection to a term consecutive to his or her current term.

Allan Falk, PC (by *Allan Falk*), for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Denise C. Barton*, *Erik A. Grill*, *Joseph Ho*, and *Adam Fracassi*, Assistant Attorneys General, for defendants.

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

PER CURIAM. This action tests whether Judge PETER D. O'CONNELL, a judge of the Michigan Court of Appeals whose six-year term of office expires on January 1, 2019, may run as an incumbent for a Court of Appeals position with a term commencing on January 1, 2017. Judge MICHAEL F. GADOLA's name will appear on the November 2016 ballot as the incumbent running for this seat. Judge O'CONNELL posits that he, too, is "an incumbent judge of the Court of Appeals." He asserts that this status entitles him to enjoy two privileges of incumbency: access to the ballot by filing an affidavit of candidacy, rather than petition signatures, and the ballot designation of "Judge of the Court of Appeals."

The controlling constitutional provision permits a judge of the Court of Appeals to run for "*the* office of which he is *the* incumbent" by filing an affidavit of candidacy. Const 1963, art 6, § 22 (emphasis added). We interpret the Michigan Constitution in the light of the common understanding of its terms, which we locate in the plain meaning of the text at the time of ratification. *UAW v Green*, 498 Mich 282, 286-287; 870 NW2d 867 (2015). The definite article "the" has consistently denoted a specific, particular thing. In this case, "the" makes all the difference.

Our Constitution links the term "incumbent" to a definite and specific office. The office for which Judge

O'CONNELL seeks to run as an incumbent is now held by Judge GADOLA. Judge O'CONNELL is not "the incumbent" for "the office" held by Judge GADOLA. We affirm the Court of Claims, which reached the same conclusion.

I

In November 2012, the people of the Fourth District of the Court of Appeals reelected Judge PETER D. O'CONNELL to serve a six-year term of office. Judge O'CONNELL was first elected to the Court of Appeals in 1994 for a six-year term of office. He successfully ran for reelection as an incumbent in 2000, 2006, and 2012. His current term is set to expire on January 1, 2019. Judge O'CONNELL is prohibited from running for reelection in the November 2018 general election, as he then will have attained the age of 70 years. Const 1963, art 6, § 19(3).

Governor Rick Snyder appointed MICHAEL GADOLA to the Court of Appeals in January 2015 to fill the vacancy created when Judge WILLIAM C. WHITBECK retired. Judge WHITBECK's six-year term of office would have expired on January 1, 2017. 308 Mich App vii. Judge O'CONNELL concedes that Judge GADOLA may run as an incumbent for that 2017-2023 term of office. Judge O'CONNELL seeks to run as an incumbent for the very same term of office, thereby avoiding the age-bar applicable to the term of office to which he was repeatedly elected.

In February 2016, Judge O'CONNELL submitted an affidavit of candidacy for reelection as an incumbent judge of the Court of Appeals, Fourth District. He did not attempt to gather the petition signatures, as is required of nonincumbents running for Court of Appeals positions. MCL 168.409b(1). Judge GADOLA filed an affidavit of candidacy for reelection as an incumbent

judge for the same position. The defendant Director of Elections promptly rejected Judge O'CONNELL's affidavit.[1] Judge O'CONNELL then sought an order of mandamus in the Court of Claims, averring that the director had a clear legal duty to place his name on the ballot as an incumbent.

Court of Claims Judge CYNTHIA D. STEPHENS denied Judge O'CONNELL's complaint for mandamus in a written opinion issued on August 16, 2016. Drawing on the language of Const 1963, art 6, §§ 9, 22, 23, and 24, Judge STEPHENS concluded that Judge O'CONNELL failed to establish that he was an "incumbent."[2] Without having filed nominating petitions, Judge STEPHENS ruled, Judge O'CONNELL was not entitled to placement on the regular election ballot. Judge STEPHENS elaborated:

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[1] Defendants the Bureau of Elections and the Department of State are also parties to this appeal.

[2] Const 1963, art 6, § 22 states:

> Any judge of the court of appeals, circuit court or probate court may become a candidate in the primary election for the office of which he is the incumbent by filing an affidavit of candidacy in the form and manner prescribed by law.

Const 1963, art 6, § 23 provides in relevant part:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law.

Const 1963, art 6, § 24 provides:

> There shall be printed upon the ballot under the name of each incumbent justice or judge who is a candidate for nomination or election to the same office the designation of that office.

> The starting point for the Court's analysis is the Constitution's employment of the term "incumbent" and the common meaning of that term. As Plaintiff admits, the term "incumbent" "is linked to" to [sic] an office under the pertinent constitutional provisions. But it is not linked to *any* office. In discussing incumbency, both art 6, § 22 and art 6, § 24 link the term to a particular office. See art 6, § 22 (referring to "the office"); and art 6, § 24 (referring to "the same office."). Indeed, it is well established that "the" is a definite article that is generally recognized as having a "specifying or particularizing effect, as opposed to the indefinite or generalized force of the definite article a or an[.]" *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (citations and quotation marks omitted). Because the Constitution refers to "the office" and "the same office," the Court "must determine to which specific or particular" office the Constitution refers. See *id*.

Judge STEPHENS emphasized that the constitutional text makes "clear that each judicial office has its own particular term and that such a term is to be understood as being separate and distinct from the terms of other judicial offices in a given district." This means that the Fourth District of the Court of Appeals consists of "seven separate judicial offices in the Fourth District, one of which is occupied by" Judge O'CONNELL. Judge STEPHENS buttressed her conclusion by citing Const 1963, art 6, § 9, which provides:

> Judges of the court of appeals shall hold office for a term of six years and until their successors are elected and qualified. The terms of office for the judges in each district shall be arranged by law to provide that not all terms will expire at the same time.

Harmonizing this language with the other pertinent constitutional provisions, Judge STEPHENS reasoned that each office of a judge of the Court of Appeals is confined to a six-year term. Thus, a judge's incumbency status is tethered to a " 'particular or specific' " office

with an expressed temporal limit. The arrangement of the terms of office to avoid their fully concurrent expiration further persuaded Judge STEPHENS that the drafters of the Michigan Constitution intended "that the terms of each office are to be separate and distinct from one another." Article 6, § 9 thereby directs "that each judge serves a term with defined temporal limits and which is separate and distinct from the terms served by his or her colleagues" and having "its own temporal parameters."

Judge STEPHENS then turned to the common meaning of the word "incumbent" as used in our Constitution, finding it linked to an office subject to a specific term:

> "The office" or "the same office" of which Plaintiff is an incumbent is inescapably tied to the particular term he is serving. Indeed, the Framers' choice of the word "office" instead of "court" in the pertinent constitutional provisions indicates the intent of the Framers to tie incumbency status to a particular, individualized term, rather than the general role as "judge." The juxtaposition of the definite article "the" with "office" and "same office" associates the judge's incumbency status with reelection to his or her own office, distinguished from other judges' offices not having the same beginning and end dates. Accordingly, the word "incumbent" as it is used in the pertinent constitutional provisions refers to a judge running for reelection to a term consecutive to his or her own term—i.e., the term of office the judge is presently serving—and not to a judge vying for an office occupied by another judge.

Judge STEPHENS soundly rejected Judge O'CONNELL's argument that as a generically "incumbent" judge he is also "the" incumbent for the seat currently occupied by Judge GADOLA. The term of office applicable to Judge GADOLA's seat, Judge STEPHENS explained, is different and distinct from that of the office to which Judge

O'CONNELL was elected. Judge O'CONNELL is not "the incumbent" as to the former. Judge STEPHENS summed up:

> Here, the office Plaintiff occupies gives him legal authority to exercise the powers of a Court of Appeals judge for a specified period. When he was elected to serve in this office, he was not elected to serve as a judge on the Court of Appeals for any timeframe he chose. Rather, the voters in the Fourth District elected Plaintiff to a term expiring in 2019. Hence, the office Plaintiff holds is that of a Court of Appeals judge in the Fourth District for a specified period of time, i.e., the term to which he was originally elected. Accordingly, the only office for which Plaintiff is the incumbent is a judge on the Michigan Court of Appeals, Fourth District, with a term expiring in 2019.

Because Judge O'CONNELL failed to establish the requirements for mandamus, the Court of Claims denied the writ.

II

We review for an abuse of discretion a trial court's decision to deny a writ of mandamus. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012). However, the first two elements required for issuance of a writ of mandamus—that defendants have a clear legal duty to perform and the plaintiffs have a clear legal right to performance of the requested act—are subject to de novo consideration as questions of law. *Id*. Likewise, this Court reviews constitutional questions de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006).

"Mandamus is an extraordinary remedy . . . ." *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 142; 369 NW2d 277 (1985). Thus, issuance of this writ is proper only if (1) the party seeking the writ "has

a clear, legal right to performance of the specific duty sought," (2) the defendant has the clear legal duty to perform the act requested, (3) "the act is ministerial," and (4) no other remedy exists, legal or equitable, "that might achieve the same result." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014). "Within the meaning of the rule of mandamus, a 'clear, legal right' is one 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.' " *Univ Med Affiliates*, 142 Mich App at 143 (citation omitted); see also *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 518-519.

Whether Judge O'CONNELL has a "clear, legal right" to performance of the duty sought and whether defendants have a corresponding "clear legal duty" to perform depend on whether Judge O'CONNELL is entitled to appear on the ballot as an "incumbent" in his bid for election to the office currently held by Judge GADOLA. Several provisions within Article VI of the Michigan Constitution resolve this question. When construing the Constitution, we focus on the will of the people who ratified it. *Adair v Michigan*, 497 Mich 89, 101; 860 NW2d 93 (2014). "In performing this task, we employ the rule of common understanding." *CVS Caremark v State Tax Comm*, 306 Mich App 58, 61; 856 NW2d 79 (2014). "Under the rule of common understanding, we must apply the meaning that, at the time of ratification, was the most obvious common understanding of the provision, the one that reasonable minds and the great mass of the people themselves would give it." *Id*. We give the operative words "their common and most obvious meaning . . . ." *In re Burnett Estate*, 300 Mich App 489, 497-498; 834 NW2d 93 (2013). "Further, every provision must be interpreted in the light of the

document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). The interpretation of a constitutional provision takes account of the purpose sought to be accomplished by the provision. *Adair*, 497 Mich at 102.

III

In this appeal, Judge O'CONNELL embellishes the arguments he advanced in the Court of Claims with a prophecy that if upheld, the Court of Claims' decision will effectively invalidate the oath of office for all 27 current judges on the Court of Appeals, "wreak[ing] foul havoc" by "jeopardizing in one fell swoop all decisions made by those same 27 Court of Appeals Judges (and their predecessors)," as none "validly filed what the court of claims now insists would be the requisite oath of office identifying the position assumed by reference to its specific start and end dates." The concept of "term" simply has no application to the implementation of §§ 22 and 24 or the common understanding of the word "office," Judge O'CONNELL urges. Incumbency is a status, he claims, and not a position harnessed to a fixed time period. "If Judge GADOLA is the only incumbent judge of the Court of Appeals, then the other 26 people exercising the powers of that office must be impostors, including Judge O'CONNELL and Judge STEPHENS," he importunes. (Emphasis omitted.) Finally, Judge O'CONNELL asserts that the Court of Claims' analysis of "the" as "the definite article" contravenes the principle of *reductio ad absurdum*, especially when the phrase "each incumbent justice or judge" means that there can be more than one.

Judge O'CONNELL's old and new arguments boil down to this: every judge on the Fourth District of the Michigan Court of Appeals is an incumbent of "the same office." Article 6, §§ 22 and 24 of the Michigan Constitution make no mention of a judge's "term of office," and so that term may not be imported into their interpretation and application.

We reject Judge O'CONNELL's unrestrained interpretation of "incumbent" as encompassing each and every Court of Appeals judge elected from the same district. Article 6, § 22 contemplates that only certain judges are entitled to run as incumbents, not the entire field of sitting judges: "Any judge of the court of appeals . . . may become a candidate in *the* primary election for *the* office of which he is *the* incumbent by filing an affidavit of candidacy . . . ." (Emphasis added.) The plain language of § 22—the constitutional provision creating an incumbent judge's gateway to the ballot—contravenes Judge O'CONNELL's arguments.

Const 1963, art 6, § 22 permits an incumbent judge to become a candidate in the primary election by filing an affidavit of candidacy, rather than nominating petitions:

> Any judge of the court of appeals, circuit court or probate court may become a candidate in the primary election for the office of which he is the incumbent by filing an affidavit of candidacy in the form and manner prescribed by law.

Const 1963, art 6, § 24 requires that a judge who is seeking reelection "to the same office" he or she currently holds be designated as "Judge of the Court of Appeals" on the ballot.

The Court of Claims correctly concluded that these two provisions inextricably link the term "incumbent" to a particular office. "The" is a definite article that

generally has a "specifying or particularizing effect . . . ." *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (quotation marks and citations omitted). Judge O'CONNELL invites us to discard this aspect of *Robinson*. "In a constitution, as in a statute," Judge O'CONNELL insists, MCL 8.3b instructs that "the singular includes the plural and vice versa." But MCL 8.3b is a permissive tool of statutory interpretation, not a cudgel of construction. *Robinson*, 486 Mich at 14 n 13. Our Constitution employs the phrases "*the* office" and "*the* same office" in a context that encompasses several other provisions which, when read together, confirm that the drafters meant "the" in its traditional, singular sense when they drafted § 22.

Article 6, § 22 establishes the initial criteria for incumbency status as a judge of the Court of Appeals. By referring to "the office of which he is the incumbent," § 22 could not be plainer. With respect to the election scheduled for November 8, 2016, one judge is the incumbent for that judge's office. Judge GADOLA enjoys that status as to the term of office following the expiration of the term to which he was appointed; Judge O'CONNELL does not. Our analysis could stop here, as we find the language of § 22 abundantly clear. We reject Judge O'CONNELL's warning of dire consequences stemming from the oath of office required for judges of the Court of Appeals; Const 1963, art 11, § 1 dictates the oath's content. And although § 22 effectively negates the balance of Judge O'CONNELL's arguments, other constitutional provisions also inform our holding.

As did the Court of Claims, we look first to Const 1963, art 6, § 9, which sets forth a six-year term of office for "the judges in each district," which are "arranged by law to provide that not all terms will

expire at the same time." This deliberate staggering of the terms of Court of Appeals judges conveys that the seats on this Court are not akin to those at a picnic table or a game of musical chairs—indistinct and interchangeable. Rather, by defining and regulating "[t]he terms of office" for the judges of this Court, the drafters intended that judicial offices would be segregated and distinguished by distinct terms of office.

Article 6, § 24 reinforces that the incumbency label applies singularly to a candidate "for . . . election to the same office" and designates "that office." Read in conjunction with § 22, these provisions compel the literal and commonsense conclusion that the judge holding a judicial office defined by a certain term assigned solely to that office is the incumbent for election to that office. Moreover, because "[i]t is axiomatic that two persons cannot occupy the same office at the same time," *Goodman v Clerk of Circuit Court for Prince George's Co*, 291 Md 325, 329; 435 A2d 422 (1981), it is impossible for two judges to serve in the same term of office for which only one was originally elected. This axiom was undoubtedly known to the drafters of our Constitution, as it reflects the teaching of Professor Floyd R. Mechem in his treatise on Public Officers: "[I]t is 'evident that two different persons cannot, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law.' " *Tooele Co v De La Mare*, 90 Utah 46, 58-59; 59 P2d 1155 (1936), quoting Mechem, Public Officers, § 322, p 216; see also *Oakland Paving Co v Donovan*, 19 Cal App 488, 494; 126 P 388 (1912); *Stowers v Blackburn*, 141 W Va 328, 343; 90 SE2d 277 (1955).

Finally, we observe that yet another constitutional provision, Article 6, § 23, supports our holding. This

section provides that when a judicial vacancy occurs, the governor shall fill it. "The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term." This reference to a particular ("the unexpired") term refutes Judge O'CONNELL's claim that terms of office are fungible. Not only does this section refer to the office in relation to a specific term, but in conjunction with Article 6, §§ 22 and 24, it clearly provides that the appointee who decides to seek election to the unexpired term—like Judge GADOLA—would be *the* incumbent judge for that term of office. Section 23 continues, "Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law." The Court of Appeals is a court of record. MCL 600.301. The phrase "a new office of judge in a court of record" clearly references the addition of a judicial office to an existing bench of a court of record. "A new office of a judge" evidences the ratifiers' intent to tie the term "office" to a particular, individualized judicial seat, rather than to a generalized class of elected officeholders. The plain meaning of § 23 accords with our view that incumbency status is reserved for the judge running for reelection to a term consecutive to his or her own term. Here, the sole judge meeting that criterion is Judge GADOLA.

We affirm the Court of Claims.

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY (ON REMAND)

Docket No. 319710. Submitted June 30, 2016, at Lansing. Decided August 30, 2016, at 9:00 a.m. Leave to appeal sought.

State Farm Mutual Automobile Insurance Company brought an action against Michigan Municipal Risk Management Authority (MMRMA) and QBE Insurance Corporation to determine which one had highest priority and was, therefore, responsible for paying no-fault benefits to a motorcyclist injured when hit by a car running a red light because the car was being chased by a police vehicle. QBE moved for summary disposition on the ground that it could rescind its policy on the basis of fraud. The court, Alexander C. Lipsey, J., denied the motion, relying on the innocent-third-party rule. QBE sought leave to appeal. The Court of Appeals granted leave and consolidated the case with another interlocutory appeal in which State Farm was appealing a denial of summary disposition regarding whether the motor vehicle operated by the police officer was "involved in" the accident. QBE argued on appeal that the innocent-third-party rule was abrogated in *Titan Ins Co v Hyten*, 491 Mich 547 (2012). The Court of Appeals, RIORDAN, P.J., and MURPHY and BOONSTRA, JJ., affirmed the trial court's denial of QBE's motion for summary disposition in an unpublished opinion, issued February 19, 2015 (Docket Nos. 319709 and 319710). The Court of Appeals held that Michigan caselaw had long denied an insurer's right to rescind an insurance policy in order to avoid paying no-fault benefits to an innocent third party, that *Titan* only applied to contractual amounts in excess of statutory minimums, and that the motorcyclist's entitlement to benefits was statutory, not contractual. QBE filed an application for leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration of the issue. 498 Mich 870 (2015). The Supreme Court directed the Court of Appeals to hold this case in abeyance pending a decision in *Bazzi v Sentinel Ins Co*, 315 Mich App 763 (2016).

On remand, the Court of Appeals *held*:

Bazzi ultimately held that the innocent-third-party rule did not survive the Supreme Court's decision in *Titan*. *Bazzi* was precedentially binding under MCR 7.215(C)(2) and (J)(1). Therefore, the trial court erred by denying summary disposition to QBE on the basis of the innocent-third-party rule. The public-policy concerns raised by the abrogation of the innocent-third-party rule were more appropriately considered by the Legislature and not the courts.

Vacated and remanded.

MURPHY, J., concurring, agreed that the case was controlled by the decision in *Bazzi* and that the insurance company was not barred from pursuing a fraud defense on the basis of the innocent-third-party rule. Judge MURPHY wrote separately to highlight language in *Titan* that reflected a potential determination by the Supreme Court that the remedies for actionable fraud were limited in relation to statutorily mandated insurance coverage and benefits, including PIP benefits, and to suggest that the complete abrogation of the innocent-third-party rule would read that language out of the *Titan* opinion.

Mellon Pries, PC (by *James T. Mellon* and *David A. Kowalski*), for Michigan Municipal Risk Management Authority.

Kallas & Henk PC (by *Constantine N. Kallas* and *Michele L. Riker-Semon*) for QBE Insurance Corporation.

Before: RIORDAN, P.J., and MURPHY and BOONSTRA, JJ.

BOONSTRA, J.

ON REMAND

This case is before us on remand from our Supreme Court. *State Farm Mut Auto Ins Co v Mich Muni Risk Mgt Auth*, 498 Mich 870 (2015). In our original opinion we, *inter alia*, affirmed the trial court's denial of summary disposition to third-party plaintiff/appellant QBE

Insurance Corporation (QBE) on the ground that the innocent-third-party rule barred rescission of the policy of insurance at issue. *State Farm Mut Auto Ins Co v Mich Muni Risk Mgt Auth*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket Nos. 319709 and 319710).[1] The Supreme Court, in lieu of granting QBE's application for leave to appeal, vacated our opinion with respect to QBE and remanded the case, instructing us to hold this case in abeyance pending the outcome of *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016). *State Farm Mut Auto Ins Co*, 498 Mich at 870. As *Bazzi* has now been decided, we consider the instant case and conclude that the innocent-third-party rule did not bar QBE's claim of fraud as a defense to an insurance contract and that the trial court therefore erred by denying QBE's claim of summary disposition. We vacate the portion of the trial court's order denying summary disposition to QBE under the innocent-third-party rule and remand for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The facts of the case as a whole are set forth in our previous opinion, and we will not repeat them in full. See *State Farm Mut Auto Ins Co*, unpub op at 2-5. In relevant part, our previous opinion stated:

> QBE also moved for summary disposition pursuant to MCR 2.116(C)(10). QBE asserted, inter alia, that it was entitled to rescind its policy of insurance provided to [Whitney] Gray because Gray had procured her policy by

[1] Our original opinion was issued in two consolidated cases. *Id*. The instant case was deconsolidated from the case in Docket No. 319709 by order of this Court. *State Farm Mut Auto Ins Co v Mich Muni Risk Mgt Auth*, unpublished order of the Court of Appeals, entered September 14, 2015 (Docket Nos. 319709 and 319710). Nothing in this opinion alters our resolution of the case in Docket No. 319709.

defrauding QBE. According to QBE, Gray had supplied false information on her application for insurance by affirmatively indicating that [a 1999 Oldsmobile Cutlass] was registered to her, when in fact it was registered to Tina Poole, Gray's mother. Had Gray truthfully completed the application, QBE would never have issued the policy. Under such circumstances, QBE argued that it was entitled to rescind the insurance policy issued to Gray, and thus was entitled to be dismissed from the suit.

In support of its argument, QBE provided the application for insurance that had been submitted by Gray, which stated that the named insured "must be the registered owner" of the insured vehicle (the Cutlass). Gray had indicated on the application that she was the registered owner of the vehicle, when in fact the vehicle was registered to Poole. QBE argued that it would not have issued the policy had it been provided accurate information on the application. Gray testified at her deposition that she did not own the Cutlass.

Following a hearing, the trial court ruled that it was denying both QBE's and State Farm's motions for summary disposition. Regarding State Farm's motion, the trial court found that while it was not convinced by [the Michigan Municipal Risk Management Authority's] arguments, the question of "whether the police vehicle was in fact involved for purposes of establishing liability is something that should be presented to the trier of fact in this matter, namely the jury." Regarding QBE's motion, the trial court found that Gray "owned the 1999 Oldsmobile and therefore had insurance. She was therefore liable for the vehicle that she nominally owned, the 1998 Grand Prix, which was ultimately driven by Mr. Johnson." The trial court further stated that "as a matter of law I do not believe QBE would be entitled to claim a rescission of those mandatory benefits set forth in the No-Fault Act by statute as they relate to innocent third-parties."

The trial court entered separate orders denying summary disposition to State Farm and QBE on December 4, 2013. . . . With regard to QBE's motion, the ordered [sic] stated that it was denied

> for the reasons stated on the record, including, but not limited to . . . [i]nsurance coverage required by statute, such as that of the No-Fault Act, MCL 500.3101, *et seq*., cannot be rescinded after an innocent third party has sustained injury which is the subject of the coverage required by statute . . . .

The order also stated as an additional reason for denial that "[a]ny termination of the registration or title which may be available would not have retroactive effect, so as to alter the state of ownership or registration as of 08/12/2011." [*Id*. at 4-5.]

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). 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." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). 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). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Policemen & Firemen Retirement Sys Bd of Trustees v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of mate-

rial fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

Because the innocent-third-party rule did not survive our Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), the trial court erred by denying summary disposition to QBE on this basis. *Bazzi*, 315 Mich App at 768. We see no reason to reiterate in full the holding of *Bazzi*. Suffice it to say that it is precisely on point with respect to the issue presented in the instant case and is precedentially binding. MCR 7.215(C)(2) and (J)(1). Further, we agree with the *Bazzi* panel that the public-policy concerns engendered by the abrogation of the innocent-third-party rule are more appropriately considered by the Legislature, not this Court. *Bazzi*, 315 Mich App at 779-780.

Having concluded that the trial court erred by its denial of summary disposition on the basis of the innocent-third-party rule, we vacate the trial court's order in that respect. However, this Court must further consider the posture of this case relative to the underlying issue of fraud. In denying QBE's motion, the trial court stated that "there is some question, I guess, factually as to whether in fact there was fraud." It further opined that while it was inclined to believe that "there was fraud in obtaining the insurance just from what's before me," "there at least could be some triable issues" in that regard. Based on our review of the record, we see no reason to disturb that finding.

Vacated with respect to the denial of summary disposition under the innocent-third-party rule, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. QBE may tax costs. MCR 7.219(A).

RIORDAN, P.J., concurred with BOONSTRA, J.

MURPHY, J. (*concurring*). Because this Court in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), held that the innocent-third-party rule was implicitly and effectively abolished in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), for purposes of mandatory personal protection insurance benefits, commonly referred to as PIP benefits, under the no-fault act, MCL 500.3101 *et seq*., I am compelled to agree with the majority that QBE Insurance Corporation (QBE) was not barred from pursuing a fraud defense relative to its insurance policy with Whitney Gray. Therefore, I concur with the majority that the trial court erred by denying QBE's motion for summary disposition on the basis of the innocent-third-party rule. I write separately to simply express my view that there is language in our Supreme Court's opinion in *Titan* that plainly and unambiguously reflects that the Supreme Court itself accepted the notion that remedies for actionable fraud are limited in relation to statutorily mandated insurance coverage and benefits.

In *Titan*, 491 Mich at 572, our Supreme Court ruled:

> Should Titan prevail on its assertion of actionable fraud, it may avail itself of a traditional legal or equitable remedy to avoid liability under the insurance policy, notwithstanding that the fraud may have been easily ascertainable. *However, as discussed earlier in this opin-*

> *ion, the remedies available to Titan may be limited by statute*. [Emphasis added; citation omitted.]

Importantly, attached to the end of the emphasized sentence in the preceding passage was the following footnote: "For example, MCL 500.3009(1) provides the policy coverage minimums for all motor vehicle liability insurance policies." *Titan*, 491 Mich at 572 n 17.[1] When footnote 17 is read in conjunction with the sentence to which it was appended, it necessarily signified the Supreme Court's stance that the $20,000/$40,000 residual liability coverage mandated by MCL 500.3009(1) cannot be diminished or limited by legal or equitable remedies generally available to an insurer for actionable fraud. There can be no other reasonable construction of the sentence and corresponding footnote. Optional insurance coverage above the minimum liability limits contained in a policy procured by fraud might not be reached by an injured third party seeking damages arising out of a motor vehicle accident, but footnote 17 in *Titan* makes abundantly clear that the mandatory liability minimums are to be paid by the insurer under the policy despite any fraud.

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[1] MCL 500.3009(1) states:

> An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to a limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident, and subject to that limit for 1 person, to a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident, and to a limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.

In *Titan*, 491 Mich at 559, the Court recognized that MCL 257.520(f)(1) expressly restricts the ability of an insurer to avoid liability under a policy on the ground of fraud, although the statute has very limited applicability, being relegated to situations in which proof of future financial responsibility is statutorily required.[2] MCL 500.3009(1) has no such language; rather, MCL 500.3009(1) merely sets forth minimum policy requirements in regard to residual liability coverage. With footnote 17, however, the *Titan* Court indicated that MCL 500.3009(1) is an example of a statute that would also limit available remedies for fraud. The only feasible explanation for any fraud-remedy limitation arising out of or created by MCL 500.3009(1) is that the statutory provision pertains to *mandatory* coverage. By observing that MCL 500.3009(1) limits available remedies for actionable fraud, the Supreme Court effectively telegraphed its view that an insurer would be liable under a policy with respect to liability coverage required by MCL 500.3009(1) in connection to an innocent third party injured by a negligent driver who had fraudulently procured the policy.

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[2] MCL 257.520(f) provides, in pertinent part:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> (1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy, and except as hereinafter provided, no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy, or in adjusting a claim under such policy, and no failure of the insured to give any notice, forward any paper or otherwise cooperate with the insurance carrier, shall constitute a defense as against such judgment creditor.

MCL 500.3009(1) is incorporated by reference in the no-fault act with regard to mandatory residual liability coverage. See MCL 500.3101(1) ("The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under . . . residual liability insurance."); MCL 500.3131(2) (residual liability insurance mandate "shall not require coverage in this state other than that required by section 3009(1)"). PIP coverage is also mandated by statute. MCL 500.3101(1) ("The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance[.]"). And "[u]nder personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" MCL 500.3105(1).[3] Given the mandatory nature of PIP coverage under the no-fault act, and considering the logic gleaned from examining footnote 17 of *Titan*, one can reasonably extrapolate that MCL 500.3101(1) (requiring PIP coverage) would be another example, along with MCL 500.3009(1), of a statute that limits the availability of remedies for actionable fraud.

In sum, *Bazzi*'s construction of *Titan* must be honored, and thus I concur in the majority's holding. It is my belief, however, that the opinion in *Titan* cannot be interpreted as abolishing the innocent-third-party rule in the context of statutorily mandated automobile insurance coverage because to reach such a conclusion would require a wholesale disregard of *Titan*'s footnote 17.

I respectfully concur.

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[3] MCL 500.3107 describes the allowable expenses and recoverable losses that constitute PIP benefits.

PEOPLE v BLANTON

Docket No. 328690. Submitted April 12, 2016, at Grand Rapids. Decided August 30, 2016, at 9:05 a.m.

Timothy L. Blanton, Jr., was convicted in the Kent Circuit Court after pleading guilty to armed robbery, MCL 750.529, assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Blanton had agreed to plead guilty to those charges in exchange for the dismissal of other charges against him and the dismissal of a second-offense habitual offender enhancement, MCL 769.10. The court, George J. Quist, J., conducted the plea colloquy with Blanton before accepting his plea. With the exception of the felony-firearm charge, the court advised Blanton of the sentences possible for the charges against him. The court did not inform Blanton of the mandatory sentence that would be imposed for a conviction of felony-firearm or that the felony-firearm sentence would have to be served consecutively to the sentences for his other convictions. The remainder of the plea colloquy was properly conducted. The court advised Blanton of the rights he would be giving up if he pleaded guilty, asked how he wished to plead to the charges, elicited a factual basis for Blanton's guilty plea, concluded that Blanton's plea was knowingly, intelligently, and voluntarily made, accepted the plea, and adjudicated Blanton guilty of the three charges included in the plea agreement. At sentencing, Blanton pleaded guilty to a probation violation and was sentenced to 5 to 25 years of imprisonment for that violation. The court then sentenced Blanton to 5 to 10 years of imprisonment for the assault with intent to do great bodily harm conviction, 20 to 50 years of imprisonment for the armed robbery conviction, and 2 years of imprisonment for the felony-firearm conviction. The sentences for the convictions other than felony-firearm were to run concurrently after defendant served the felony-firearm sentence. Blanton subsequently moved to withdraw his guilty plea under MCR 6.310(C). He contended that there had been an error in the plea proceeding—that his plea was not knowing, understanding, or voluntary because the court had failed to advise him of the maximum possible penalty he faced for conviction of felony-firearm and that the other sentences would have to be served consecutively

to the two-year felony-firearm sentence. The prosecution conceded the error but argued that Blanton could not withdraw his plea to all charges, only to the felony-firearm charge. At a hearing on the matter, the court acknowledged that the plea proceeding was defective but refused to adopt the prosecution's approach to the issue. The court noted that the plea to felony-firearm was made as part of a "package deal" and that the plea agreement was indivisible. The court denied the prosecution's motion for reconsideration but agreed with the prosecution's position that the court failed to comply with MCR 6.310(C), which instructed that the court advise Blanton of the consequences of withdrawing his plea and give him the opportunity to let his plea stand or to withdraw it. Blanton chose to withdraw his plea. The court ordered that Blanton's sentences be vacated and opened the case for further proceedings. The prosecution appealed, and the trial court stayed the proceedings.

The Court of Appeals *held*:

1. MCR 6.310(C) permits a defendant to move to withdraw his or her plea within six months of sentencing, and the defendant has the burden of demonstrating a defect in the plea-taking process. If the trial court concludes that there was an error in the plea proceedings, the court must do what is necessary to remedy the error and give the defendant an opportunity to allow the plea and sentence to stand or to withdraw the plea. In this case, there was no dispute that the trial court erred. As part of a defendant's plea proceeding, MCR 6.302(B)(2) requires a trial court to inform the defendant of the maximum possible prison sentence he or she could receive for conviction of the offense and of any mandatory minimum sentence required by law. Because the understanding, voluntary, and accurate components of a valid plea—set forth in MCR 6.302(A)—are grounded on the guarantees of constitutional due process, a trial court may be required to advise a defendant of information not expressly stated in MCR 6.302. This obligation extends to informing a defendant of any consecutive or mandatory sentencing consequences of his or her conviction. Failure to advise a defendant of any consecutive or mandatory sentences constitutes a clear defect in the plea proceeding because the defendant cannot make an understanding plea without that information. A plea that is not voluntary or understanding violates both the state and the federal Due Process Clauses. In this case, the trial court failed to inform Blanton that his felony-firearm conviction carried a mandatory and consecutive two-year sentence that had to be served before the other sentences he received. This failure was a clear defect in the plea

proceeding because Blanton could not tender an understanding plea without knowing about the full consequences of his plea.

2. If a clear defect in a plea proceeding has occurred, the trial court must, under MCR 6.310(C), correct the error and give the defendant the opportunity to withdraw his or her plea or to elect to let the plea and sentence stand. A plea agreement is subject to review under contract principles. A plea agreement that includes pleading to more than one offense is generally considered a "package deal"; that is, a defendant's choice to withdraw his or her plea effectively means that the plea is withdrawn as to all the charges against the defendant, not just the charge or charges affected by the error in the plea proceeding. A plea agreement covering multiple offenses is indivisible when the objective facts and circumstances indicate that the parties intended the agreement to include multiple offenses. In this case, Blanton was charged with multiple offenses in a single information and made an agreement with the prosecution to plead guilty to three charges at the same time in exchange for the dismissal of the remaining charges and the habitual offender enhancement. The trial court did not ask Blanton to plead to each offense separately. Instead, Blanton entered a single plea to all three charges. The terms of the plea agreement were contained in a single document, and Blanton's plea to the multiple charges was accepted at a single proceeding. The trial court did not abuse its discretion by allowing Blanton to withdraw his plea to all three charges because the plea agreement was indivisible.

Affirmed.

CRIMINAL LAW — GUILTY PLEA TO MULTIPLE OFFENSES — PLEA WITHDRAWAL — DIVISIBILITY OF PLEA AGREEMENT.

A plea agreement is evaluated using contract principles, and the parties' intent is paramount; when objective facts and circumstances indicate that the parties intended a plea agreement involving multiple offenses to be a "package deal," the agreement is indivisible and a defendant may not elect to withdraw his or her plea to a single offense; plea withdrawal in the case of indivisible plea agreements means that the plea to one offense is inseparable from the plea to other offenses encompassed by the same plea agreement (MCR 6.310).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting At-

torney, *James K. Benison*, Chief Appellate Attorney, and *Gary A. Moore*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christine A. Pagac*) for defendant.

Before: SAAD, P.J., and BORRELLO and GADOLA, JJ.

BORRELLO, J. The prosecution appeals by leave granted[1] the June 19, 2015 circuit court order granting defendant's motion to withdraw his guilty plea to charges of armed robbery, MCL 750.529; assault with intent to do great bodily harm, MCL 750.84; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, on the basis that the plea proceeding was defective. The trial court denied the prosecution's motion for reconsideration on July 24, 2015. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendant was originally charged with one count each of assault with intent to commit murder, MCL 750.83; assault with intent to rob while armed, MCL 750.89; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; and felony-firearm in connection with events that occurred on May 19, 2014, in Grand Rapids, Michigan. He was charged as a second-offense habitual offender, MCL 769.10. Defendant was bound over for trial following a preliminary examination.

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[1] *People v Blanton*, unpublished order of the Court of Appeals, entered October 19, 2015 (Docket No. 328690).

The record reflects that defendant was originally offered a plea deal that would have allowed him to plead guilty to the charges of assault with intent to commit murder, felon-in-possession, and felony-firearm in exchange for the prosecution's dropping the assault with intent to rob while armed charge and the second-offense habitual offender enhancement. However, at a status conference on July 16, 2014, defendant rejected that plea offer.

Defendant was subsequently offered a second plea deal that would allow him to plead guilty on an amended information to charges of armed robbery, assault with intent to do great bodily harm, and felony-firearm in exchange for the prosecution's dropping the assault with intent to commit murder, assault with intent to rob while armed, and felon-in-possession charges as well as the second-offense habitual offender enhancement. Additionally, the prosecution agreed that the sentencing guidelines range would be 171 to 285 months' imprisonment. Defendant expressed his desire to accept that plea offer.

A plea proceeding was held on September 22, 2014, during which the terms of the second plea offer were placed on the record. The trial court placed defendant under oath. Thereafter, the trial court advised defendant that because he was on probation at the time he allegedly committed the charged offenses, he could be punished "up to the statutory maximum for whatever [he was] on probation for" and that any such sentence would "run concurrently, meaning at the same time, as any counts in this case except for the felony firearm." Defendant expressed his understanding of these facts. The trial court then advised defendant that upon a conviction for armed robbery, he faced a maximum possible penalty of life imprisonment. Defendant ex-

pressed his understanding. The trial court further advised defendant that upon a conviction for assault with intent to do great bodily harm, he faced a maximum possible penalty of 10 years' imprisonment. Without asking if defendant understood this fact, the trial court then advised defendant that he was also charged with felony-firearm, but did not advise defendant of the maximum possible penalty for this offense or the fact that the penalty would run consecutively to the other sentences. The trial court then simply asked defendant if he "underst[ood] the nature of the charges." Defendant responded affirmatively.

The trial court next advised defendant of the rights he would be giving up by pleading guilty as well as the fact that once the plea was accepted, defendant did "not have any automatic right to withdraw [the] plea or to change [his] mind." Defendant expressed his understanding. Defendant further acknowledged that he was not forced or threatened to enter the plea. After satisfying itself that the pertinent information had been discussed, the trial court asked defendant, "To the charge of armed robbery, assault with intent to do great bodily harm, and felony firearm on May 19th, 2014, how do you plead; guilty or not guilty?" Defendant responded, "Guilty, Your Honor." After eliciting a factual basis for the plea,[2] the trial court found that defendant's plea was "knowingly, intelligently, and voluntarily made" and accepted the plea. The trial court then adjudicated defendant guilty.[3]

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[2] Defendant admitted that he was present in Grand Rapids on May 19, 2014, that he went to 506 Dickinson Street, that he was armed with a firearm, and that he shot the victim with the intent to steal the victim's "sunglasses and a cell phone."

[3] A written plea agreement, which was signed by defendant and acknowledged at the plea proceeding, was placed in the lower court record. The plea agreement does not refer to the penalties defendant faced by pleading guilty.

Sentencing was held on October 20, 2014. At the outset of the hearing, defendant entered a guilty plea to his pending probation violation. Ultimately, defendant was sentenced to 5 to 25 years' imprisonment for the probation violation, 5 to 10 years' imprisonment for the assault with intent to do great bodily harm conviction, 20 to 50 years' imprisonment for the armed robbery conviction, and 2 years' imprisonment for the felony-firearm conviction. The former three sentences were ordered to be served consecutively to the felony-firearm sentence.

After he was sentenced, defendant requested and was appointed appellate counsel. Then, on April 17, 2015, defendant, through his appellate counsel, moved in the trial court to withdraw his guilty plea. As the basis for withdrawing his plea, defendant argued that his plea was not knowingly, understandingly, and voluntarily entered because during the plea proceeding the trial court failed to advise him of the maximum possible penalty he faced for conviction of the felony-firearm charge and that the felony-firearm sentence would run consecutively to the other sentences. Defendant contended that the failure to so advise him violated MCR 6.302(B)(2). Accordingly, because there was "an error in the plea proceeding," defendant argued that he was entitled under MCR 6.310(C) to withdraw his plea.

In response to defendant's motion, the prosecution conceded that the trial court had erred by failing to advise defendant during the plea proceeding of the maximum possible penalty for the felony-firearm offense and that the sentence for that offense would be consecutive to the other sentences. However, while the prosecution conceded that the error entitled defendant to withdraw his guilty plea to the felony-firearm

charge, it disputed the notion that defendant was entitled to withdraw "all his pleas to the charged offenses." Instead, the prosecution argued that because defendant had been properly advised regarding the charges of armed robbery and assault with intent to commit great bodily harm, and because any failure to inform defendant regarding the felony-firearm charge was "extrinsic" to those other charges, defendant was not entitled to withdraw his guilty plea to those other charges. Therefore, the prosecution requested that defendant's motion to withdraw be denied as it pertained to the convictions for armed robbery and assault with intent to commit great bodily harm.

A hearing on defendant's motion was held on June 19, 2015. At the outset, the trial court recognized that there was "no dispute that the plea proceeding was defective in some way because [defendant] was not informed about the . . . penalty regarding the felony firearm" charge. As to the issue whether defendant was entitled to withdraw his plea in total or only with respect to the felony-firearm charge, the trial court agreed with defendant's position that the plea agreement was a "comprehensive deal" and was not divisible:

> I agree with the defendant in this case. A plea agreement, I think, is a comprehensive deal. There's a plea -- Michigan Court Rule 6.310(C) controls this case -- or controls this issue. If there's an error in the plea proceeding, it allows the withdrawal of the plea. And I do find the defendant's position persuasive that pleas are comprehensive deals. You can't just take one part out because it's a negotiated process. So, [defendant] will be allowed to withdraw his entire plea . . . .

The trial court subsequently entered two written orders on June 19, 2015. Specifically, in one order the trial court granted defendant's motion to withdraw his

plea in full. In the other order, the trial court vacated the judgment of sentence and reopened the case for further proceedings.

The prosecution moved the trial court for reconsideration on July 10, 2015. As a threshold matter, the prosecution argued that the trial court erred by simply granting defendant's motion to withdraw his plea instead of following the procedure set forth in MCR 6.310(C), which provides that "[i]f the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." According to the prosecution, by granting the motion without even asking defendant what his preference was, the trial court left open the possibility that defendant could be tried and convicted of *all* counts (including those dropped as part of the plea) and sentenced to a harsher punishment, only to then insist that he be reoffered the plea deal because he never rejected it on the record. Therefore, the prosecution contended that, at a minimum, a hearing needed to be held at which defendant could be advised of his rights and allowed to choose whether to withdraw his plea or allow it to stand. Next, as it pertained to his right to withdraw the plea, the prosecution maintained that the trial court had erred by allowing defendant to withdraw his entire plea; rather, "the proper remedy" was "to allow him to withdraw the plea to the felony firearm count but not his pleas to the other two counts . . . ." In the interest of "maintaining the otherwise valid pleas" and to dispel any concern that allowing defendant to withdraw only his plea to the felony-firearm charge could result in his admissions from the plea proceeding being

used against him in a subsequent trial on that charge, the prosecution agreed to drop the felony-firearm charge if the trial court granted its motion for reconsideration. As the prosecution reasoned, "Once the felony firearm count has been dismissed, the issues with the improper plea proceeding will be moot, and Defendant will have no basis to challenge his other two pleas."

While the prosecution's motion for reconsideration was pending, a status conference was held on July 23, 2015. The trial court indicated on the record that it would be denying the motion for reconsideration, but acknowledged that it had failed to comply with the process set forth in MCR 6.310(C). Therefore, after placing defendant under oath, the trial court briefly advised defendant of the consequences of withdrawing his plea; namely, that if another plea deal could not be reached, he would be tried and, if convicted, the penalties would be "much more severe than the sentence that was issued" previously. Defendant expressed that he still wished to withdraw his plea, and the trial court granted his request.

Ultimately, the trial court entered an order on July 24, 2015, denying the prosecution's motion for reconsideration. In so doing, the trial court concluded:

> The People do not provide any specific case, statute, or court rule to support their position that the defendant should only be allowed to withdraw the "defective" portion of his plea. The Court is not aware of any case law in Michigan which supports the People's position. However, the Court finds that plea agreements are "package deals" and indivisible. Although the Court knows of no binding precedent in Michigan on this issue, the Court finds the Supreme Court of Washington's analysis in the [sic] State v. Turley, 149 Wash. 2d 395, 69 P. 3d 338 (2003) persuasive.

> Based on the above analysis, the People's motion for reconsideration is respectfully denied.

The prosecution filed an application for leave to appeal the trial court's June 19, 2015 decision, which, as noted, this Court granted. In the meantime, the trial court granted the prosecution's motion to stay the proceedings.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's ruling on a motion to withdraw a plea. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). Likewise, we review for an abuse of discretion a trial court's ruling on a motion for reconsideration. *People v Perkins*, 280 Mich App 244, 248; 760 NW2d 669 (2008). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). Interpretation of court rules presents a question of law that we review de novo. *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

III. ANALYSIS

A defendant's ability to withdraw a guilty or nolo contendere plea is governed by the Michigan Court Rules. Under those rules, a defendant has an absolute "right to withdraw any plea until the court accepts it on the record." MCR 6.310(A). However, "[t]here is no absolute right to withdraw a guilty plea once it has been accepted." *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). Instead, under MCR 6.310, a defendant's ability to withdraw a plea after the trial court has accepted it is limited to certain circum-

stances. Specifically, as relevant to this case, a motion to withdraw a guilty plea after sentencing is governed by MCR 6.310(C), which provides, in relevant part:

> Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. . . . If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea.

In other words, under MCR 6.310(C), "[a] defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *Brown*, 492 Mich at 693.

At the outset, as the trial court concluded and the prosecution conceded, there was a clear defect in the plea-taking process vis-à-vis the felony-firearm charge. "Guilty- and no-contest-plea proceedings are governed by MCR 6.302." *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). "The first sentence of [MCR 6.302(A)] provides that a 'court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate.' " *Id*. at 330-331, quoting MCR 6.302(A); see also *Brown*, 492 Mich at 688-689. In order for a plea to be voluntary and understanding, the defendant "must be fully aware of the direct consequences of the plea." *Cole*, 491 Mich at 333 (quotation marks and citations omitted). The penalty to be imposed is "[t]he most obvious 'direct consequence' of a conviction[.]" *Id*. at 334 (quotation marks and citation omitted).

Accordingly, under MCR 6.302(B)(2), a trial court must, as part of the plea colloquy, inform the defendant

of "the maximum possible prison sentence for the offense *and any mandatory minimum sentence* required by law . . . ." (Emphasis added.) Additionally, because "the 'understanding, voluntary, and accurate' components of [MCR 6.302(A)] are premised on the requirements of constitutional due process," a trial court may, in certain circumstances, be required to inform a defendant about facts not explicitly required by MCR 6.302. *Cole*, 491 Mich at 332. For example, although not explicitly required by MCR 6.302(B), it is well settled that a trial court must inform the defendant of any "consecutive and/or mandatory sentencing" requirements. *People v Mitchell*, 102 Mich App 554, 557; 302 NW2d 230 (1980), rev'd in part on other grounds 412 Mich 853 (1981).[4] When a defendant is not fully informed about the penalties to be imposed, there is a "clear defect in the plea proceedings" because the defendant is unable "to make an understanding plea under MCR 6.302(B)." *Brown*, 492 Mich at 694. A plea that is not voluntary and understanding "violates the state and federal Due Process Clauses." *Id*. at 699, citing US Const, Ams V and XIV, and Const 1963, art 1, § 17.

At the time of defendant's sentencing,[5] the felony-firearm statute, MCL 750.227b, provided in relevant part:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of [MCL 750.223, MCL 750.227,

[4] Under MCR 7.215(J)(1), *Mitchell* is not precedentially binding because it was published before November 1, 1990. Nonetheless, this Court finds its reasoning to be persuasive.

[5] MCL 750.227b was amended effective July 1, 2015, but the amendment did not alter the substantive provisions at issue in this case. See 2015 PA 26.

> MCL 750.227a, or MCL 750.230], is guilty of a felony, and shall be imprisoned for 2 years. . . .
>
> (2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

The plain language of MCL 750.227b thus makes clear that when a defendant carries a firearm during the commission of a felony, he or she is subject to a *mandatory* two-year term of imprisonment to be served "consecutively with and preceding any term of imprisonment imposed" for the underlying felony. See *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). Accordingly, to comply with MCR 6.302(B), the trial court, as part of the plea colloquy in this case, should have advised defendant that by pleading guilty to felony-firearm (1) he would be sentenced to a mandatory two-year term of imprisonment, (2) this term of imprisonment would be served first, and (3) the concurrent sentences for armed robbery and assault with intent to commit great bodily harm would be served consecutively to the felony-firearm sentence. See *Mitchell*, 102 Mich App at 557. There is no dispute that the trial court failed to do so. Consequently, there was a "clear defect in the plea proceeding" because defendant, unaware of the full nature of the penalty for felony-firearm, could not make an understanding and voluntary plea as required by MCR 6.302. See *Brown*, 492 Mich at 694. See also *Mitchell*, 102 Mich App at 557 (remanding the case to the trial court so that the defendant could be properly advised that "a felony-firearm conviction carries a mandatory two-year sentence which must be served *before*, rather than concur-

rently with, any sentence imposed with regard to his plea on the murder charge").

Given this defect in the plea-taking process, the issue before this Court is the remedy to which defendant is entitled. As noted, under MCR 6.310(C), a defendant, upon showing a defect in the plea-taking process, is entitled to have the error corrected by the trial court and to thereafter have "the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." See also *Brown*, 492 Mich at 702. However, the parties dispute whether this rule allows defendant to withdraw his entire plea or only his plea to the felony-firearm charge. We are unaware of any Michigan caselaw addressing this question.

The prosecution asserts that the matter can be resolved simply by looking to the plain language of MCR 6.302 and MCR 6.310. Specifically, as the prosecution points out, MCR 6.302 and MCR 6.310 each make "repeated references" to the singular terms "plea" or "plea proceeding," as opposed to the plural terms "pleas" or "plea proceedings." It follows, according to the prosecution, that "a defect in the plea proceeding would necessarily reference a defect as to the particular plea, not as to any plea entered during a single hearing." In other words, the prosecution appears to argue that the use of the singular terms denotes an intention by the drafters of the court rules to treat a plea involving multiple charges as divisible so that a defect in the plea proceeding as to one charge would not render the proceeding defective as to the other charges.

The prosecution's argument lacks merit. As a threshold matter, to the extent that our Supreme Court's intent can be gleaned from its use of the singular terms "plea" and "plea proceeding" in the

court rules, the intent espoused would be the exact opposite of what the prosecution suggests—i.e., the use of the terms in their singular form denotes an intention to treat a "plea" pertaining to multiple charges as part of one singular and indivisible whole that cannot be divided according to the specific offenses. However, the mere fact that the Supreme Court used singular terms in the court rules is ultimately not that helpful in determining its intent because MCR 1.107 expressly provides that "[w]ords used in the singular also apply to the plural, where appropriate." Consequently, the Supreme Court's use in MCR 6.302 and MCR 6.310 of the singular terms "plea" and "plea proceeding" does not necessarily resolve the issue. Therefore, given the absence of a clear directive in the court rules, reference to the rules does not end our inquiry.

We are not aware of any relevant Michigan caselaw addressing this issue. However, in the seminal case of *State v Turley*, 149 Wash 2d 395; 69 P3d 338 (2003)—relied on by the trial court in this case—the Washington Supreme Court addressed the very issue currently before this Court.[6] *Id*. at 398. In *Turley*, the defendant pleaded guilty to two charges but was erroneously advised at the plea hearing regarding the mandatory sentencing requirements of only one of the charges. *Id*. at 396. When the defendant was later sentenced according to those mandatory requirements, he moved to withdraw his plea pursuant to a court rule requiring the trial court to allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." *Id*. at 398. The defendant argued that the plea agreement was

[6] Decisions from foreign jurisdictions are not precedentially binding but may be considered persuasive. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

indivisible and that "because the plea agreement covered both charges, the court should allow him to withdraw both pleas" even though the plea proceeding was defective as to only one of the charges. *Id*. at 397. The trial court agreed that the defendant's plea was not intelligent and voluntary, but allowed him to withdraw only the plea pertaining to the charge for which the plea proceeding was defective. *Id*. at 397-398. The Washington Court of Appeals affirmed. *Id*. at 398.

On appeal, the Washington Supreme Court addressed the question "whether a trial court may grant or deny a motion to withdraw a plea agreement as to each count separately when the defendant pleaded guilty to multiple counts entered the same day in one agreement." *Id*. The court answered that question "in the negative." *Id*. The court observed that "[a] plea agreement is essentially a contract made between a defendant and the State," and the court looked to contract principles—specifically, "the intent of the parties"—to determine whether a plea agreement should be considered separable or indivisible. *Id*. at 400.

The court found several "objective indications of intent" relevant to determining the intent of the parties. *Id*. First, the defendant "negotiated and pleaded to two charges contemporaneously." *Id*. Second, "[o]ne document contained the plea to and conditions for both charges." *Id*. Finally, "[t]he trial court accepted his plea to both charges at one hearing" without separately advising the defendant of the consequences of each individual charge. *Id*. Finding no "objective indications to the contrary in the agreement itself," the court ultimately concluded that the plea agreement was indivisible and that the defendant "should have been

permitted to withdraw both pleas" as a result of the incomplete information given at the plea hearing. *Id*. at 400-401.

Since the Washington Supreme Court's pronouncement in *Turley*, Washington appellate courts have consistently adhered to the principle that when the objective circumstances indicate an intent by the prosecution and the defendant to treat a plea agreement to multiple charges as a "package deal," *id*. at 400, the plea agreement is indivisible and the defendant is permitted, upon showing a defect, to withdraw the plea in its entirety, even when the defect pertains to only one charge. See, e.g., *In re Personal Restraint of Shale*, 160 Wash 2d 489, 493-494; 158 P3d 588 (2007) (holding that a plea agreement involving multiple charges was indivisible when, although the individual pleas were described in different documents, they were for crimes committed at the same time, were signed on the same day, and referred to one another); *In re Personal Restraint of Bradley*, 165 Wash 2d 934, 942-943; 205 P3d 123 (2009) (holding that a plea agreement involving multiple charges was indivisible even though the crimes were committed three months apart and charged in separate informations because the objective circumstances evidenced "that the pleas were negotiated as part of a package deal"); *State v Bisson*, 156 Wash 2d 507, 519-520; 130 P3d 820 (2006) (rejecting the defendant's request to withdraw only that portion of his plea pertaining to sentencing enhancements because the plea agreement was indivisible and the remedy was therefore "restricted to the withdrawal of his plea in its entirety").

Other states have also applied contract principles to determine that a plea agreement is indivisible and therefore not capable of being partially withdrawn.

See, e.g., *Whitaker v State*, 881 So 2d 80-82 (Fla App, 2004) (holding that the trial court erred by granting only partial withdrawal of the defendant's guilty plea because the record demonstrated that the parties intended to negotiate the defendant's pleas to several charges as part of a "package" in exchange for the dismissal of other charges). But see *People v Kazadi*, 284 P3d 70, 76 (Colo App, 2011) (recognizing that "some jurisdictions allow withdrawal of multiple pleas when one of the pleas was not validly entered and the plea bargain was a 'package deal,' " but declining to adopt that approach because the Colorado Supreme Court had previously "invalidated one plea but not the other in an alleged 'plea package,' when the basis for voiding one did not necessarily undermine the other").

We conclude that the contractual approach set forth in *Turley* is persuasive. This Court has previously explained that "[c]ontractual analogies may be applied in the context of a plea agreement" if to do so would not "subvert the ends of justice." *People v Swirles (After Remand)*, 218 Mich App 133, 135; 553 NW2d 357 (1996). See also *People v Martinez*, 307 Mich App 641, 651; 861 NW2d 905 (2014). Given the nature of the plea-bargaining process in Michigan, during which both parties often tend to negotiate a "package deal," we conclude that adherence to the approach set forth in *Turley* would not "subvert the ends of justice." *Swirles*, 218 Mich App at 135. Moreover, we note that review in this case is for an abuse of discretion. *Brown*, 492 Mich at 688. Given that there was no precedential authority on this issue in Michigan, we decline to conclude that the trial court abused its discretion by applying the contractual approach set forth in *Turley*.

Applying the contractual approach to the instant case, the objective facts reveal an intent by the pros-

ecution and defendant to treat the plea agreement as indivisible. *Turley*, 149 Wash 2d at 400. Specifically, defendant was charged with multiple offenses in a single information. He negotiated with the prosecution to allow him to plead guilty to three charges contemporaneously in exchange for the dismissal of the remaining charges and the habitual offender enhancement. A single document contained the terms of the plea agreement. And the trial court accepted defendant's plea to all three charges at one hearing. Specifically, at the sentencing hearing, the trial court did not ask defendant his plea to each individual charge; instead, the trial court asked defendant how he pleaded to the charges, and defendant's sole response was "[g]uilty." In other words, the "pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding," and were thus part of a "package deal." *Id*. Consequently, defendant offered a guilty plea to the entirety of the plea agreement. Neither the trial court nor the state sought from defendant a bifurcation of any of the factual underpinnings for any of the crimes to which he tendered a plea of guilty. Because the plea agreement was indivisible, the trial court did not abuse its discretion by allowing defendant to withdraw the plea in its entirety, rather than withdraw only the plea affected by the trial court's omission.

Affirmed.

SAAD, P.J., and GADOLA, J., concurred with BORRELLO, J.

COLOMA CHARTER TOWNSHIP v BERRIEN COUNTY

HERMAN v BERRIEN COUNTY

Docket Nos. 325226 and 325335. Submitted March 8, 2016, at Grand Rapids. Decided September 6, 2016, at 9:00 a.m. Leave to appeal granted 501 Mich 868.

In Docket No. 325226, Coloma Charter Township brought an action in the Berrien Circuit Court in 2013 against Berrien County and the Berrien County Sheriff's Department, seeking to enjoin the county and its sheriff's department from discharging firearms from a newly constructed shooting-range building into a previously constructed outdoor shooting range that was subject to a 2008 permanent injunction that enjoined the county from operating the outdoor shooting range because it violated township ordinances. In Docket No. 325335, Joe Herman and others (the Herman plaintiffs) brought an action in the Berrien Circuit Court in 2013 against Berrien County, seeking to enforce the 2008 permanent injunction and requesting that the court hold the county in civil and criminal contempt for violating that injunction. In 2005, the Herman plaintiffs had brought an action in the Berrien Circuit Court against Berrien County, challenging the county's ability to locate a law enforcement training facility with outdoor shooting ranges near the Herman plaintiffs' residences on the basis that the shooting ranges would violate various township zoning and noise ordinances. The court, Paul L. Maloney, J., granted the county's summary disposition motion, holding that the county building that was used for firearms classroom training and the shooting range were exempt under MCL 46.11 of the county commissioners act (CCA), MCL 46.1 *et seq*., from the township ordinances. In a split decision, the Court of Appeals, O'CONNELL, P.J., and MURRAY, J. (DAVIS, J., dissenting), affirmed. *Herman v Berrien Co*, 275 Mich App 382 (2007). The Supreme Court reversed the Court of Appeals, holding that land uses that are ancillary to a county building and not indispensable to its normal use are not covered by the grant of priority in the CCA over local regulation. Accordingly, the county's outdoor shooting range did not have priority over the township ordinances because those land uses were not indispensable to the normal use of the

county's indoor firearms training building—which was for classroom training—that was adjacent to the outdoor shooting range. *Herman v Berrien Co*, 481 Mich 352 (2008). In accordance with that decision, on remand in 2008 the circuit court entered a permanent injunction enjoining the county from using the previously constructed outdoor shooting range for firearms training. On the basis of legal advice in 2013, the county constructed an open-air, pole-barn-type structure (shooting-range building) that faced the longest of the previously constructed outdoor shooting ranges and allowed law enforcement officers to fire weapons from inside the building at the targets in the outdoor shooting range. Plaintiffs then filed their separate actions in the circuit court. In August 2014, the court, John E. Dewane, J., dismissed the Herman plaintiffs' claim of civil contempt on the basis of governmental immunity. The township moved for summary disposition of its claims, and the Herman plaintiffs joined the motion. In October 2014, the court denied the plaintiffs' motions and granted summary disposition in favor of the county and the sheriff's department, concluding that because the shooting-range building was a necessary county building for purposes of MCL 46.11(b) and (d) of the CCA and the outdoor shooting range was indispensable to the normal use of the shooting-range building, the county's authority to site the shooting-range building took priority over the township's zoning and noise ordinances. For that reason, the circuit court modified the 2008 permanent injunction to allow law enforcement officers to shoot firearms from the shooting-range building to the range for training and annual assessment purposes. The circuit court later acquitted the county of the Herman plaintiffs' criminal contempt charge, concluding that although the proofs had established beyond a reasonable doubt that the county had been aware of the prior 2008 Supreme Court decision and that the county had violated the injunction, there was no evidence that the violation was an intentional violation of a known legal duty or that the county had imputed knowledge of the injunction through the county's former corporate counsel, R. McKinley Elliot. Plaintiffs in both cases appealed, and the Court of Appeals ordered that the cases be consolidated.

The Court of Appeals *held*:

1. MCL 46.11(b) and (d) of the CCA authorize a county to site county buildings on property even if it violates or is inconsistent with local township zoning regulations. Those subsections grant counties the power to determine the site of, remove, or designate a new site for a county building and to erect the necessary buildings for jails, clerks' offices, and other county buildings. The

CCA grants counties the authority to site buildings, not land uses or activities. Ancillary land uses of a building—such as parking lots, sidewalks, and light posts—are included in a county's siting power because it allows the county to make normal use of the building; ancillary land uses take priority over township regulations.

2. In both cases, the circuit court erred by granting summary disposition in favor of defendants and by modifying the injunction to allow law enforcement officers to shoot firearms from the newly constructed shooting-range building into the existing outdoor shooting range. The shooting-range building was ancillary to the outdoor shooting range—as opposed to the shooting range being ancillary to the normal use of the building—because the outdoor shooting range was used as such before the 2008 permanent injunction was issued and before the shooting-range building was constructed. As stated by the Supreme Court in the prior 2008 opinion, shooting ranges are not a normal or indispensable use of a county building, and the county may not protect the nonconforming land use of the property as an outdoor shooting range by siting the shooting-range building adjacent to it.

3. In both cases, the circuit court's order regarding attorney fees was vacated and the issue remanded because the county violated the Supreme Court's prior decision and in turn violated MCL 46.11(b) and (d).

4. In Docket No. 325335, the circuit court correctly acquitted the county of criminal contempt.

In Docket No. 325226, the circuit court order granting summary disposition in favor of defendants was reversed and the case remanded for entry of summary disposition in favor of the township, the circuit court order modifying the permanent injunction was reversed, and the circuit court order regarding attorney fees was vacated and the issue remanded.

In Docket No. 325335, the circuit court order granting summary disposition in favor of defendants was reversed and the case remanded for entry of summary disposition in favor of the Herman plaintiffs, the circuit order modifying the permanent injunction was reversed, the circuit court order regarding attorney fees was vacated and the issue remanded, and the circuit court order acquitting the county of criminal contempt charges was affirmed.

MARKEY, J., concurring in part and dissenting in part, agreed that the court did not abuse its discretion by finding the county not guilty of criminal contempt following a bench trial. In both cases, Judge MARKEY disagreed with the majority's analysis of

MCL 46.11(b) and (d) of the CCA and its application to the shooting-range building. The shooting-range building is a "county building" within the meaning of MCL 46.11(b) and (d), and the county used it for the lawful purpose of necessary firearms training for county law enforcement officers. The CCA is clear and unambiguous and places only one limit on a county's power to site and erect county buildings—specifically, a county may not use the MCL 46.11 power to site buildings if there is any other requirement of law that county buildings be located at the county seat. The discharge of the firearms and firearms training occurred within the confines of the shooting-range building, even though law enforcement officers fired at targets outside the building in the shooting range. The county's normal use of the shooting-range building was the discharge of firearms for law enforcement training, and the adjacent outdoor shooting range was an indispensable ancillary use to the building's normal use; outdoor firearms training was not the primary use of the property. Judge MARKEY would have affirmed the circuit court's ruling that the county's authority under the CCA to site and erect buildings had priority over the township's regulations with respect to the shooting-range building and also would have affirmed the circuit court's order granting summary disposition in favor of defendants. In Docket No. 325335, Judge MARKEY would have affirmed the circuit court's order modifying the 2008 permanent injunction; the circuit court's order was not an abuse of discretion because circumstances related to the shooting-range building and the ancillary outdoor shooting range land use had changed from when the injunction had originally been issued. Judge MARKEY also would have affirmed the circuit court's order granting the county summary disposition of the Herman plaintiffs' civil contempt claim for attorney fees under MCL 600.1721 as compensation for the county's violation of the permanent injunction; under the governmental tort liability act, MCL 691.1401 *et seq*., the county was immune from tort liability, which included the Herman plaintiffs' claim for indemnification for attorney fees.

Docket No. 325226:

DeFrancesco & Dienes (by *Scott A. Dienes*), *Foster, Swift, Collins & Smith, PC* (by *Michael D. Homier* and *Laura J. Genovich*), and *McGraw Morris, PC* (by *Craig R. Noland*), for Coloma Charter Township.

Kreis, Enderle, Hudgins & Borsos, PC (by *Thomas G. King*), for Berrien County and the Berrien County Sheriff's Department.

Honigman, Miller, Schwartz & Cohn, LLP (by *Christopher E. Tracy*), for Landfill Management Company, Inc., and Hennessy Land Company.

Docket No. 325335:

Rhoades McKee PC (by *Gregory G. Timmer*, *Michael C. Walton*, and *James R. Poll*) for Joe Herman, Sue Herman, Jay Jollay, Sarah Jollay, Jerry Jollay, Neil Kreitner, Tony Peterson, Liz Peterson, Randy Bjorge, Annette Bjorge, and Tina Buck.

Kreis, Enderle, Hudgins & Borsos, PC (by *Thomas G. King*), for Berrien County.

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

MURRAY, J. These consolidated appeals are from two separate orders that (1) granted summary disposition to defendants Berrien County and Berrien County Sheriff's Department[1] and (2) modified a permanent injunction. For the reasons set forth below, in both dockets we reverse the trial court's orders to the extent the court ruled that the county could operate the shooting range under the authority of the county commissioners act (CCA), MCL 46.1 *et seq.*, and remand for entry of summary disposition in favor of plaintiffs.[2] For these same reasons, we reverse the trial court's modification

[1] Defendants Landfill Management, Inc., and Hennessy Land Company are also parties to the appeal in Docket No. 325226.

[2] The term "plaintiffs" refers to Coloma Charter Township (Docket No. 325226) and Joe Herman, Sue Herman, Jay Jollay, Sarah Jollay, Jerry

of the injunction and vacate and remand on the issue of attorney fees in light of our conclusion that the county acted in violation of *Herman v Berrien Co*, 481 Mich 352; 750 NW2d 570 (2008), and MCL 46.11(b) and (d). We affirm the trial court's ruling on criminal contempt.

These appeals are the continuation of the litigation that resulted in the *Herman* decision. We adopt the statement of facts and procedural history contained in Part I of Judge MARKEY's partial dissent, as well as the statement of the standard of review set forth in Part II(A) of her opinion. Finally, we also agree with Part III(C) of her opinion addressing criminal contempt. In light of this, one can see that our disagreement only lies with respect to the trial court's ruling granting summary disposition to the county, as well as the related issues of modifying the permanent injunction and plaintiffs' request for attorney fees. We now turn to those issues.

In *Herman*, the Supreme Court explained that the CCA, and specifically MCL 46.11(b) and (d), authorizes a county to site county buildings even if inconsistent with local township regulations. The Court held that because a building cannot function normally without such items as a parking lot, sidewalks, and light posts, those types of ancillary uses are also permitted by statute and therefore also have priority over township zoning provisions. *Id*. at 368.

Despite the fact that the county constructed a new building[3] since the issuance of *Herman*, this appeal is

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Jollay, Neal Kreitner, Tony Peterson, Liz Peterson, Randy Bjorge, Annette Bjorge, and Tina Buck (Docket No. 325335).

[3] Although plaintiffs cite several insightful decisions defining what is, or is not, a public building under the governmental tort liability act, MCL 691.1401 *et seq*., in the absence of a statutory definition, Judge MARKEY correctly resorts to a dictionary definition of "building."

still controlled by *Herman*. In general, the *Herman* Court confirmed that since *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702; 664 NW2d 193 (2003), "it has become accepted that the CCA gives counties priority over local regulations that inhibit a county's power to site and erect county buildings under the CCA." *Herman*, 481 Mich at 362. More specific to the siting of county buildings, the Court unequivocally held that the power given to counties is to site buildings, not to allow counties to site land uses or activities:

> The CCA is an unambiguous statute. In pertinent part, it gives counties the power to "[d]etermine the site of, remove, or designate a new site for a county building" and to "[e]rect the necessary buildings for jails, clerks' offices, and other county buildings . . . ." MCL 46.11(b) and (d). A plain reading of this language leads to the conclusion that the Legislature intended to give counties the power to "site" and "erect" "county buildings." Each time the CCA grants the power to site, it invariably relates that power to "buildings." *Notably, the Legislature never semantically links the power to site with any nonbuilding activity or land use. In other words, the CCA does not give counties the power to site a county "activity" or county "land use"; rather, it always relates its grant of siting power to "buildings."* This leads to the conclusion that the siting power is limited to buildings. This conclusion is supported by the contextually derived purpose of the CCA. The CCA was expressly promulgated "to define the powers and duties of the county boards of commissioners . . . ." Title of 1851 PA 156, as amended by 1978 PA 51. Accordingly, in [MCL 46.11], the act clearly and descriptively articulates the numerous powers it gives to counties. *The power to site county activities or land uses is conspicuously absent from that list.* Also, *the CCA's continued use of the term "building(s)" must have significance. That term would be rendered nugatory if the CCA's power to "site" was meant to extend to other county acts, such as siting land uses, because those other acts are never listed in the CCA.* In

> essence, if those unlisted acts were actually included in the power to site buildings, then the CCA's express inclusion of the power to site buildings would be superfluous. This cannot be. Therefore, the CCA's continued use of the term "building(s)" must place significant limitations on the meaning of the act's term "site" by omitting the power to do other acts. [*Id*. at 366-368 (emphasis added; first and second alterations in original).]

Consequently, the CCA provides the county with no power to site land uses or activities, only county buildings.

The *Herman* Court also acknowledged that "the power to site a building is worthless if the entity that sites the building cannot make normal use of the building." *Id*. at 368. As in *Pittsfield*, the *Herman* Court too recognized that a county could conduct *ancillary* land uses to make normal use of the building:

> However, we are mindful that the power to site a building is worthless if the entity that sites the building cannot make normal use of the building. Just as *Pittsfield* recognized that the power to site a building would be "mere surplusage" if the siting entity had to comply with zoning ordinances, *Pittsfield*, [468 Mich] at 713, we too acknowledge that the power to site a building would be meaningless if the siting entity could not conduct ancillary land uses in order to make normal *use of the building*. For instance, the normal use of most county buildings would require sidewalks, parking lots, and light poles. Thus, while defining the power to "site" as being limited to buildings, we simultaneously accept that some *ancillary* land uses must be included in the county's siting power. [*Id*. (emphasis added).]

Thus, a county can site county buildings pursuant to MCL 46.11(b) and (d), and the *Herman* Court held that ancillary land uses fall within that siting power to allow for the normal use of the building. And, of course, the Court held that this shooting range was not an

ancillary use of the building containing indoor instructional rooms. *Id*. at 370-371.

The problem with the building constructed in front of the existing shooting range is that *it* is ancillary to the use of the shooting range, as opposed to the shooting range being ancillary to the normal use of the building. See *Random House Webster's College Dictionary* (2003) ("ancillary" is defined as "subordinate" or "subsidiary"). Indeed, the shooting range existed long before the building and was utilized (until the courts stopped its use) without the existence of the building. The evidence shows that the shooting range was and is the main feature of this location, making the shooting-range building subordinate to, or ancillary to, the shooting range. The county's argument has the tail (a small structure) wagging the dog (the previously constructed and utilized range). See *State v Stark*, 354 Or 1, 11; 307 P3d 418 (2013). Or, stated differently, the county used an after-the-fact building in an attempt to statutorily shield its nonconforming land use, something the *Herman* Court stated was impermissible under the CCA. No matter the intentions of the county in seeking to comply with *Herman*, the facts reveal a belated attempt to protect a land use by siting an adjacent building. This it cannot do.

There is an additional reason why the county's position cannot prevail. As we have noted, the *Herman* Court concluded that "Berrien County's outdoor shooting ranges do not have priority over the township ordinances that plaintiffs rely on because they are land uses that are not indispensable to the normal use of the county building." *Herman*, 481 Mich at 354. Consequently, the Supreme Court has spoken: shooting ranges are not a normal or indispensable use of a county building. This decision makes sense on a num-

ber of different levels. The purpose of the CCA is to allow counties priority over the township zoning act (TZA), MCL 125.271 *et seq.*,[4] to erect buildings and ancillary items to those buildings such as parking lots, shrubs, and lighting, which are specifically adapted to support the use of the building. We find no support in the CCA that the Legislature contemplated shooting ranges as normal uses of county buildings.

For these reasons, in both dockets we reverse the trial court's orders to the extent the court ruled that the county could operate the shooting range under the authority of the CCA, and remand for entry of summary disposition in favor of plaintiffs. For these same reasons, we reverse the trial court's modification of the injunction, and vacate and remand on the issue of attorney fees in light of our conclusion that the county acted in violation of *Herman* and MCL 46.11(b) and (d). We affirm the trial court's ruling on criminal contempt.

As the prevailing parties, plaintiffs may tax costs. MCR 7.219(A). We do not retain jurisdiction.

O'CONNELL, P.J., concurred with MURRAY, J.

MARKEY, J. (*concurring in part and dissenting in part*). These consolidated appeals concern whether the county's authority to "site" and "erect" buildings pursuant to the county commissioners act (CCA), MCL 46.1 *et seq.*, see MCL 46.11(b) and (d), has priority over the zoning ordinance of the Charter Township of Coloma (the township). I respectfully dissent in part from the majority opinion. Despite

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[4] The TZA was repealed by MCL 125.3702(1)(c) of the Michigan Zoning Enabling Act (ZEA), 2006 PA 110, MCL 125.3101 *et seq*. The ZEA now authorizes local zoning.

recognizing that Berrien County constructed a new building—the clear and only purpose of which is the indoor discharging of firearms—the majority concludes that these cases are controlled by the holding of *Herman v Berrien Co*, 481 Mich 352; 750 NW2d 570 (2008). But *Herman* held only that the outdoor shooting ranges were not ancillary to a different, classroom-instruction-only building. The majority cites no language in the CCA to support its conclusion but instead relies on the idiom of "the tail wagging the dog." In my view, the dog in these cases is the CCA, which has supremacy over the tail, the township's ordinances. Because the new structure is a "building," one must look to the language of the CCA for a basis to preclude the county from invoking its authority to "site" it. Principles of construction dictate that a statute must be enforced according to its plain terms, *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005), and that "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself," *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). I read nothing in the CCA to preclude the county from exercising its authority to site buildings to take advantage of previously constructed infrastructure. And, for the reasons I discuss later in this opinion, I believe this previously constructed infrastructure is ancillary to the newly constructed county building and indispensable to its normal use. For these reasons, I conclude that the circuit court's reasoning was sound in both cases, and I would affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

These consolidated appeals concern whether a county's authority under the CCA to "site" and "erect"

buildings, MCL 46.11(b) and (d),[1] has priority over the zoning ordinance of the township with respect to using an open-air, three-sided structure within which defendant Berrien County Sheriff's Department conducts firearms training of law enforcement officers. During their training, the officers fire weapons from inside the structure toward targets located in a previously constructed shooting range outside the structure. The shooting range used is one of six outdoor shooting ranges that were the subject of prior litigation in Docket No. 325335 that resulted in our Supreme Court's ruling in favor of the plaintiff township residents who sought to enforce the township ordinance. *Herman* clarified the Court's prior decision in *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702; 664 NW2d 193 (2003), which held that, in general, the CCA has priority over local ordinances.

At the time of the prior litigation in Docket No. 325335, the 14-acre site at issue consisted only of an indoor (classroom) firearms training building that was adjacent to the outdoor shooting ranges. In *Herman*,

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[1] MCL 46.11 provides:

> A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:
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> * * *
>
> (b) Determine the site of, remove, or designate a new site for a county building. The exercise of the authority granted by this subdivision is subject to any requirement of law that the building be located at the county seat.
>
> * * *
>
> (d) Erect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them.

our Supreme Court reiterated the factual background of these cases:

> This case involves a piece of property that is located in Berrien County and Coloma Township. The property consists of a 14-acre parcel of land. The property is controlled by defendant, Berrien County, under a 20-year lease from a party that is unrelated to this case. The county entered into the lease in March 2005. The county leased the property with the intention of using it for a firearms training facility, which various law enforcement agencies would use for training exercises. Accordingly, in May 2005, the county contracted with DLZ Michigan, Inc., to design a master plan and conduct a feasibility study for the proposed facility. This master plan included constructing a building of more than 3,000 square feet at the center of the parcel to serve as a training and support building. This building would have a parking lot with 24 standard parking spaces (and three handicapped spaces), multiple outdoor light poles, and a driveway. The facility would also have numerous outdoor shooting ranges. The ranges were to be set up like the spokes of a wheel that require the shooter to fire out from the center of the parcel. The center of the parcel is where the building would be located. . . . The county initially planned on building the ranges first and erecting the building later. During the course of this litigation, construction of both the shooting ranges and the building was started and is now completed. [*Herman*, 481 Mich at 354-356 (citations omitted).]

The Court explained that the outdoor shooting ranges violated township ordinances:

> Operation of the county's shooting ranges would contravene several local ordinances. First, under the township's zoning ordinance, the shooting ranges are not a permitted land use given the property's current zoning status (primary agricultural). Additionally, gun clubs are not permitted in this zoning status unless the Coloma Charter Township Board has issued a special land use permit, which the county has not received. Finally, the

gun ranges produce noise levels that purportedly exceed the township's anti-noise ordinance.[5]

[5] The parties have not litigated the merits of whether the shooting ranges violate the anti-noise ordinance because, up to this point, the main dispute hinged on whether the shooting ranges were immune from this ordinance. Nonetheless, the county's own feasibility study predicted that the gun range would produce noise levels above 87 decibels extending to approximately 370 of the surrounding acres. This apparently violates the anti-noise ordinance, which prohibits noise levels above 65 decibels between 7:00 a.m. and 10:00 p.m. and 55 decibels at all other times.

[*Herman*, 481 Mich at 356 & n 5.]

The *Herman* plaintiffs "are a group of individuals who own property located in close proximity to the shooting ranges." *Id*. at 358. "In late November 2005, plaintiffs filed a declaratory judgment action that aimed to stop operation of the facility. The complaint alleged that the county's facility was prohibited by the township's zoning ordinance; and the plaintiffs' amended complaint additionally alleged that the facility violated the township's anti-noise ordinance." *Id*. Relying on *Pittsfield*, the circuit court granted defendant Berrien County (the county) summary disposition, and this Court affirmed in a split decision.[2] Our Supreme Court reversed, holding that the CCA authority extended only to "site" buildings and such land uses that are ancillary to the county building and indispensable to its normal use. *Herman*, 481 Mich at 367-369. Stated otherwise, the Court held that "the scope of the CCA's priority over [local regulation] is limited to ancillary land uses that are indispensable to the building's normal use." *Id*. at

[2] *Herman v Berrien Co*, 275 Mich App 382; 739 NW2d 635 (2007), rev'd 481 Mich 352 (2008).

368-369. The Court reasoned that the outdoor shooting ranges were not indispensable because the indoor training and support could be conducted without the outdoor shooting ranges being located next to the building. For that reason, the Court held that "under the CCA, the shooting ranges are not given priority over the township's ordinances." *Id*. at 370-371. The Court remanded the case to the circuit court for further proceedings consistent with its opinion. *Id*. at 371.

On remand, the circuit court entered a permanent injunction on November 10, 2008, enjoining the county "from utilization of the shooting ranges heretofore constructed by it in Coloma Township, Berrien County, Michigan." A copy of the injunction that was filed in the clerk's office was signed "approved as to form" by then county counsel R. McKinley Elliott, who was, in January 2012, elected a member of the county board of commissioners. The county apparently was never served with the injunction, and there was no proof of service in the circuit court file.

After the Supreme Court's decision in *Herman*, the county began conducting necessary law enforcement firearms shooting training at an existing private gun club in the township, known as the Coloma Rod and Gun Club (CRGC). Apparently to accommodate the additional use, CRGC constructed six additional shooting ranges for the use of law enforcement firearms training and other firearms shooting. In October 2010, the township brought an action to enjoin CRGC's expansion of its nonconforming use. On November 27, 2012, the circuit court ruled in the township's favor, finding that the CRGC's expansion of its gun ranges by adding and using six new pistol bays was a nuisance per se and ordering the nuisance abated. This order was not appealed.

Seeking to lawfully use the previously constructed shooting ranges adjacent to its classroom training facility, the county passed a resolution on August 8, 2013, to construct a "Shooting Range Building" at the outdoor range property. The resolution noted that *Herman* had decided outdoor ranges were not indispensable to the indoor training building and that the county had unsuccessfully attempted to obtain a special land-use permit from the township. The resolution then provided:

> **WHEREAS**, Corporate Counsel advised the County Board on August 1, 2013, that there was legal support for the construction of a shooting range building on the range area of the Training Facility which would be consistent with the "indispensable use" standard of the *Herman* decision, thereby falling under the authority provided in the [CCA], and exempt from Township regulation.
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> **NOW, THEREFORE, BE IT HEREBY RESOLVED** that the Berrien County Board of Commissioners authorize and directs the County Administrator to proceed to have a Shooting Range Building designed and constructed on the shooting range area of the County Training Facility at 7110 Angling Road, Coloma Charter Township, and authorizes expending the minimal funds necessary . . . to accomplish said building construction not to exceed $11,500.00; and take such further necessary action with the landowner to remain consistent with the County's lease of said property.

Based on the foregoing resolution, the county constructed an open-air, pole-barn-type structure consisting of a covered cement slab that is completely open on one side, facing the longest of the previously constructed outdoor shooting ranges. Defendants describe it as follows:

> The Gun Range Building consists of a 43x20 foot concrete pad with, a 42xl6 foot building, comprised of

> eight (8) 6x6 posts and five (5) 4x6 posts and a full roof constructed over the concrete pad. All of the posts are permanently cemented into the ground. Partial walls exist on three (3) sides of the Gun Range Building with open areas at the top and bottom of each wall. An overhang and awning type structure exists along the fourth open wall (front side) so as to allow shooting out to the Current County Range and to provide additional safety for shooting and sound baffling, and provide a shelter for firearms training. The walls, ceiling, and overhang are permanent in their construction and the open areas allow for proper ventilation and drainage, while at the same time, allowing firearms training, including live firing of weapons, to be conducted within the Gun Range Building with the actual shooting occurring from within the building out to targets located at the other end of the Current County Range. The County's Gun Range Building was completed in September of 2013, and after completion, it and the Current County Range were used by the Sheriff and deputies to conduct the required firearms training . . . .

On November 14, 2013, the *Herman* plaintiffs filed a motion seeking enforcement of the 2008 injunction and asking the circuit court to hold the county in civil and criminal contempt for its violation of the order (Docket No. 325335). Also, on the same date, the township filed a new action in the circuit court, seeking to enjoin the county and its sheriff's department from discharging firearms at the site in violation of the township's zoning ordinance (Docket No. 325226). The circuit court held a number of joint hearings and issued a series of rulings in 2014 that modified the 2008 injunction, ruled in favor of the county to allow use of the shooting-range building, and found, after a trial, that the county was not guilty of criminal contempt.

After an initial evidentiary hearing, the circuit court on January 17, 2014, issued an opinion and order modifying the 2008 injunction while the litigation was

pending and denying the township's request for a preliminary injunction. The circuit court, citing *Ali v Detroit*, 218 Mich App 581; 554 NW2d 384 (1996), and dictionary definitions, found that the county would likely prevail on its claim that the new structure was a "building" within the meaning of the CCA. The court reasoned "that the assembly is a permanent box like structure having a roof used for firearms skill proficiency assessment and training. It has three walls that enclose space albeit with gaps for ventilation." The court also found that "the assembly was permanently fixed to the ground at a specific location with a roof and three walls enclosing space for purposes of confining the Sheriff's deputies participating in the assessment and training for which the assembly was specifically designed and constructed."

The circuit court in its initial opinion and order also rejected plaintiffs' argument that the structure could not be a county "building" because it was not listed in the examples noted in MCL 46.11(d), as cited in *Herman*, 481 Mich at 367 n 14. The court ruled that the statute is clear and unambiguous and that the term "county buildings" includes any "buildings" that are "owned, leased, operated, used or maintained by a county for activities authorized by law." The circuit court further ruled that the county's motive (to avoid *Herman*) was not relevant; what mattered was the result of the county's actions. In that regard, the circuit court opined:

> The result of the Board's action was that the shooting range building was erected and sited near the Classroom. That building was purposely erected and the site was purposely determined to take advantage of the Ranges which the Board was advised could then be used for shooting despite *Herman* because, as an indispensable use, the shooting would no longer be subject to the [township's] ordinances.

> The Board had the power to erect "necessary buildings". Whether the building was necessary was a [county board] legislative decision which the judiciary should not second guess.

Nevertheless, the circuit court found that "firearms assessment and training for the sheriff's deputies is necessary" and required by MCOLES (Michigan Commission on Law Enforcement Standards).[3] The circuit court explained:

> The mandatory MCOLES Annual Firearms Standard for Active Duty Law Enforcement Officers — Primary Duty Weapon (2010) requires both knowledge and an annual assessment of mechanical firearms skills proficiency. While the knowledge component may be taught in the Classroom Building that existed at the time *Herman* was decided, the assessment component requires shooting at multiple targets, placed at multiple distances, use of cover, close range shooting, mandatory combat reload, appropriate handling of stoppages, shooting from different cover positions, shooting with the support hand only, discussions on deadly force issues, and decision making.

The circuit court also found the evidence supported that use of the building for live-fire training improved safety and reduced noise. Thus, the circuit court determined "the record supports a preliminary conclusion that the Board properly exercised its power to erect a necessary county building [MCL 46.11(d)] and to determine its site [MCL 46.11(b)]." (Bracketed material in original.)

The circuit court also determined that the shooting range adjacent to the open end of the building met *Herman*'s "indispensable use" test, opining:

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[3] See Michigan Commission on Law Enforcement Standards Act, 1965 PA 203; MCL 28.602 *et seq.*; see also State of Michigan, *Michigan Commission on Law Enforcement Standards* <http://www.michigan.gov/mcoles> (accessed September 2, 2016) [https://perma.cc/3XY9-M8M6].

> The normal use of the shooting range building is to facilitate safe and quiet outdoor firearms assessment and training for sheriff's deputies. . . . The evidence supports a preliminary finding that the shooting range building could not be used for outdoor firearms training without shooting. While consuming only a small fraction of the assessment and training time, the shooting is the essence of the assessment and training. Safety dictates that the shooting not take place without the protection offered by the Range. In other words, the Range is indispensable to the normal use of the shooting range building.

The circuit court then entered an order temporarily modifying its 2008 injunction to permit the sheriff and actively employed sheriff's deputies to use the outdoor shooting range

> for shooting any weapon carried on duty by the shooter for MCOLES required annual assessments and recommended training from the confines of the shooting range building while under the direct supervision of an MCOLES recognized firearms instructor on Tuesdays, Wednesdays and Thursdays between 8:00 a.m. and 5:00 p.m., except on days observed as holidays . . . .

On March 28, 2014, the county moved for summary disposition, seeking dismissal of the civil and criminal contempt claims. A hearing was held on May 19, 2014, and on the basis of governmental immunity, see *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), the circuit court granted the motion with respect to plaintiffs' claim for civil contempt. The circuit court's August 20, 2014 order left unresolved the question of criminal contempt.

The *Herman* plaintiffs on August 4, 2014, moved for summary disposition on criminal contempt, but the circuit court ruled that the criminal contempt claims required assessment of witness credibility at a trial. Later, on December 2, 2014, the court conducted a trial

on the criminal contempt charge and issued an opinion and judgment of acquittal. The circuit court found that although plaintiffs had proved beyond a reasonable doubt that the county was aware of the 2008 *Herman* decision and that the county violated the injunctive order by beginning use of the outdoor shooting ranges on September 4, 2013, the plaintiffs "failed to prove beyond a reasonable doubt that the violation was willful" because of lack of evidence to support a finding "beyond a reasonable doubt that the violation was an intentional violation of a known legal duty." The circuit court found that all testifying witnesses were credible and determined that no agent of the county had actual knowledge that the court had entered its 2008 injunctive order. The court also found "reasonable doubt that the County had imputed knowledge through Commissioner Elliott in his then capacity as County's Corporate Counsel." There was no proof of service in the file, and Elliott testified he signed a blank page "approved as to form" at the request of opposing counsel for an order to close the circuit court file after the Supreme Court's decision in *Herman*. The circuit court also found that the county board was respectful of the *Herman* decision and acted on advice of counsel that its actions would not violate that case, which also created reasonable doubt regarding the charge of criminal contempt.

With respect to the civil litigation, the township moved for summary disposition under MCR 2.116(C)(10) on August 29, 2014. The *Herman* plaintiffs joined in this motion for summary disposition on September 29, 2014. After hearing arguments on the motions, the circuit court on October 13, 2014, issued an opinion and order, granting defendants summary disposition in both cases under MCR 2.116(I)(2). The court modified its permanent injunctive order in the *Herman* case (Docket No. 325335) and denied the

township's request in the new case (Docket No. 325226) to declare that defendants were in violation of the permanent injunctive order; the court also denied the *Herman* plaintiffs' request to enforce the permanent injunction. The court issued a modified opinion and order on October 23, 2014, that only changed the statement that the scheduled trial would concern *criminal* contempt rather than *civil* contempt.

The circuit court's analysis in its October 23, 2014, opinion mirrored that of its opinion of January 17, 2014, when the court denied the township's request for a preliminary injunction and granted temporary relief from the 2008 permanent injunction. The circuit court concluded as a matter of law that the shooting-range structure is a "county building" under MCL 46.11(b) and (d). The court again concluded that whether the shooting-range building was "necessary" was a legislative decision and not one that the court could second-guess. But, as in its preliminary ruling, the circuit court again discussed that firearms training was necessary to satisfy MCOLES standards and given that the shooting-range building "enhanced safety and reduced noise, the Board rationally concluded that the gun range building was a 'necessary building'." The circuit court ruled, as a matter of law, "the Board properly exercised its power to erect a necessary county building [MCL 46.11(d)] and to determine its site [MCL 46.11(b)]." (Bracketed material in original.)

With respect to whether the shooting range adjacent to the shooting-range building met *Herman*'s "indispensable use" test, the circuit court once again determined that it did.

> The normal use of the shooting range building is to facilitate safe and quiet outdoor firearms training for sheriff's deputies. This normal use contrasts with normal

> use of the nearby Classroom Building at issue in *Herman* which was for indoor classroom training . . . . The shooting range building could not be used for outdoor firearms and training assessment without shooting. While consuming only a small fraction of the training time, the shooting is the essence of the training and assessment. Safety dictates that the shooting could not take place without the protection offered by the Range. In other words, the Range is indispensable to the normal use of the shooting range building.
>
> Plaintiffs' ancillary/primary dichotomy has no basis in reason or in *Herman*. It is axiomatic that if the Board has the power to site a building, it has the power to site the building's normal and primary use. The power to site a building would be meaningless without the power to site its primary use, and, as *Herman* held, its indispensable ancillary uses. Implicit in *Herman* is that the Board's power to site a building includes the power to site its primary use, and the only restraint imposed by *Herman* is on the Board's power to site dispensable ancillary uses. If shooting is the primary use, it consumes the *Herman* restraint.

On the basis of this analysis, the circuit court concluded that the county's authority under the CCA to site necessary county buildings "trumps [the township's] zoning and noise ordinances." The circuit court therefore denied the plaintiffs' motion for summary disposition and granted summary disposition to defendants under MCR 2.116(I)(2).

The circuit court also modified its permanent injunction by providing an exemption for

> the one shooting range directly adjacent to and southwest of the open front of the shooting range building constructed . . . pursuant to Resolution A1308168 . . . for firearms shooting solely for MCOLES required annual assessments and recommended training from the confines of the shooting range building while under the direct supervision of a qualified firearms training instructor.

In each case, the circuit court denied reconsideration by order entered December 11, 2014. Plaintiffs now appeal by right. This Court, by order of February 13, 2015, consolidated these appeals "to advance the efficient administration of the appellate process."[4]

II. ANALYSIS FOR DOCKET NO. 325226 AND DOCKET NO. 325335

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A court must view the proffered evidence in the light most favorable to the party opposing the motion and properly grants the motion when the undisputed facts establish a party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

This Court also reviews de novo questions of statutory interpretation. *Pittsfield*, 468 Mich at 707. The primary goal of statutory interpretation is to discern the intent of the Legislature; the first step when doing so is to review the language of the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Undefined terms in a statute must be accorded their plain and ordinary meaning; a court may consult a dictionary regarding the ordinary meaning of a word. *Pierce v Lansing*, 265 Mich App 174, 178; 694 NW2d 65 (2005). "When the language of a statute is unambiguous, the Legislature's intent is clear and judicial con-

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[4] *Coloma Charter Twp v Berrien Co*, unpublished order of the Court of Appeals, entered February 13, 2015 (Docket Nos. 325226 and 325335).

struction is neither necessary nor permitted." *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008) (citation and quotation marks omitted). Courts must enforce plain and unambiguous statutory language as written. *Herman*, 481 Mich at 366.

B. DISCUSSION

I conclude that the circuit court correctly ruled that the structure at issue is a "county building" as that term is used in MCL 46.11(b) and also that the county has the authority to "erect" the structure by determining it is "necessary," MCL 46.11(d). The circuit court also correctly ruled that the county has authority to "site" the building that has the normal purpose of training law enforcement officers in the use of firearms by discharging them from within the building. Further, the circuit court correctly ruled that the adjacent shooting range is ancillary and indispensable to the normal use of the building, giving the county use priority over township ordinances. *Herman*, 481 Mich at 362 n 13, 368-369. Consequently, the circuit court properly granted defendants summary disposition under MCR 2.116(C)(10). *Maiden*, 461 Mich at 120.

Our Supreme Court held in *Pittsfield* that the authority to "site" buildings granted to counties by the CCA in MCL 46.11(b) and (d) had priority over a conflicting township zoning ordinance enacted pursuant to the authority of the Township Zoning Act, MCL 125.271 *et seq*.[5] *Pittsfield*, 468 Mich at 703-704, 710-715. The Court made this determination on the basis of legislative intent expressed in the text of the legislation pertaining to the two local governments. *Id*. at

[5] Local zoning is now authorized by the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., which repealed the Township Zoning Act. See MCL 125.3702(1)(c).

709-710. The Court concluded that the authority of a county to "site" a county building was only limited by " 'any requirement of law that the building be located at the county seat.' " *Id*. at 705 n 2, quoting MCL 46.11(b). Specifically, "the Legislature, by explicitly turning its attention to limits on the county siting power and deciding on only one limitation, must have considered the issue of limits and intended no other limitation." *Pittsfield*, 468 Mich at 711. The Court rejected the township's argument that its zoning had at least equal priority because the Legislature had exempted certain activities from township zoning but not county activity. The Court determined that this argument was "flawed because this approach would cause MCL 46.11(b) to be mere surplusage." *Id*. at 713.

As discussed already, the underlying litigation in these cases resulted in our Supreme Court deciding whether the county's authority to site county buildings extended to ancillary uses of the property adjacent to the building. *Herman*, 481 Mich 352. The property at the time of the prior litigation consisted of 14 acres with only an indoor firearms classroom training building and nearby outdoor shooting ranges. The Court focused on the term "site" and held that "land uses that are ancillary to the county building and not indispensable to its normal use are not covered by the CCA's grant of priority over local regulations." *Id*. at 354. For that reason, the Court held that a county's authority under the CCA extended only to erecting and siting buildings and such land uses that are ancillary to the county building and indispensable to its normal use. *Id*. at 368-369. Finding the CCA unambiguous, the Court held that a county's power to site is limited by the language of the statute to county buildings. *Id*. at 366-369. The Court explained that a plain reading of MCL 46.11(b) and (d)

> leads to the conclusion that the Legislature intended to give counties the power to "site" and "erect" "county buildings." Each time the CCA grants the power to site, it invariably relates that power to "buildings." Notably, the Legislature never semantically links the power to site with any nonbuilding activity or land use. In other words, the CCA does not give counties the power to site a county "activity" or county "land use"; rather, it always relates its grant of siting power to "buildings." This leads to the conclusion that the siting power is limited to buildings. [*Id*. at 366-367.]

Ultimately, the Court held that the outdoor shooting ranges then existing did not have priority over the township ordinances "because they are land uses that are not indispensable to the normal use" of the classroom firearms training building. *Id*. at 354, 370. The Court further reasoned that while the outdoor shooting ranges complemented the normal use of the building for indoor classroom training and practice, the outdoor shooting ranges used for outdoor shooting practice and training were not indispensable to that normal use of the building, which was indoor classroom training. *Id*. at 370-371. "For purposes of CCA priority, a building's normal use only extends to the actual uses of that particular building because, again, that is the extent of the power granted to the county by the CCA." *Id*. at 370.

Accordingly, for the county to site and erect the structure at issue in contravention of township ordinances, the structure must be a "building" that has as its normal use the discharging of firearms within its confines. Because the CCA does not define the term "building," it is appropriate to consult a dictionary to determine its plain and ordinary meaning. *Pierce*, 265 Mich App at 178, citing *Ali*, 218 Mich App at 584. Plaintiffs unpersuasively argue that cases like *Pierce* and *Ali* that discuss the plain meaning of the term

"building" are not reliable authority because they discuss that word's meaning in relation to the "public building" exception to governmental tort immunity, MCL 691.1406. I find these cases important because they discuss the plain meaning of the term "building," which also is at issue in the present cases. Because the analysis in *Pierce* and *Ali* regarding the plain and ordinary meaning of the undefined term "building" is based on the proper technique of consulting dictionary definitions for that purpose, *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012), those cases are worthy of consideration regarding the plain meaning of the term "building" as used in the CCA. Furthermore, individual words in a statute must be read in context and in light of the purpose of the statute as a whole. *Herman*, 481 Mich at 366; *Sun Valley Foods*, 460 Mich at 237.

For these reasons, the circuit court correctly relied on *Ali* and dictionary definitions to determine that the shooting-range structure was a building within the meaning of the CCA. The structure, similar to an open-on-one-side pole barn, has a 43-by-20-foot concrete pad, with eight six-inch-square posts cemented into the ground that support partial walls on three sides and a full roof. The structure was specifically designed to allow active shooting of firearms out the open side of the structure toward targets in the longest of the previously constructed shooting ranges, which are basically open spaces surrounded by earthen berms to prevent fired rounds from escaping the premises. The structure is permanent and has an overhang on the open side partially protecting shooters from the elements. This description fits within the definition of "building" found in *Merriam-Webster's Collegiate Dictionary* (11th ed): "a usu[ally] roofed and walled structure built for permanent use (as for a dwelling)."

The conclusion that the structure at issue is a building is also supported by this Court's opinions in *Ali* and *Pierce*. In *Ali*, the Court held that a permanent, walled, bus passenger shelter made of plexiglass and steel, which was designed to protect people from inclement weather, was a building for purposes of the public building exception to governmental immunity. *Ali*, 218 Mich App at 585. The *Ali* Court, *id*. at 584-585, determined the plain meaning of the undefined statutory term "building" from dictionaries:

> "Building" is defined as a "relatively permanent, essentially boxlike construction having a roof and used for any of a wide variety of activities, as living, entertaining, or manufacturing," *The Random House College Dictionary: Revised Edition* (1984), and a "structure designed for habitation, shelter, storage, trade, manufacturing, religion, business, education and the like. A structure or edifice enclosing a space within its walls, and usually, but not necessarily covered with a roof." Black's Law Dictionary (5th ed).

Further, in *Pierce*, 265 Mich App at 178-180, the Court relied on *Ali* to conclude that a parking structure described as a relatively permanent, essentially box-like structure made of concrete with a roof and enclosed on all sides by half-walls was a public building within the meaning of MCL 691.1406. Both *Pierce* and *Ali* distinguished *Freedman v Oak Park*, 170 Mich App 349, 353-354; 427 NW2d 557 (1988). In *Freedman*, a covered park bench was determined not to be a public building within the meaning of MCL 691.1406. See *Pierce*, 265 Mich App at 179, and *Ali*, 218 Mich App at 585 (describing *Freedman* as involving "merely a portable bench with a roof over it"). Indeed, *Freedman* does not rest entirely on its determination that the covered park bench was not a building but also on its conclusion that the apparently portable structure was not dangerous or defective so as to support the plaintiff's tort claim.

Freedman, 170 Mich App at 353-354. For these reasons, the circuit court properly distinguished *Freedman* and relied on *Ali* and dictionary definitions to conclude that the permanent box-like structure having a roof and partial walls and used for firearms training was a building.[6] Moreover, because the county erected and maintained the building on property that the county possessed under a long-term lease, and the county used the structure for the lawful purpose of necessary firearms training for county law enforcement officers, the structure necessarily is a county building within the meaning of MCL 46.11(b) and (d).

Plaintiffs present several unavailing arguments contrary to the conclusion that the shooting-range building used for discharging firearms has priority over the township's zoning ordinance. Plaintiffs first argue that the shooting-range building is not "necessary" as that term is used in MCL 46.11(d) and that the phrase "necessary buildings for jails, clerks' offices, and other county buildings" limits the county's authority to erect and site buildings. Plaintiffs cite no authority for this argument. It is settled that an argument presented without supporting authority is abandoned on appeal. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). On the other hand, defendants cite *Pittsfield*, in which the Court opined that "the Legislature expressly stated only one limitation on the authority of the county to site buildings" and that "the Legislature, by explicitly turning its attention to limits on the county siting power and deciding on only one limitation, must have considered

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[6] This conclusion is supported by the township's own zoning ordinance that defines "building" as a "structure," which in turn is defined in part as "[a]nything constructed or erected with a fixed location on the ground, or attached to something having a fixed location on the ground."

the issue of limits and intended no other limitation." *Pittsfield*, 468 Mich at 711. The one limit is found in MCL 46.11(b), which restricts the siting of a county building with respect to "any requirement of law that the building be located at the county seat."

I agree with the circuit court that the word "necessary" in MCL 46.11(d) only means that the county's authority to erect and site a building is limited to lawful purposes, i.e., ones not prohibited by a state statute or the Constitution. Contrary to plaintiffs' contention, the circuit court's ruling does not render the term "necessary" superfluous but rather recognizes the traditional limits of judicial review of legislative acts in our constitutional system of separation of powers. The circuit court correctly ruled that although the county acted through a resolution to move its agents to erect and site the shooting-range building, this action was legislative.[7] See *Blank v Dep't of Corrections*, 462 Mich 103, 122; 611 NW2d 530 (2000) (opinion by KELLY, J.) (opining that "passing a resolution to override rules promulgated by an executive branch agency is an inherently legislative action"); *Bengston v Delta Co*, 266 Mich App 612, 621-622; 703 NW2d 122 (2005) (noting that legislative acts include passing an ordinance or resolution). Judicial review of legislative acts is deferential. For example, judicial review of the constitutionality of legislation is generally limited to whether the legislation has a rational basis. "Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose." *Crego v*

[7] "Boards of supervisors shall have legislative, administrative and such other powers and duties as provided by law." Const 1963, art 7, § 8. Even assuming the county's actions were administrative, because no hearing was involved, judicial review would be limited to whether the action was "authorized by law[.]" Const 1963, art 6, § 28.

Coleman, 463 Mich 248, 259; 615 NW2d 218 (2000). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Id*. at 260 (citation omitted). "[I]f constitutionally empowered to act, 'the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination.' " *Charles Reinhart Co v Winiemko*, 444 Mich 579, 600 n 38; 513 NW2d 773 (1994) (opinion by RILEY, J.), quoting *Black v Liquor Control Comm*, 323 Mich 290, 296; 35 NW2d 269 (1948) (citation and quotation marks omitted). For this reason, whether the shooting-range building was necessary for the purposes of MCL 46.11(d) was a legislative decision that the judiciary should not second-guess. *Id*.

Plaintiffs next argue that the shooting-range building does not come within the authority of MCL 46.11(b) because the building does not fit within the types of "county buildings" listed in MCL 46.11(d) ("jails, clerks' offices, and other county buildings"), citing the doctrine of *ejusdem generis* and the statement in *Herman*, 481 Mich at 367 n 14. The *Herman* Court held that siting power in the CCA is limited to buildings and highlighted this limitation by noting, "In fact, the CCA expressly includes examples that uniquely fit into the category of buildings: courthouses, jails, clerks' offices, and other county buildings."[8] *Id*. But nothing in *Herman* indicates that the Court's footnote was intended as anything other than an extension of the Court's analysis that a county's authority to site county buildings, MCL 46.11(b), and erect necessary buildings, MCL 46.11(d), "does not equate to the power to review

[8] It should be noted that the statute does not list "courthouses."

and approve site plans," *Herman*, 481 Mich at 365. Thus, the footnote merely accentuates the importance of the Court's holding that a county's CCA authority is limited to *buildings*, not activities or land uses.

Additionally, the circuit court correctly determined that "[t]he CCA is an unambiguous statute." *Id*. at 366. An unambiguous statute must be enforced as written, and there is no need to resort to secondary rules of construction. See *People v Jacques*, 456 Mich 352, 355; 572 NW2d 195 (1998). "A plain reading of [MCL 46.11(b) and (d)] leads to the conclusion that the Legislature intended to give counties the power to 'site' and 'erect' 'county buildings.' " *Herman*, 481 Mich at 366. The Legislature has placed only one limit on this authority: "That limitation is that the county cannot use the power that was given in MCL 46.11 to site buildings if there is any other requirement of law that county buildings be located at the county seat." *Pittsfield*, 468 Mich at 711. In sum, there is nothing in the plain language of the CCA or our Supreme Court's opinions in *Pittsfield* and *Herman* that limits the authority of the county to site particular kinds of county buildings.

Applying the doctrine of *ejusdem generis* does not alter this conclusion. Under this doctrine of statutory construction, "where a general term follows a series of specific terms, the general term is interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004) (citation and quotation marks omitted). But when the general term or phrase comes before the more specific terms, the doctrine of *ejusdem generis* does not apply to limit the meaning of the more general term or phrase. *Brown v Farm Bureau Gen Ins Co of Mich*, 273 Mich

App 658, 664; 730 NW2d 518 (2007). With respect to MCL 46.11(b) and (d), while the general phrase "other county building" follows the listing of "jails, clerk's offices" in Subsection (d), the pertinent general term in that subsection, "necessary buildings," and the critical phrase "county building" in Subsection (b), are located *before* the listing of types of buildings in Subsection (d). Consequently, the doctrine of *ejusdem generis* does not apply to limit the meaning of the more general phrases of "necessary buildings," MCL 46.11(d), or "county building," MCL 46.11(b). *Brown*, 273 Mich App at 664. Moreover, as discussed already, nothing in the plain language of the CCA indicates that the Legislature intended to limit a county's authority to "site" buildings. MCL 46.11(b). Thus, *ejusdem generis* simply does not apply. *Jacques*, 456 Mich at 357.

The circuit court also correctly concluded that the county's use of an outdoor shooting range adjacent to the new building was ancillary and indispensable to the building's normal use. *Herman*, 481 Mich at 368-369. Plaintiffs' arguments to the contrary are based on the false premise that the adjacent outdoor shooting range was being used for "outdoor shooting" and "outdoor firearms training." While it is true that bullets fired inside the building travel to targets outside the building and located in what had previously been used as an outdoor shooting range, and the fired bullets are restrained from leaving the county's property by berms, the discharge of firearms (shooting) and the firearms training occur within the confines of the building. Further, the facts are not disputed that the shooting-range building was specifically designed and used for the purpose of shooting and firearms training from within the building. Consequently, shooting and firearms training are the normal uses of the shooting-range building. "For purposes of CCA priority, a build-

ing's *normal use* only *extends to the actual uses of that particular building* because, again, that is the extent of the power granted to the county by the CCA." *Id*. at 370 (emphasis added). Therefore, the adjacent outdoor shooting range provides an ancillary and indispensable use: the placement of targets at which to shoot and the construction of surrounding berms to ensure the safety and protection of the surrounding community from fired bullets. *Id*. at 357, 368-369.

I reject, as did the circuit court, plaintiffs' argument that outdoor shooting or outdoor firearms training was the "primary" use of the property to which the building was the "ancillary" use. The county has the authority "to 'site' and 'erect' 'county buildings.' " *Id*. at 366; MCL 46.11(b) and (d). When the county exercises this authority, the normal uses of the building have priority over local zoning and other local regulations to the contrary. *Herman*, 481 Mich at 362 n 13. The CCA does not otherwise authorize the siting of a particular land use apart from the siting of a building, but *Herman* held that a county may "conduct ancillary land uses in order to make normal use of the building." *Id*. at 366-368. And "the ancillary land use will only have priority over local regulations if it is indispensable to the building's normal use." *Id*. at 369. Thus, the proper analysis is to initially determine the normal use of the sited and erected county building and then determine whether any nonbuilding use is indispensable to the building's normal use. See *id*. at 369-370. "In order to decide if this ancillary land use is indispensable to the normal use of the county's building, we must define the normal use of the county's building." *Id*. at 369. As discussed in the preceding paragraph, the county's normal use of the shooting-range building was the discharge of firearms for the purpose of law

enforcement officer training, and the adjacent outdoor shooting range was an indispensable ancillary use to the building's normal use.

Plaintiffs' only remaining argument is that the circuit court's ruling accords to counties unfettered authority to site any land use anywhere under the guise of conducting that use through the siting and erecting of a building. This, however, is essentially a policy argument with respect to enforcement of MCL 46.11(b) and (d). But this Court must enforce an unambiguous statute as written. *Herman*, 481 Mich at 366. The legislative branch of government makes policy choices, and the judiciary may not interfere under the guise of statutory interpretation because the legislation is perceived to be unjust, inconvenient, unnecessary, impolitic, unwise, unfair, or otherwise a bad policy choice. See *Johnson v Recca*, 492 Mich 169, 197; 821 NW2d 520 (2012); *Fowler v Doan*, 261 Mich App 595, 603; 683 NW2d 682 (2004).

For all the foregoing reasons, I would affirm the circuit court's ruling that the county's authority under the CCA to site and erect buildings, MCL 46.11(b) and (d), has priority over the township's ordinances with respect to the shooting range building at issue. I would also affirm the circuit court's grant of summary disposition to defendants and all orders and judgments implementing the circuit court's ruling regarding MCL 46.11(b) and (d).

III. ADDITIONAL ISSUES IN DOCKET NO. 325335

A. RELIEF FROM THE PERMANENT INJUNCTION

Plaintiffs argue that the circuit court erred by relying on MCR 2.612(C)(1)(e) and "changed circumstances"—the county's new gun-range structure—to modify its

2008 injunction. Plaintiffs argue that the circuit court found that the county had violated the injunction by resuming use of the shooting ranges in September 2013 before seeking a modification of the court's order but nevertheless failed to apply the doctrine of clean hands and deny the county equitable relief.

This court reviews for an abuse of discretion the circuit court's decision regarding injunctive relief and its decision on a motion to amend the prior judgment. *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011); *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). The circuit court abuses its discretion only when the court's decision is outside the range of reasonable and principled outcomes. *Mich AFSCME Council 25*, 293 Mich App at 146. See also *id*. at 146 & n 2 (stating that a trial court's decision that is within the range of reasonable and principled outcomes is not an abuse of discretion and an injunction may always be modified if the facts support it).

The circuit court did not abuse its discretion by modifying the 2008 permanent injunction in accordance with the changed circumstances. "On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds: . . . it is no longer equitable that the judgment should have prospective application." MCR 2.612(C)(1)(e). Furthermore, "an injunction is always subject to modification or dissolution if the facts merit it." *Opal Lake Ass'n v Michaywé Ltd Partnership*, 47 Mich App 354, 367; 209 NW2d 478 (1973).

In this case, the facts had changed since the issuance of the 2008 injunction. Specifically, the circuit court correctly ruled that the county had the authority

under MCL 46.11(b) and (d) to site and erect the shooting-range building and also correctly ruled that the adjacent shooting range was an indispensable nonbuilding use ancillary to the building's normal use of active shooting firearms training. The county's use of the building and adjacent shooting range thus had priority over the township's ordinances. *Herman*, 481 Mich at 362 n 13, 369-370. The circumstances had changed such that, with respect to the shooting-range building and its adjacent range, the county was immune from enforcement of township regulations. *Id*. at 361 n 11, 362 n 13. Because the underlying legal authority supporting the injunction with respect to the shooting-range building and its adjacent range had been eliminated by the county's authority under the CCA, it was "no longer equitable that the [2008 injunction] should have prospective application." MCR 2.612(C)(1)(e). Because of these changed circumstances, the circuit court did not abuse its discretion by determining that the 2008 injunctive order should be modified. *Id*.; *Mich AFSCME Council 25*, 293 Mich App at 146; *Opal Lake Ass'n*, 47 Mich App at 367.

Plaintiffs' arguments that the circuit court abused its discretion by failing to apply the doctrine of clean hands and by granting the county equitable relief by modifying its injunction are without merit. The clean-hands doctrine provides "that one who seeks the aid of equity must come in with clean hands." *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975) (citation and quotation marks omitted). The doctrine is based on the principle that a court of equity, as the enforcer of conscience and good faith, should not assist a wrongdoer. *Id*. Hence, the clean-hands doctrine has been applied to deny equitable relief to parties who are themselves guilty of wrongful conduct. *Rose v Nat'l Auction Group*, 466 Mich 453, 463-464; 646 NW2d 455

(2002). But the clean-hands doctrine is intended to preserve the integrity of the court, and it is discretionary with the court whether to invoke it. *Stachnik*, 394 Mich at 386.

In this case, because the circuit court determined that the county did not willfully violate the 2008 injunction and because the changed circumstances rendered prospective enforcement of an injunction regarding the shooting-range building and adjacent range inequitable, the circuit court did not abuse its discretion by declining to invoke the doctrine of clean hands and instead granting partial equitable relief from the 2008 injunction. *Id*.; *Mich AFSCME Council 25*, 293 Mich App at 146; *Ligon*, 276 Mich App at 124.

B. ATTORNEY FEES UNDER MCL 600.1721

Plaintiffs also contend that the circuit court erred by not awarding attorney fees under MCL 600.1721 because plaintiffs suffered "actual loss"—attorney fees—as a result of defendants' contemptuous conduct. Plaintiffs contend that the circuit court's reliance on *Bradley Estate*, 494 Mich 367, to grant defendants summary disposition of plaintiffs' claim for damages under § 1721 is misplaced. Plaintiffs argue that *Bradley Estate* is distinguishable from this case because the plaintiff in *Bradley Estate* sought damages for an underlying tort claim and in this case, plaintiffs sought attorney fees as an initial claim under § 1721 on the basis of the county's violation of the 2008 injunction. Plaintiffs also argue that *Bradley Estate* does not extend beyond a "civil wrong" to criminal contempt, in which attorney fees may also be recovered. *Taylor v Currie*, 277 Mich App 85, 100; 743 NW2d 571 (2007).

This Court reviews de novo a trial court's determination to grant summary disposition. *Odom*, 482 Mich

at 466. A motion for summary disposition under MCR 2.116(C)(7) may assert that a claim is barred by immunity granted by law and may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Id*. The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Maiden*, 461 Mich at 119. The court properly grants the motion when the undisputed facts establish a party is entitled to judgment as a matter of law. *Odom*, 482 Mich at 466; MCR 2.116(C)(7) and (I)(1). Issues of statutory interpretation are reviewed de novo. *Bradley Estate*, 494 Mich at 377.

I find plaintiffs' efforts to distinguish *Bradley Estate* unavailing. Although plaintiffs present a debatable point that the *Bradley Estate* holding may not extend to criminal contempt, the circuit court granted defendants summary disposition as to plaintiffs' claim under MCL 600.1721 only with respect to *civil contempt*. The circuit court denied summary disposition with respect to *criminal contempt* and, after a trial, found defendants not guilty of criminal contempt. Plaintiffs' claim for attorney fees under § 1721 with respect to civil contempt is controlled by the *Bradley Estate* holding that under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., governmental entities are immune from tort liability, which includes claims for indemnification or compensatory damages under MCL 600.1721. *Bradley Estate*, 494 Mich at 371-372. Accordingly, the circuit court properly granted defendants summary disposition under MCR 2.116(C)(7) of plaintiffs' claims for damages resulting from defendants' civil contempt violation of the 2008 injunction.

Plaintiffs' argument that the holding of *Bradley Estate* does not apply to the facts of this case because criminal contempt was alleged is also unavailing. The

Court's opinion in *Bradley Estate* does repeatedly refer to claims under MCL 600.1721 as being for a civil wrong based on civil contempt. See *Bradley Estate*, 494 Mich at 371-372, 383 (stating that "torts and contracts [are] the two types of civil wrongs"), 385, 393, 397. But a tort claim may also be based on intentional conduct that is criminal. The critical issue is whether a party seeks compensatory damages under MCL 600.1721, see *Bradley Estate*, 494 Mich at 389 n 54, 392 nn 58 and 59, or whether there is only an effort to protect the integrity or authority of the court by punishing the contemptuous party, *id*. at 394-396. When a party seeks compensation or indemnification under MCL 600.1721, the *Bradley Estate* Court's analysis regarding governmental immunity would still apply to such a claim whether the "alleged misconduct" or the "other breach of a legal duty" is labeled "civil" or "criminal" because if the action permits an award of damages as compensation for an injury caused by a noncontractual civil wrong, "then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable." *Id*. at 389. See also *Taylor*, 277 Mich App at 100 (holding that MCL 600.1721 makes no distinction between civil and criminal contempt, and its requirement of indemnification for actual loss applies even when a court imposes a criminal sanction).

Of course, as noted, the simple answer on the facts of this case is that the circuit court did not grant defendants summary disposition on the claim of criminal contempt but instead conducted a trial, finding defendants not guilty of that charge. Therefore, regardless of the merits of plaintiffs' argument that the holding of *Bradley Estate* does not preclude the application of MCL 600.1721 to cases of criminal contempt, "the possible effect of that statute in this case is nullified by the trial court's explicit finding that neither the Sheriff

nor the board were in contempt . . . .” *Local 214 v Genesee Co Bd of Comm’rs*, 401 Mich 408, 410-411; 258 NW2d 55 (1977).

C. CRIMINAL CONTEMPT

Plaintiffs assert that as a municipal corporation, the county acts through its agents and the county is charged with knowledge of all the county’s agents acting within the scope of their authority. See *New Props, Inc v Geo D Newpower, Jr, Inc*, 282 Mich App 120, 134, 139; 762 NW2d 178 (2009). Specifically, plaintiffs contend that the evidence showed that Commissioner Elliott, who was corporate counsel at the time of the entry of the 2008 injunction, and whose signature appears on the injunction in the circuit court file, had knowledge of the injunction that should have been imputed to the county. Plaintiffs’ argument hinges on their contention that Commissioner Elliott’s testimony that he did not recall the injunctive nature of the order when he voted in favor of the new structure in August of 2013 was not credible. Because Elliott’s testimony was not credible, it would not support a finding of reasonable doubt whether the county had actual notice of the injunction. Instead, plaintiffs argue that Elliott’s admissions and the other evidence established beyond any reasonable doubt that Elliott had knowledge, imputed to the county, of the entry of the injunction in November 2008. Thus, according to plaintiffs, the circuit court erred by finding the county not guilty of criminal contempt.

This Court reviews for an abuse of discretion a trial court’s decision on a motion to hold a party in contempt. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). “The abuse of discretion standard recognizes that there will be circumstances where

there is no single correct outcome and which require us to defer to the trial court's judgment; reversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Porter v Porter*, 285 Mich App 450, 455; 776 NW2d 377 (2009). The trial court's findings of fact in a contempt proceeding are reviewed for clear error and will be affirmed on appeal when supported by competent evidence. *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009). Clear error occurs only when the appellate court is left with the definite and firm conviction that a mistake was made. *Id*. at 669. In reviewing the trial court's findings, this Court will not "weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the findings." *In re Kabanuk*, 295 Mich App 252, 256; 813 NW2d 348 (2012).

In a criminal contempt proceeding, "[a] party charged with criminal contempt is presumed innocent . . . and the contempt must be proven beyond a reasonable doubt." *Porter*, 285 Mich App at 456. In this case, the circuit court heard the testimony of all the witnesses, found them credible, and weighed all the evidence. The circuit court determined that plaintiffs had not proved beyond a reasonable doubt that the county's violation of the 2008 injunction was a willful violation of a known legal duty. For those reasons, the circuit court concluded that plaintiffs had not proved beyond a reasonable doubt that the county was guilty of criminal contempt. Plaintiffs' only claim on appeal is that the trial court erred by favorably assessing the credibility of Commissioner Elliott. Because this Court will not second-guess the trial court's credibility determinations, plaintiffs' appeal must fail. *In re Kabanuk*, 295 Mich App at 256; *In re Contempt of Henry*, 282 Mich App at 668. The circuit court did not abuse its

discretion by finding the county not guilty of criminal contempt. *Porter*, 285 Mich App at 454-455; *DeGeorge*, 276 Mich App at 591.

IV. CONCLUSION

I would affirm the circuit court in both cases on all issues. Specifically, I conclude that the circuit court correctly ruled that the structure at issue is a "county building" as that term is used in MCL 46.11(b), and also that the county has the authority to "erect" the structure by determining it is "necessary," MCL 46.11(d). Further, the circuit court correctly ruled that the adjacent shooting range is ancillary and indispensable to the normal use of the building, thus giving the county use of the building and the adjacent shooting range priority over township ordinances. *Herman*, 481 Mich at 362 n 13, 368-369.

With respect to the other issues raised in Docket No. 325226, I conclude that the circuit court did not abuse its discretion by granting defendants partial equitable relief from the 2008 injunction. Furthermore, the circuit court did not err by denying plaintiffs an award of attorney fees under MCL 600.1721. Finally, the circuit court did not abuse its discretion by finding the county not guilty of criminal contempt. I would affirm the circuit court in all respects.

CITIZENS FOR A BETTER ALGONAC COMMUNITY SCHOOLS v ALGONAC COMMUNITY SCHOOLS

Docket No. 326583. Submitted July 12, 2016, at Detroit. Decided September 8, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 1009.

Plaintiffs, Citizens for a Better Algonac Community Schools and Heidi Campbell, brought an action in the St. Clair Circuit Court, alleging that defendant, Algonac Community Schools, violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., by failing to undertake public deliberations concerning contract negotiations for a newly selected school superintendent because the negotiations had been conducted by means of e-mail exchanges. Plaintiffs sought a declaratory judgment finding a violation of the OMA, an order compelling compliance with the OMA and enjoining any further noncompliance, and an award of attorney fees and costs. The parties filed competing motions for summary disposition, and the court, Daniel J. Kelly, J., ruled that defendant violated the OMA. However, the court denied injunctive relief and attendant attorney fees and court costs to plaintiffs because plaintiffs had failed to show that the practice of using e-mails had occurred in the past, continued at the present time, or would persist in the future. The court subsequently denied plaintiffs' motion for reconsideration, which cited e-mails from 2012 allegedly revealing that defendant had long been in the practice of using e-mail communications to do its work. Plaintiffs appealed, arguing that the court erred by failing to issue an injunction and by failing to award attorney fees and costs, and defendant cross-appealed, arguing that the court erred by declaring an OMA violation.

The Court of Appeals *held*:

1. The Open Meetings Act, MCL 15.261 *et seq*., generally provides that all meetings of a public body shall be open to the public and that all decisions of a public body shall be made at a meeting open to the public. With respect to causes of action available under the OMA, MCL 15.270 (an action to invalidate a decision made in violation of the OMA), MCL 15.271 (an action for injunctive relief to enjoin an ongoing OMA violation or to compel compliance), and MCL 15.273 (an action for damages for an intentional OMA violation) create a three-tiered enforcement

scheme for private litigants. These sections, and the distinct kinds of relief that they provide, stand alone. Furthermore, a complaint seeking pure declaratory relief, as an independent remedy standing on its own, is unsustainable in regard to alleged OMA violations. In this case, plaintiffs did not seek to invalidate the decision to hire the new superintendent or the decision pertaining to the substance of his contract under MCL 15.270, nor did plaintiffs pursue a remedy under MCL 15.273 on the basis of an intentional violation of the OMA by a public official; accordingly, the only other available OMA cause of action was a suit seeking injunctive relief pursuant to MCL 15.271.

2. In *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125 (2014), the Supreme Court held that MCL 15.271(4) allows for an award of court costs and actual attorney fees, but only if a party succeeds in obtaining injunctive relief. Under MCL 15.271(1), a person may seek injunctive relief when a public body is not complying with the OMA, and *Speicher* held that MCL 15.271(1) contemplates an ongoing violation. The "ongoing" requirement of MCL 15.271(1) does not mandate a showing that a public body, at the time an OMA suit is filed, is in the midst of deliberating a particular matter in violation of the OMA. Rather, if there has been a pattern, within a relevant time frame, reflecting that a public body has been regularly engaging in activity that violates the OMA, an action for injunctive relief under MCL 15.271 would be proper even if deliberations were not being conducted at the precise point in time when the OMA action was filed; the pattern itself could establish ongoing violations. In this case, because plaintiffs' complaint only alluded to e-mails pertaining to the hiring of the new superintendent but did not allege other instances of OMA malfeasance and because a review of the record did not reveal any evidence that defendant, at the time suit was filed or thereafter, was actively employing e-mail communications to deliberate on matters of public policy, plaintiffs did not have a viable action for injunctive relief. The distant 2012 e-mails cited in plaintiffs' rejected motion for reconsideration, considered in conjunction with the superintendent-related e-mails, were inadequate to establish a regular pattern of conduct during a pertinent time frame such that it could be said that there was an ongoing OMA violation. Although the trial court properly concluded that plaintiffs were not entitled to injunctive relief under MCL 15.271, and therefore an award of costs and attorney fees could not enter, the trial court improperly issued a judgment that nonetheless awarded plaintiffs declaratory relief because the judgment effectively signified that plaintiffs had a recognizable cause of action for declaratory relief, which ran afoul of the OMA's

three-tiered enforcement scheme and *Speicher*. Because plaintiffs failed to posit adequate allegations and evidence in support of their complaint as needed to implicate at least one of the three remedy and cause-of-action sections set forth in the OMA, the trial court should have dismissed the lawsuit.

3. *Speicher* was retroactively effective and was applicable to the instant pending action; there were no exigent circumstances warranting the extreme measure of prospective-only application.

4. The holding that the OMA does not provide for a cause of action seeking declaratory relief does not conflict with earlier opinions addressing and ostensibly accepting OMA claims for declaratory relief because those opinions never specifically confronted an argument or analyzed the issue of whether the OMA actually permits an action for declaratory relief; rather, the cases were concerned with whether declaratory relief, when awarded, implicated the right to attorney fees and costs under MCL 15.271(4). Even if a conflict existed, *Speicher* clearly stated that the OMA does not provide for declaratory relief.

Trial court ruling denying injunctive relief, attorney fees, and court costs affirmed; trial court ruling granting declaratory relief in favor of plaintiffs vacated; case remanded for entry of an order summarily dismissing plaintiffs' OMA action.

O'CONNELL, J., concurring in part and dissenting in part, agreed with the majority that *Speicher* should be given retroactive effect and that plaintiffs were not entitled to injunctive relief or attorney fees, but dissented from the majority's conclusion that the trial court was not permitted to grant declaratory relief under the OMA. Judge O'CONNELL would have held that the trial court validly granted plaintiffs declaratory relief because the disjunctive word "or" in MCL 15.271(1), which provides that a party "may commence a civil action to compel compliance or to enjoin further noncompliance," indicates that injunctive relief is only one possible form of relief and because the Supreme Court in *Speicher* did not reverse the trial court's grant of declaratory relief under the OMA but instead merely refused to allow attorney fees and costs unless the plaintiff attained injunctive relief.

1. STATUTES — OPEN MEETINGS ACT — AVAILABLE CAUSES OF ACTION.

With respect to causes of action available under the Open Meetings Act (OMA), MCL 15.261 *et seq*., three sections create a three-tiered enforcement scheme for private litigants: MCL 15.270 (an action to invalidate a decision made in violation of the OMA), MCL 15.271 (an action for injunctive relief to enjoin an ongoing OMA violation or to compel compliance), and MCL 15.273 (an

action for damages for an intentional OMA violation); these sections, and the distinct kinds of relief that they provide, stand alone; a complaint seeking pure declaratory relief, as an independent remedy standing on its own, does not provide a valid cause of action for alleged OMA violations.

2. STATUTES — OPEN MEETINGS ACT — ACTIONS FOR INJUNCTIVE RELIEF.

Under MCL 15.271(1), a person may seek injunctive relief when a public body is not complying with the Open Meetings Act (OMA), MCL 15.261 *et seq*.; MCL 15.271(1) contemplates an ongoing violation; the ongoing requirement does not mandate a showing that a public body, at the time an OMA suit is filed, is in the midst of deliberating a particular matter in violation of the OMA; rather, if there has been a pattern, within a relevant time frame, reflecting that a public body has been regularly engaging in activity that violates the OMA, an action for injunctive relief under MCL 15.271 would be proper even if deliberations were not being conducted at the precise point in time when the OMA action was filed because the pattern itself could establish ongoing violations.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for Citizens for a Better Algonac Community Schools and Heidi Campbell.

Fletcher Fealko Shoudy & Francis, PC (by *Gary A. Fletcher* and *T. Allen Francis*), for Algonac Community Schools.

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

MURPHY, J. This case concerns the Open Meetings Act (OMA), MCL 15.261 *et seq*., and our Supreme Court's construction of the OMA in *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014). For the reasons set forth in this opinion, we vacate the trial court's judgment granting declaratory relief in favor of plaintiffs and remand for entry of an order summarily dismissing plaintiffs' OMA action,

thereby precluding any award of court costs and attorney fees to plaintiffs.

In early 2014, the Algonac Board of Education (the board), working on behalf of defendant, engaged in the process of searching for and hiring a new school superintendent for defendant. On April 1, 2014, at a special meeting of the board, there was a unanimous vote to offer the superintendent position to the superintendent of a neighboring school district and to, according to minutes of the meeting, "begin contract development as soon as possible." The board did not discuss or vote on the substance of any contract at the April 1 meeting. Over the next few weeks, the board president and members exchanged a series of e-mails regarding contract negotiations and drafts of proposed contracts relative to the new superintendent's employment, working out contractual details and settling on a final contract. At a regular meeting of the board conducted on April 28, 2014, the board unanimously, swiftly, and without discussion approved the terms and conditions of the employment contract for the new superintendent.

In May 2014, plaintiffs filed suit, alleging that the board's e-mail communications with respect to the superintendent's contract constituted deliberations of a public body that were required by the OMA to take place at a meeting open to the public. Plaintiffs alleged that defendant violated the OMA by failing to conduct the contract discussions in an open meeting. In their prayer for relief, plaintiffs sought a declaratory judgment finding a violation of the OMA, an order compelling compliance with the OMA and enjoining any further noncompliance, an award of attorney fees and costs, and any other relief deemed just and equitable. Defendant denied any violation of the OMA in regard

to the e-mails concerning the superintendent's contract. The parties filed competing motions for summary disposition. In a written opinion, the trial court ruled that the board, through employment of the e-mails, had "violated the [OMA] by conducting deliberations for the new school superintendent outside of a public meeting as required." The court, however, declined to grant any injunctive relief to plaintiffs, finding that plaintiffs had failed to show that the practice of using e-mails had occurred in the past, continued at the present time, or would persist in the future. Because the trial court denied plaintiffs' request for injunctive relief, it also refused to award plaintiffs attorney fees and court costs despite the conclusion that defendant had violated the OMA. In a final judgment, the court declared that defendant had violated the OMA "when it failed to undertake public deliberations concerning contract negotiations for a newly selected school superintendent . . . ." The judgment also provided that plaintiffs' requests for injunctive relief, attorney fees, and court costs were denied for the reasons set forth in its earlier written opinion. Subsequently, the trial court denied plaintiffs' motion for reconsideration.

On appeal, plaintiffs argue that the trial court erred by failing to enjoin defendant's "secret practices of illegal email communications" and by failing to award attorney fees and costs to plaintiffs. In a cross-appeal, defendant contends that there was undisputed evidence confirming that a quorum of the board did not deliberate in violation of the OMA; therefore, the trial court erred by declaring an OMA violation.

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), as well as issues of statutory con-

struction, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "We review for an abuse of discretion a trial court's decisions whether to invalidate a decision made in violation of the OMA and whether to grant or deny injunctive relief." *Morrison v East Lansing*, 255 Mich App 505, 520; 660 NW2d 395 (2003), overruled in part on other grounds by *Speicher*, 497 Mich at 132 n 14, 143.

In *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), the Michigan Supreme Court articulated the principles governing statutory construction:

> 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.]

The OMA generally provides that "[a]ll meetings of a public body shall be open to the public and shall be held in a place available to the general public," that "[a]ll decisions of a public body shall be made at a meeting open to the public," and that, except as otherwise provided, "[a]ll deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public . . . ." MCL 15.263(1) through (3), respectively.

With respect to causes of action available under the OMA, MCL 15.270(1) provides that a person may file "a civil action in the circuit court to challenge the validity of a decision of a public body made in violation of th[e] act." And MCL 15.270(2) empowers a court to invalidate a public body's decision on the basis of OMA violations. See *Speicher*, 497 Mich at 135. The *Speicher* Court noted that MCL 15.270 "does not provide for an award of attorney fees or costs." *Id*. Next, MCL 15.271(1) states that a person may file "a civil action to compel compliance or to enjoin further noncompliance with" the OMA "[*i*]*f a public body is not complying with th*[*e*] *act*." (Emphasis added.) According to our Supreme Court, MCL 15.271(1) "contemplates an *ongoing* violation, precisely the circumstances in which injunctive relief is appropriate." *Speicher*, 497 Mich at 138 (emphasis added). As construed by the *Speicher* Court, MCL 15.271(4) allows for an award of court costs and actual attorney fees, but only if a party succeeds in obtaining the injunctive relief described in the statute. *Id*. In holding that a party must be successful in obtaining injunctive relief before being entitled to court costs and attorney fees under MCL 15.271(4), the Court in *Speicher* overruled *Ridenour v Dearborn Sch Dist Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981), "and its progeny to the extent that those cases allow for the recovery of attorney fees and costs under MCL 15.271(4) when injunctive relief was not obtained, equivalent or otherwise." *Speicher*, 497 Mich at 143. Finally, MCL 15.273(1) provides that "[a] public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees . . . ." See *Speicher*, 497 Mich at 136.

In sum, MCL 15.270 (action to invalidate decision made in violation of the OMA), MCL 15.271 (action for injunctive relief to enjoin ongoing OMA violation or to compel compliance), and MCL 15.273 (action for damages for intentional OMA violation) "create[] a three-tiered enforcement scheme for private litigants[.]" *Speicher*, 497 Mich at 135. In *Speicher*, the Supreme Court made an important observation concerning MCL 15.270, MCL 15.271, and MCL 15.273, stating:

> As an initial matter, these sections, and the distinct kinds of relief that they provide, stand alone. This is an important point because to determine whether a plaintiff may bring a cause of action for a specific remedy, this Court must determine whether the Legislature intended to create such a cause of action. When a statute, like the OMA, gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only. [*Speicher*, 497 Mich at 136 (citations, quotation marks, and brackets omitted).]

In this case, plaintiffs did not seek to invalidate the decision to hire the new superintendent or the decision pertaining to the substance of his contract, so MCL 15.270 was not implicated, nor did plaintiffs pursue a remedy under MCL 15.273 on the basis of an intentional violation of the OMA by a public official. Indeed, no public official was personally named as a defendant. Accordingly, the only other available OMA cause of action was under MCL 15.271, pertaining to a suit seeking injunctive relief. Before discussing MCL 15.271 any further in regard to injunctive relief, we shall speak to the issue of declaratory relief. In *Speicher*, 497 Mich at 136-137 n 31, our Supreme Court stated:

> The Court of Appeals failed to identify the source of its authority to grant plaintiff declaratory relief in this case.

> *The OMA does not provide for such relief*. Nor is it clear that plaintiff was entitled to declaratory relief under MCR 2.605, the court rule governing declaratory judgments. See *South Haven* [*v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 533-534; 734 NW2d 533 (2007)] (stating that a party does not have standing to bring a declaratory judgment claim where there is no actual controversy); *id*. at 528 ("It is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers.") (quotation marks and citation omitted). In any event, since no party raised the issue, we will assume without deciding that plaintiff was entitled to declaratory relief on its claim that defendants violated the act by not timely posting the Planning Commission's modified meeting schedule, as required by MCL 15.265(3). [Emphasis added.]

Later, in responding to the dissent, the *Speicher* Court noted that "[t]o the extent the dissent invokes the federal presumption that a declaratory judgment is the functional equivalent of an injunction, that presumption has not been adopted in this state, nor would it apply in this context given that the Legislature has explicitly provided injunctive relief as an available remedy under the OMA." *Speicher*, 497 Mich at 143 n 51. Taking into consideration these two passages from *Speicher* (footnotes 31 and 51), along with the Court's admonition, quoted earlier, that "a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only," *id*. at 136 (citation and quotation marks omitted), it becomes abundantly clear that the Supreme Court's view is that a complaint seeking pure declaratory relief, as an independent remedy standing on its own, is unsustainable in regard to alleged OMA violations. Effectively, there was no legislative intent to create an OMA cause of action for declaratory relief. See *Speicher*, 497 Mich at 136 (stating that, in deciding "whether a plaintiff may bring a

cause of action for a specific remedy, this Court must determine whether the Legislature intended to create such a cause of action") (citation and quotation marks omitted).

Accordingly, any determination regarding whether there was an OMA violation in the instant case had to be tied to either an attempted invalidation of the employment contract or hiring decision, MCL 15.270, which was not pursued, an action for damages against a public official for an intentional OMA violation, MCL 15.273, which was not commenced, or a request for injunctive relief, MCL 15.271, which was sought by plaintiffs. We note that each one of the three remedies, when pursued, would result in a ruling by a trial court that would necessarily have a declaratory component to it; i.e., if invalidation was sought under MCL 15.270, if injunctive relief was requested under MCL 15.271, or if a damages claim was alleged under MCL 15.273, an underlying determination would need to be made regarding whether there was or was not a violation of the OMA. Ultimately, however, the structure of the OMA and the somewhat limited nature of the available remedies as recognized in *Speicher* only allow for causes of action seeking, on the basis of an alleged OMA violation, (1) invalidation of a public body's decision, (2) injunctive relief, or (3) money damages.

Turning to MCL 15.271, the question becomes whether plaintiffs had a viable cause of action for injunctive relief, which remedy arises when "a public body is not complying with" the OMA. MCL 15.271(1). As indicated earlier, the Supreme Court specifically stated that MCL 15.271(1) "contemplates an ongoing violation." *Speicher*, 497 Mich at 138. Assuming noncompliance with the OMA relative to the flurry of e-mails regarding the hiring of the new superintendent

and his contract, that particular presumed violation was no longer ongoing at the time plaintiffs' lawsuit was filed. Although plaintiffs could have pursued invalidation of the contract or hiring decision under MCL 15.270 on the basis of a completed OMA violation, they opted not to do so. In plaintiffs' complaint, they alleged that defendant, on information and belief, had deliberated on matters "in the recent past" and "likely" was continuing to do so "by mass/joint email communications . . . ." The complaint then alluded to the e-mails pertaining to the hiring of the new superintendent and his contract; no allegations of other instances of OMA malfeasance were provided in the complaint.

In the trial court's written opinion, the court ruled, as noted earlier, that injunctive relief was not appropriate because plaintiffs had failed to present evidence showing previous, current, or potential future use of e-mail communications to deliberate on matters of public policy comparable to those communications associated with the hiring of the new superintendent and his contract. The court essentially concluded that there was no ongoing OMA violation that would justify injunctive relief. In their rejected motion for reconsideration, plaintiffs cited and attached earlier 2012 e-mails unconnected to the hiring of the superintendent, which plaintiffs claimed revealed that defendant had long been in the practice of using mass group e-mail communications to do its work, necessitating injunctive relief.

A review of the record does not reveal any evidence that defendant, at the time suit was filed or thereafter, was actively employing e-mail communications to deliberate on matters of public policy. To be clear, we do not find that the "ongoing" requirement of MCL 15.271(1) ("[i]f a public body is not complying with th[e]

act") mandates a showing that a public body, at the time an OMA suit is filed, is in the midst of deliberating a particular matter in violation of the OMA. Rather, if there has been a pattern, within a relevant time frame, reflecting that a public body has been regularly engaging in activity that violates the OMA, an action for injunctive relief under MCL 15.271 would be proper even if deliberations were not being conducted at the precise point in time when the OMA action was filed; the pattern itself could establish "ongoing" violations.[1] In this case, even if the evidence concerning the 2012 e-mails—which was not submitted until plaintiffs filed their motion for reconsideration and which was not the subject of any specific allegations in the complaint—could be considered and showed an OMA violation, we would still find it insufficient to show an ongoing OMA violation. See *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 533; 609 NW2d 574 (2000) ("Merely because a violation of the OMA has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future."), overruled in part on other grounds by *Speicher*, 497 Mich at 132-133 n 14, 143. The distant 2012 e-mails, considered in conjunction with the superintendent-related e-mails, were inadequate to

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[1] For example, if a public body deliberated on 10 separate matters over a one-month period, all in violation of the OMA, the filing of an action for injunctive relief under MCL 15.271 would be appropriate *before* an eleventh matter was entertained the following month even if the tenth matter had been concluded. In such a scenario, the public body's conduct would establish an ongoing OMA violation, i.e., that the public body was "not complying with th[e] act . . . ." MCL 15.271(1). The same conclusion would likely not be reached if the 10 OMA violations had occurred five years before an OMA injunctive suit was filed, with no current or active violations taking place, nor any violation having transpired during the five-year interim.

establish a regular pattern of conduct during a pertinent time frame such that it could be said that there was an ongoing OMA violation, assuming the past conduct even violated the OMA.[2]

Although we agree with the trial court that plaintiffs were not entitled to injunctive relief under MCL 15.271, and therefore an award of costs and attorney fees could not enter, it was improper to issue a judgment that nonetheless awarded plaintiffs declaratory relief because the judgment effectively signified that plaintiffs had a recognizable cause of action for declaratory relief, running afoul of the OMA's three-tiered enforcement scheme and *Speicher*.[3] Because plaintiffs were not entitled to injunctive relief as a matter of law, they had no sustainable cause of action under the OMA; therefore, the suit should have been dismissed.

We must tackle two other issues before concluding this opinion. First, plaintiffs present an argument that *Speicher*, which was issued after plaintiffs' lawsuit was filed but during the pendency of the lower court proceedings, should only be given prospective application. Plaintiffs raised this issue for the first time in their motion for reconsideration, and therefore it was not properly preserved for appellate review and is rejected. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich

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[2] Although plaintiffs assert that defendant has taken the position, by way of its answer to the complaint and the cross-appeal, that it may generally use e-mail communications similar to those exchanged in finalizing the superintendent's contract without offending the OMA, this is not the same as defendant actually participating in such communications relative to other matters. If defendant chooses to chart such a course, it does so at the risk of future OMA litigation.

[3] In a summary disposition brief, plaintiffs accepted *Speicher*'s pronouncement that the OMA did not provide for declaratory relief, arguing that they sought injunctive and not declaratory relief.

App 513, 519; 773 NW2d 758 (2009). Indeed, in their brief in response to defendant's motion for summary disposition, plaintiffs acknowledged *Speicher* and used the opinion as a basis to support their claim for injunctive relief and the attendant attorney fees and costs, essentially waiving their prospective-only argument. Moreover, the argument also fails on a substantive level. In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586-587; 702 NW2d 539 (2005), the Supreme Court observed:

> Typically, our decisions are given retroactive effect, applying to pending cases in which a challenge has been raised and preserved. Prospective application is a departure from this usual rule and is appropriate only in "exigent circumstances." This case presents no "exigent circumstances" of the sort warranting the "extreme measure" of prospective-only application. [Citations, quotation marks, and ellipsis omitted.]

In *Mich Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 197; 596 NW2d 142 (1999), our Supreme Court rejected prospective-only application of one of its decisions that had overruled opinions issued by the Court of Appeals because this Court had misinterpreted the law in a manner that was in direct conflict with the plain language of the pertinent statute and the Legislature's intent. The *Speicher* Court noted that "the *Ridenour* court and the cases that followed it impermissibly strayed from the plain language of MCL 15.271(4)." *Speicher*, 497 Mich at 143. Accordingly, we rule that *Speicher* is retroactively effective and was applicable to the instant pending action; there are no exigent circumstances warranting the extreme measure of prospective-only application.

Second, our holding that the OMA does not provide for a cause of action seeking declaratory relief cannot

be viewed as being in conflict with *Ridenour* and its progeny, including any binding opinions issued on or after November 1, 1990. MCR 7.215(J)(1). Those opinions, while addressing and ostensibly accepting OMA claims for declaratory relief, never specifically confronted an argument or analyzed the issue of whether the OMA actually permits an action for declaratory relief. Rather, the cases were simply concerned with the question whether declaratory relief, when awarded, implicated the right to attorney fees and costs under MCL 15.271(4). See, e.g., *Ridenour*, 111 Mich App at 806; *Nicholas*, 239 Mich App at 535. Furthermore, even if a conflict existed, the words spoken by the Supreme Court in *Speicher* are clear, inescapable, and cannot be ignored—"[t]he OMA does not provide for [declaratory] relief"—even though the Court proceeded with its analysis on the assumption that the plaintiff was entitled to declaratory relief. *Speicher*, 497 Mich at 136-137 n 31. The *Speicher* Court's remarks must be given weight by this Court.

In conclusion, we vacate the trial court's ruling granting declaratory relief in favor of plaintiffs and remand the case for entry of an order summarily dismissing plaintiffs' OMA suit because plaintiffs failed to posit adequate allegations and evidence in support of their complaint as needed to implicate at least one of the three remedy and cause-of-action sections set forth in the OMA. Therefore, plaintiffs were not entitled to court costs and attorney fees.

Affirmed with respect to the denial of injunctive relief, attorney fees, and court costs, vacated in regard to the granting of declaratory relief, and remanded for entry of an order summarily dismissing plaintiffs' OMA action. We do not retain jurisdiction. Having fully

prevailed on appeal, defendant is awarded taxable costs under MCR 7.219.

WILDER, P.J., concurred with MURPHY, J.

O'CONNELL, J. (*concurring in part and dissenting in part*). Plaintiffs, Citizens for a Better Algonac Community Schools and Heidi Campbell, appeal as of right the trial court's order declaring that defendant, Algonac Community Schools, violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., but denying injunctive relief and attorney fees. I respectfully dissent from the majority's conclusion that the trial court may not grant declaratory relief under the OMA. In all other respects, I concur in the majority's opinion. Because I conclude that the trial court may grant declaratory relief under the OMA, I would affirm.

The majority ably states the factual background of this case and the legal background of the OMA. I agree with the majority that *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125; 860 NW2d 51 (2014), should be given retroactive effect and that plaintiffs were not entitled to injunctive relief in this case. Where my analysis diverges is whether *Speicher* prohibits the trial court from granting declaratory relief.

While a party is only entitled to attorney fees and costs under MCL 15.271(4), MCL 15.271(1) provides that a party "may commence a civil action to compel compliance *or* to enjoin further noncompliance with this act." (Emphasis added.) The disjunctive word "or" indicates that enjoining future compliance is only one possible form of relief. See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). The *Speicher* Court considered a similar circumstance. In that case, the plaintiff obtained declara-

tory relief under the OMA. *Speicher*, 497 Mich at 128. The Michigan Supreme Court did not reverse the trial court for granting declaratory relief; it merely refused to allow attorney fees and costs unless the plaintiff attained injunctive relief. *Id*. at 144.[1] I would conclude that the trial court validly granted plaintiffs declaratory relief but that plaintiffs were not entitled to attorney fees because they did not obtain injunctive relief.

I would affirm.

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[1] Specifically, our Supreme Court stated, "Although the Court of Appeals concluded that [the] plaintiff was nevertheless entitled to declaratory relief for defendants' notice violation, he is not entitled to receive court costs and actual attorney fees because he did not succeed in obtaining injunctive relief in the action, as MCL 15.271(4) requires." *Speicher*, 497 Mich at 144.

STOCK BUILDING SUPPLY, LLC v CROSSWINDS COMMUNITIES, INC

Docket No. 325719. Submitted March 4, 2016, at Detroit. Decided September 13, 2016, at 9:00 a.m.

Stock Building Supply, LLC (Stock) filed an action in the Oakland Circuit Court against Hitchingham Development Company, LLC (Hitchingham), Crosswinds Communities, Inc. (Crosswinds), and others, seeking to foreclose its construction liens on a condominium project. Stock named all parties claiming an interest in the property as defendants, including Church & Church, Inc. (Church). Church was one of many contractors that Crosswinds and Hitchingham hired to construct the project, which was funded by a loan from Citizens Bank that was secured by a mortgage on the entire project. Church performed work on four separate units of the project and was provided with four separate mortgages. On October 15, 2008, the court, Rudy J. Nichols, J., entered an order appointing O'Keefe & Associates (O'Keefe) as receiver, making O'Keefe the fiduciary for all parties interested in the property. In July 2009, O'Keefe reported to the court that it received an offer to purchase a unit, and the court entered an order approving the sale of the unit, stating that the property was to be conveyed "free and clear of all claims, liens and encumbrances . . . ." Church's attorney signed the order without objection. Thereafter, for each unit sold in the project, O'Keefe presented an offer to purchase to the court, and the court entered an order approving the sale, stating that the property was to be conveyed "free and clear of all claims, liens and encumbrances." Church was notified of the orders permitting sales of the units as well as the distribution of the sale proceeds from each property to the senior lienholder, Citizens Bank. Three years later, on September 11, 2013, Church moved the trial court to reopen the case, arguing that it still maintained mortgages on four units. On October 10, 2013, the trial court issued an order that granted Church's motion to reopen the case, ordered Church to add any parties with an interest in the properties, and ordered Church and Citizens Bank to brief whether the court orders approving the sales free of liens and encumbrances extinguished Church's mortgages. Church argued that the trial court lacked

the authority to discharge a mortgage other than through foreclosure, and Citizens Bank argued that the trial court had the authority to permit sales free and clear of all liens and encumbrances, including mortgages, under MCL 570.1123(2) of the Construction Lien Act, MCL 570.1101 *et seq*. Church moved for summary disposition, arguing that no statutory law or caselaw provided the trial court, via a receiver, the authority to judicially extinguish the mortgages. Third-party defendants JPMorgan Chase Bank, Bank of America, U.S. Bank, Hong Doan, Howard Hanson III, Catherine B. Hanson, and Michael Colman also moved for summary disposition, arguing that the trial court had the authority to discharge the mortgages via a receiver under MCL 570.1123(2). Third-party defendants William and Laura Davidson filed a brief adopting the arguments of the other third-party defendants. The court granted summary disposition in favor of the third-party defendants, concluding that the language of the court orders authorizing the sale of the properties "free and clear of all claims, liens and encumbrances" included Church's mortgages, that MCL 570.1123(2) granted the court authority to extinguish a mortgage via a receiver sale, and that the foreclosure action was barred by the doctrine of laches. Church appealed.

The Court of Appeals *held*:

1. MCL 570.1123(2) provides that a receiver may petition the court for authority to sell a real property interest under foreclosure for cash or on other terms as may be ordered by the court; the sale may be by private or public sale and shall be held in the manner directed by the court; a sale under MCL 570.1123(2) shall become final upon the entry of an order of confirmation by the court, unless the court allows a period for redemption; and the redemption period, if allowed, shall not exceed four months. The plain language of MCL 570.1123(2) contemplates that the court may make decisions regarding the sale after the petition is filed, including the terms of the sale itself. The Legislature intended for the trial court to be able to act on the receiver's petition to sell the property. In this case, a judgment of foreclosure was not required before the appointment of a receiver because this case was brought by a lien claimant under the Construction Lien Act, MCL 570.1101 *et seq*., which allows the sale of real property under lien foreclosure either by a sale on foreclosure or a sale by receiver. While it is plain that MCL 570.1123(2) requires that the property being sold be under foreclosure, that premise was satisfied in this case because Citizens Bank was in the process of foreclosure when the trial court ordered the receiver to sell the subject

properties. Therefore, the plain language of MCL 570.1123(2) requires only that the subject property be under foreclosure, and MCL 570.1123(2) permits the trial court to grant a petition for sale brought by an appointed receiver.

2. In MCL 570.1123(2), the word "or" in the phrase "or on other terms as may be ordered by the court" refers back to the phrase "authority to sell the real property interest under foreclosure for cash" and concerns what terms the trial court can place on the sale. A plain reading of the statute gave the trial court authority to order receivership sales "on other terms," and the court orders authorizing that the properties be conveyed "free and clear of all claims, liens and encumbrances" could be considered "other terms." Therefore, the trial court had the authority to order receivership sales that extinguished Church's mortgages. Nevertheless, a trial court should not authorize the sale of property free and clear of all liens unless the proceeds of the sale would be applied to the liens. In this case, Church's mortgages were among many encumbrances on the project; however, the senior lienholder was Citizens Bank, and Citizens Bank also advanced funds to O'Keefe to complete construction improvements on the project to make the sale of the units viable. Each of the court's orders approving sale of the units provided that the proceeds received from the sales would "be distributed in accordance with the same priorities as held prior to consummation of such sale." It was undisputed that even after all the units in the project were sold, Citizens Bank's mortgage remained unsatisfied. Therefore, as a junior lienholder, Church would not have received any of the proceeds in any event. Under these circumstances, the court properly exercised its authority under MCL 570.1123(2) when it ordered the sales free of all liens and encumbrances.

3. Under Michigan law, a mortgage is a lien on real property intended to secure performance or payment of an obligation. Church's argument that its mortgages were not included in the language of the court orders because the language only referred to "liens" and not to "mortgages" failed. The inclusion of the word "all" in the phrase "free and clear of all claims, liens and encumbrances" was dispositive; therefore, the language of the court orders authorizing sale of the properties "free and clear of all claims, liens and encumbrances" included Church's mortgages. The trial court properly determined that its orders discharged Church's mortgages.

Affirmed.

LIENS — CONSTRUCTION LIEN ACT — SALE OF PROPERTY UNDER FORECLOSURE — TRIAL COURT'S AUTHORITY TO DISCHARGE MORTGAGES PURSUANT TO A SALE BY RECEIVER.

MCL 570.1123(2) provides that a receiver may petition the court for authority to sell a real property interest under foreclosure for cash or on other terms as may be ordered by the court; the sale may be by private or public sale and shall be held in the manner directed by the court; a sale under MCL 570.1123(2) shall become final upon the entry of an order of confirmation by the court, unless the court allows a period for redemption; MCL 570.1123(2) permits a trial court to grant an appointed receiver's petition for sale of property under foreclosure; the plain language of MCL 570.1123(2) requires only that the subject property be under foreclosure, which includes property in the process of foreclosure; MCL 570.1123(2) permits a trial court to discharge mortgages pursuant to a sale by receiver of foreclosed property; a trial court should not authorize the sale of property free and clear of all liens unless the proceeds of the sale would be applied to the liens.

Sugameli & Sugameli, PLC (by *J. Paul Sugameli*), for Church & Church, Inc.

Miller Canfield Paddock & Stone, PLC (by *LeRoy L. Asher, Jr.*, and *Lara L. Kapalla*), for Howard Hanson III, Catherine B. Hanson, Hong Doan, Michael Colman, U.S. Bank, NA, and Bank of America, NA.

Schneiderman & Sherman, PC (by *Jonas M. Parker*), for William Davidson and Laura Davidson.

Before: RONAYNE KRAUSE, P.J., and JANSEN and STEPHENS, JJ.

STEPHENS, J. In this receiver action, third-party plaintiffs, Church & Church, Inc., doing business as Church's Lumber Yards and Church's Builder Wholesale (collectively, Church), appeal as of right the trial court order granting summary disposition under MCR 2.116(C)(10) to third-party defendants, JPMorgan Chase Bank, Bank of America, U.S. Bank, Hong Doan,

Howard Hanson III and Catherine B. Hanson (the Hansons), Michael Colman, and William Davidson and Laura Davidson (the Davidsons), and denying Church the same. We affirm.

I. BACKGROUND

Church was one of many contractors that were hired by Crosswinds Communities, Inc. (Crosswinds) and Hitchingham Development Company, LLC (Hitchingham) to construct the Eton Street Station II condominium project in Birmingham, Michigan. The project was funded by a $13,201,800 loan from Citizens Bank[1] that was secured by a mortgage on the entire project. Church provided supplies to Hitchingham for work performed on Units 60 through 68 of the Eton Street project. This resulted in Church asserting construction liens on those units. Church also performed work on Units 24, 30, 72, and 73. Church was provided with four separate mortgages for that work in the amount of $20,000 each.

Litigation in this case began in July 2008 when contractor Stock Building Supply, LLC (Stock) sued Hitchingham, its guarantor Bernard Glieberman, and Crosswinds after Crosswinds and Hitchingham defaulted on their contract to pay Stock for construction services on the Eton Street project. Stock initiated an action to foreclose on its construction liens and to notify the court of the priority of its interests in the project. Stock's complaint listed several other contractors, including Church, as parties that might have had an interest in the condominium project. Church filed its cross- and counterclaim for damages on August 26,

[1] The loan was originally borrowed from Republic Bank, Citizens Bank's predecessor-in-interest.

2008, seeking recompense for its liens and mortgages. In September 2008, Citizens Bank, as senior mortgage holder, filed a cross-claim requesting foreclosure of all mortgages on the project, including those mortgages belonging to Church for Units 24, 30, 72, and 73. Citizens Bank also moved the trial court to appoint O'Keefe & Associates (O'Keefe) as a receiver to complete the construction and sale of the Eton Street project. On October 15, 2008, the trial court entered an order for O'Keefe to act as receiver, making O'Keefe the fiduciary for all parties interested in the property.

At issue in this case are the sales of condominium Units 24, 30, 72, and 73 between July 2009 and August 2010. In July 2009, O'Keefe reported to the trial court that it received an offer to purchase Unit 24. On July 14, 2009, the trial court entered an order approving the sale that stated the property was to be conveyed "free and clear of all claims, liens and encumbrances without redemption periods, with the proceeds received therefrom to be distributed in accordance with the same priorities as held prior to consummation of such sales." Church's attorney signed the order without objection. The property was conveyed by fiduciary deed on August 18, 2009. In September 2009, Church entered into a confidential settlement agreement with Citizens Bank in which Church agreed to extinguish its liens on Units 60 through 68 in exchange for $55,000. The last clause of the settlement agreement stated: "It is expressly understood that this Agreement shall have no effect on the [Church] Mortgages, which shall remain in full force and effect." Following that settlement, the trial court entered a stipulated order dismissing Church from the case with prejudice.

Thereafter, for each unit sold in the condominium project, including Units 30, 72, and 73, O'Keefe presented an offer to purchase to the trial court, and the trial court entered an order approving each sale and permitting O'Keefe to proceed. Every order contained language that the sale was "free and clear of all claims, liens and encumbrances without redemption periods, with the proceeds received therefrom to be distributed in accordance with the same priorities as held prior to consummation of such sales." Church was provided notice of the orders permitting the sales of the units and the distribution of the sale proceeds from each property to Citizens Bank as senior lienholder. Church did not challenge the sales until nearly three years later, on September 11, 2013, when it moved the trial court to reopen the case, arguing that it still maintained mortgages on Units 24, 30, 72, and 73.

Church asserted that the settlement agreement between it and Citizens Bank explicitly stated that the mortgages on the four units were still in full force and effect and that it never foreclosed on those mortgages or voluntarily discharged them. Citizens Bank filed an opposing brief, arguing that Church's motion was untimely because the disputed units were sold more than three years earlier. Additionally, Citizens Bank argued that it was entitled to the proceeds from the sales of the units because it held the senior mortgage and had not been fully recompensed for that mortgage. The trial court issued an order on October 10, 2013, that: (1) granted Church's motion to reopen the case, (2) ordered Church to file a separate motion to amend its counter- and cross-claim to add the parties now in interest to those properties, and (3) ordered Church and Citizens Bank to brief whether the orders approving the sales free of liens and encumbrances extinguished the mortgages held by Church.

Church's motion and brief filed on December 19, 2013, maintained that its mortgages were not discharged and additionally argued that the trial court lacked authority to discharge a mortgage other than through foreclosure. Church moved the trial court to permit it to amend its complaint to include foreclosure of Units 24, 30, 72, and 73. In the proposed amended complaint, the purchasers and mortgagees of Units 24, 30, 72, and 73 were added as third-party defendants. Citizens Bank opposed the proposed amendment as futile, again asserting that the trial court had granted authorization to permit sales free and clear of all liens and encumbrances, including mortgages, under the Construction Lien Act, MCL 570.1101 *et seq*., specifically MCL 570.1123. On January 31, 2014, the trial court entered an order permitting Church to amend its counter- and cross-claim to include foreclosure of the four units and to add the parties in interest to those units.

On September 30, 2014, Church filed its motion requesting summary disposition under MCR 2.116(C)(10) and judicial foreclosure of the units under MCL 600.3115. Church asserted that the case was factually undisputed and that the trial court only needed to determine whether its previous orders had discharged Church's mortgages on the subject units. Church argued that because the orders never mentioned the mortgages, the settlement agreement explicitly stated that the mortgages would remain, and that, there being no statutory law or caselaw providing the trial court, via a receiver, the authority to judicially extinguish the mortgages, summary disposition was required in Church's favor.

Third-party defendants JPMorgan Chase Bank, Bank of America, U.S. Bank, Hong Doan, the Hansons,

and Michael Colman jointly filed their own motion for summary disposition under MCR 2.116(C)(10).[2] Therein, they argued that the mortgages were extinguished upon the entry of the trial court's encyclopedic and unambiguous orders approving the sales. They asserted that the trial court had power to discharge the mortgages via a receiver sale pursuant to MCL 570.1123(2) and that Church's claims should be barred by the doctrine of laches because Church's three-year delay in asserting any rights prejudiced them. Lastly, the third-party defendants claimed that Church's foreclosure action was an impermissible collateral attack on the trial court's previous orders approving the sale of each unit. The Davidsons filed a brief adopting the arguments of the other third-party defendants and asserting that summary disposition was required under MCR 2.116(C)(10) in their favor for the same reasons just discussed.

On December 17, 2014, the trial court heard the cross-motions for summary disposition. To start, the trial court indicated its belief that the crux of the case relied on the power granted to the trial court by MCL 570.1123(2). The parties agreed that even after the sales by the receiver, Citizens Bank's senior mortgage was still not satisfied. The parties differed, however, on their reading of the statute. The parties argued consistently with their briefs, and the trial court took the motions under advisement.

On January 9, 2015, the trial court issued an order granting the third-party defendants summary disposition and denying Church's motion after having determined under MCR 2.116(C)(10) that no genuine issue of material fact existed regarding whether the orders approving the sale of Units 24, 30, 72, and 73 dis-

[2] The Davidsons did not join in this motion.

charged Church's mortgages. The court held that the clear language of its orders and the declaration of O'Keefe that the intent of the language "free and clear of all claims, liens and encumbrances" was to include Church's mortgages established that Church's mortgages were included in the orders. The court also held that MCL 570.1123(2) granted the court authority to extinguish a mortgage via a receiver sale because the statute allowed the court to order a sale of properties "on other terms and in a manner as directed by the court." (Emphasis omitted.) Lastly, the court found that the foreclosure action was barred by the doctrine of laches.

II. STANDARD OF REVIEW

The trial court granted summary disposition under MCR 2.116(C)(10). "This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law." *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(10) is proper when there is no "genuine issue regarding any material fact." *Id*. "A reviewing court may not employ a standard citing the mere possibility that the claim

might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006) (quotation marks and citation omitted). "While it is true that the trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, the nonmoving party may not rely on mere allegations or denials, but must set forth specific facts that show that a genuine issue of material fact exists." *Id*. at 318 (quotation marks and citation omitted). Equitable issues are reviewed de novo, including equitable defenses such as laches. See *Mich Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

Resolution of this case also involves interpretation of a provision of the Construction Lien Act. We review de novo questions of statutory interpretation and the proper application of statutes. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). This Court addressed the proper method of statutory interpretation in *In re Harper*, 302 Mich App 349, 354-355; 839 NW2d 44 (2013):

> The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). A statutory provision must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citation omitted). Only when the statutory language is ambiguous may a court consider evidence

> outside the words of the statute to determine the Legislature's intent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, "[a]n ambiguity of statutory language does not exist merely because a reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning." *Papas* [*v Gaming Control Bd*], 257 Mich App [647,] 658[; 669 NW2d 326 (2003)].

III. ANALYSIS

Resolution of this case requires two inquiries: first, whether the trial court had the power to discharge Church's mortgage via a sale by a receiver, and second, whether the language of the court's orders selling the property "free and clear of all claims, liens and encumbrances" included Church's mortgages.

The question whether a trial court is permitted to discharge mortgages pursuant to a sale by a receiver of encumbered property is one of first impression. Third-party defendants assert that the power of the trial court to do so is inherent under the common law and also vested in MCL 570.1123(2). Church argues that no such authority exists.

MCL 570.1123(2) provides:

> The receiver may petition the court for authority to sell the real property interest under foreclosure for cash or on other terms as may be ordered by the court. The sale may be by private or public sale and shall be held in the manner directed by the court. A sale under this subsection shall become final upon the entry of an order of confirmation by the court, unless the court allows a period for redemption. The redemption period, if allowed, shall not exceed 4 months.

Our attention is focused on what is meant by "authority to sell the real property interest under foreclosure for cash or on other terms as may be ordered by the court." Church argues that this language did not authorize the court to discharge its mortgages for three reasons. First, Church contends that the statute only grants the right to a receiver to "petition" the trial court to sell the property and is silent regarding the trial court's authority thereafter. Second, Church asserts that the statute requires that the property first be foreclosed before any process in MCL 570.1123(2) may take place. Third, Church insists that the statutory language "or on other terms as may be ordered by the court" only allowed the court to consider other forms of consideration for the sale.

We resolve these questions on the basis of the plain language of the statute. *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632, 641; 858 NW2d 105 (2014), rev'd on other grounds 499 Mich 29 (2016). It is on this basis that we disagree with Church's first assertion—that the statute only relates to the rights of a receiver to petition the court and not to what the court can actually grant. Instead, we conclude that the plain language of the statute contemplates that the court may make decisions regarding the sale after the petition is filed, including the terms of the sale itself. The first sentence of MCL 570.1123(2) reads, "The receiver may petition the court for authority to sell the real property interest under foreclosure . . . ." This sentence unmistakably grants the receiver the right to petition the court for authority to sell real property that is under foreclosure. The remainder of the first sentence and the language of the second sentence clearly refer to how the sale may be accomplished, i.e., by cash, on other terms directed by the court, or by private or public sale. The third sentence—"A sale

under this subsection shall become final upon the entry of an order of confirmation by the court, unless the court allows a period for redemption"—plainly provides for the court to enter an order regarding the sale of real property under foreclosure. This last sentence contemplates that the receiver has received an offer to purchase and is returning to the court to have the sale approved. A reviewing court is permitted to "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 65; 729 NW2d 500 (2007). It "may reasonably be inferred" from the third sentence that the Legislature intended for the trial court to be able to act on the receiver's petition to sell the property. See *id*.[3]

Church next asserts that the statutory language "the real property interest under foreclosure" requires that the property for which the receiver petitions the court for authority to sell must already be foreclosed. Church argues that judicial foreclosure is governed by MCL 600.3101 *et seq*. and cannot be accomplished through MCL 570.1123(2) of the Construction Lien Act. Church contends that a judgment of foreclosure was not entered for any of the units at issue here before the receiver was appointed. We disagree with Church's reasoning and conclusions.

The plain language of the statute clearly states that it pertains to the sale of "the real property interest *under* foreclosure . . . ." MCL 570.1123(2) (emphasis

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[3] In this case, it would make no sense for the court to confirm the sale of a property that it did not grant in the first instance. See *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999) ("[S]tatutes must be construed to prevent absurd results . . . ."); see also *K Mart Corp v Cartier, Inc*, 486 US 281, 324 n 2; 108 S Ct 1811; 100 L Ed 2d 313 (1988) (Scalia, J., concurring in part and dissenting in part) ("[I]t is a venerable principle that a law will not be interpreted to produce absurd results.").

added). Notably, the statute does not state "the real property interest *foreclosed*" or "the *foreclosed* real property," meaning that the lien-foreclosure claim must not have resulted in a judgment of foreclosure before the appointment or action by a receiver. When the language is clear and unambiguous, this Court must enforce the language of the statute as written. See *In re Harper*, 302 Mich App at 354-355. A judgment of foreclosure was not required before the appointment of a receiver because this case was brought by a lien claimant under the Construction Lien Act, which allows the sale of real property under lien foreclosure either by a sale on foreclosure or a sale by receiver. MCL 570.1123(3). Church's focus is entirely misplaced on its own mortgages and whether those were being foreclosed. However, this litigation began with a complaint by Stock for foreclosure on its construction liens and was resolved on Citizens Bank's cross- and counterclaim for foreclosure on its mortgage by receivership sales conducted according to the orders of the court approving the sales. While it is plain that MCL 570.1123(2) requires that the property being sold be under foreclosure, that premise was satisfied in this case because Citizens Bank was in the process of foreclosure when the trial court ordered the receiver to sell the subject properties. Therefore, we conclude that the plain language of the statute requires only that the subject property be under a foreclosure and that MCL 570.1123 permits the trial court to grant a petition for sale brought by an appointed receiver.

Next, Church argues that the statutory language "or on other terms as may be ordered by the court" only allowed the court to consider other forms of consideration for the sale and did not grant the court authority to discharge Church's mortgages. We conclude otherwise. Once again, this Court must turn to the language

of the statute. See *In re Harper*, 302 Mich App at 354-355. "The receiver may petition the court for authority to sell the real property interest under foreclosure for cash or on other terms as may be ordered by the court." MCL 570.1123(2). The precise language at question here is "or on other terms." MCL 570.1123(2). The statute, however, does not define what the phrase "or on other terms" means, nor is there any punctuation that would aid our interpretation of the phrase. In this case, it is proper to turn to other sources to define terms in the statute. See *In re Casey Estate*, 306 Mich App 252, 260; 856 NW2d 556 (2014); *Anzaldua v Neogen Corp*, 292 Mich App 626, 632; 808 NW2d 804 (2011) ("Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions.").

The competing analyses here are either: (1) the "or" in the statute refers back to "cash" and results in a discussion of consideration permitted for the sale of property, or (2) the "or" refers back to "authority to sell the real property interest under foreclosure for cash" and results in a discussion about what terms the trial court can place on the sale. "The word 'or' is a disjunctive term indicating a choice between alternatives." *Chiropractors Rehab Group, PC v State Farm Mut Auto Ins Co*, 313 Mich App 113, 124; 881 NW2d 120 (2015), quoting *Jesperson*, 306 Mich App at 643; *Hunt v Drielick*, 496 Mich 366, 375; 852 NW2d 562 (2014) (stating that the word "or" is "used to indicate a disunion, a separation, an alternative"), quoting *Mich Pub Serv Co v City of Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949). We conclude that a plain reading of the statute supports the second option. Subsection (2) of the statute is entirely devoted to the process of

selling the real property under foreclosure.[4] Also, the subject of the sentence at issue is the petition to sell, not the consideration for the sale. The statute clearly states, in terms that are not exhaustive, the conditions under which the sale may take place. We see no reason why the order's provision that the units be sold "free and clear of all claims, liens and encumbrances" could not be considered "other terms" by which to sell the property under the statute. To accept Church's interpretation would mean that the trial court's authority was limited to only determining what consideration was acceptable for the sale of property in receivership. This line of reasoning would also be contrary to the defined scope of a receiver's authority as granted by either law or court order. See MCR 2.622.

There was evidence submitted in the trial court that it was common practice for receivers in the metropolitan Detroit area to request and be granted authority to sell distressed properties free and clear of all liens or encumbrances. There is no rule or statute, however, that specifically grants trial courts power to order, through a receivership, sale of property under foreclosure free from all liens and encumbrances. Thus far, the issue has evaded review. See, e.g., *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc (On Reconsideration)*, 305 Mich App 460, 464; 853 NW2d 467 (2014) (analyzing issues on appeal that did not include a challenge to the circuit court's grant of "permission to sell the property free and clear of mortgages, liens, and other encumbrances"). A review

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[4] In contrast, when read in accordance with the plain meaning of its terms, Subsection (1) concerns a receiver's preparation of the real property for sale, i.e., completing construction; Subsection (3) concerns the purchase of the real property; and Subsection (4) concerns the property interests transferred upon consummation of the purchase of the real property. MCL 570.1123.

of caselaw from other jurisdictions, however, lends support for the proposition that a trial court should not authorize the sale of property free and clear of all liens unless the proceeds of the sale would be applied to the liens.[5] Church's mortgages were among many encumbrances on the Eton Street project. The senior lienholder, however, was Citizens Bank, having mortgaged the entire project in excess of $13 million. It was also Citizens Bank that advanced funds to O'Keefe to complete construction improvements on the project to make the sale of the units viable. Each of the court's orders approving sale of the units provided that the proceeds received from the sales would "be distributed in accordance with the same priorities as held prior to consummation of such sale." It is undisputed that even after all the units in the project were sold, Citizens Bank's mortgage remained unsatisfied, and therefore, as a junior lienholder, Church would not have received any of the proceeds in any event. Under these circumstances, we conclude that the court properly exercised its authority under MCL 570.1123(2) when it ordered the sales free of all liens and encumbrances.

We next consider whether the trial court properly determined that its orders discharged Church's mortgages. Church's sole argument is that its mortgages were not included in the court's order language, which stated that the properties were to be conveyed "free and clear of all claims, liens and encumbrances." Church argues that the trial court referred only to "liens," and mortgages are not liens. We find this

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[5] *Melrose v Indus Assoc*, 136 Conn 518; 72 A2d 469 (1950); *First Nat'l Bank v Powell Bros & Sanders Co, Ltd*, 55 So 590; 128 La 961 (1911); *Pemberton Lumber & Millwork Indus, Inc v Wm G Ridgway Constr Co*, 38 NJ Super 383; 118 A2d 873 (1955); *DeAngelis v Newman*, 504 A2d 1279; 350 Pa Super 536 (1986); *McIlhenny v Binz*, 13 SW 655; 80 Tex 1 (1890); *Chapman v Schiller*, 83 P2d 249; 95 Utah 514 (1938).

argument to be entirely without merit. Under Michigan law, a mortgage "*is* a lien on real property intended to secure performance or payment of an obligation." *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 256; 761 NW2d 694 (2008) (emphasis added); *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 670; 5 NW2d 524 (1942). *Black's Law Dictionary* (10th ed) also defines a "mortgage lien" as "[a] lien on the mortgagor's property securing the mortgage." We conclude that the word "all" in the court's orders is dispositive and therefore included Church's mortgages. "[T]here is no broader classification than the word 'all.' " *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994). "In its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Id*.[6] We also consider the placement of the word "all" before "claims, liens and encumbrances" as support that the court intended that all burdens against the units be included.

Given our disposition that the trial court had authority to order receivership sales that extinguished Church's mortgages, we affirm the trial court's determination that no genuine issue of material fact exists and conclude that summary disposition was appropriate. Given our disposition, we need not address the trial court's and third-party defendants' additional grounds for relief.

Affirmed.

RONAYNE KRAUSE, P.J., and JANSEN, J., concurred with STEPHENS, J.

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[6] Furthermore, "[t]he word 'all' is defined, in part, by *Random House Webster's College Dictionary* (2001) as follows: '**1.** the whole or full amount of . . . . **4.** any; any whatever . . . . **10.** Everything . . . .' " *Schmude Oil, Inc v Dep't of Environmental Quality*, 306 Mich App 35, 44; 856 NW2d 84 (2014).

THE ANDERSONS ALBION ETHANOL LLC v
DEPARTMENT OF TREASURY

Docket No. 327855. Submitted September 8, 2016, at Lansing. Decided September 13, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 1009.

The Andersons Albion Ethanol LLC (Andersons) appealed its final assessment and bill for taxes due in the Tax Tribunal, asserting that the Department of Treasury's interpretation of the formula for the renaissance zone tax credit under the Michigan Business Tax Act, MCL 208.1101 *et seq*., was erroneous. Under MCL 208.1433, the amount of the credit depended on Andersons' renaissance zone business activity factor. MCL 208.1433(9)(f) defines the renaissance zone business activity factor as a fraction, the numerator of which is the ratio of the average value of the taxpayer's property located in a designated renaissance zone to the average value of the taxpayer's property in this state plus the ratio of the taxpayer's payroll for services performed in a designated renaissance zone to all of the taxpayer's payroll in this state, and the denominator of which is two. This definition could be illustrated, as follows, by an equation in which X represents the renaissance zone business activity factor:

$$X = \frac{\left(\frac{\text{average value of zone property}}{\text{average value of Michigan property}} + \frac{\text{payroll for services performed in zone}}{\text{payroll in Michigan}}\right)}{2}$$

Andersons filed for a $514,579 renaissance zone tax credit for 2010. Andersons did not have any payroll attributable to services performed in a renaissance zone or in Michigan, so its payroll ratio was 0/0, which is an undefined number. Relying on guidance from the department's treatment of a similar credit under the former Single Business Tax Act, repealed by 2006 PA 325, Andersons did not divide the combined averages in the numerator by two, despite that MCL 208.1433(9)(f) states the denominator is two. The department concluded that Andersons had failed to properly divide by two and only granted Andersons a $257,290 credit for 2010. The department moved for summary disposition, asserting that, in such circumstances, the undefined number should impliedly be removed from the formula. Andersons contended that if the department removed the number from the formula, it should not have to divide the numerator by two

because one of the two factors did not exist. The tribunal granted summary disposition to Andersons, holding that the department had previously applied the interpretation advanced by Andersons under the Single Business Tax Act and that the department should do the same in this case. The department appealed.

The Court of Appeals *held*:

The tribunal erred by granting summary disposition to Andersons. The department's interpretation of the statute did not conflict with the statute's language, and the tribunal lacked cogent reasons to overturn the department's interpretation. The parties agreed that it was mathematically impossible to work the formula as written when one of the ratios was 0/0 but disagreed on the solution. The tribunal rejected the department's solution because it was inconsistent with the department's previous interpretation of a now-repealed, but analogous, statute. However, the inconsistency of the department's interpretation was not, in and of itself, a cogent reason to reject the department's new interpretation. A provision in a similar statute in which the Legislature expressly stated that the denominator would change in response to missing factors in the formula's numerator suggested that the Legislature was aware of that method for altering the formula and elected not to add similar language to MCL 208.1433. The language of MCL 208.1433 indicates that the Legislature wished to provide a tax benefit to businesses that both owned property in a renaissance zone and invested payroll in the renaissance zone. Businesses that only did half of those things should have received only half of the credit. Finally, mathematical examples showed that the department's interpretation was more consistent with rewarding investment in renaissance zones than Andersons' interpretation. Otherwise, businesses that invested more in the state would receive a less beneficial result.

Reversed and remanded.

TAXATION — MICHIGAN BUSINESS TAX ACT — CREDITS — RENAISSANCE ZONE BUSINESS ACTIVITY FACTOR.

When calculating the renaissance zone business activity factor under MCL 208.1433(9)(f) of the Michigan Business Tax Act, MCL 208.1101 *et seq.*, if either of the ratios in the numerator is 0/0, i.e., an undefined number, the denominator is still two.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief

Legal Counsel, and *Eric M. Jamison*, Assistant Attorney General, for the Department of Treasury.

Miller, Canfield, Paddock & Stone, PLC (by *Gregory A. Nowak* and *Maria Baldysz*), for The Andersons Albion Ethanol LLC.

Before: TALBOT, C.J., and O'CONNELL and OWENS, JJ.

O'CONNELL, J. Defendant, Department of Treasury (the Department), appeals as of right the ruling of the Tax Tribunal (the Tribunal) in favor of plaintiff, The Andersons Albion Ethanol LLC (Andersons), in this case involving a tax credit under the Michigan Business Tax Act, MCL 208.1101 *et seq*.[1] The Tax Tribunal concluded that applying the renaissance zone business activity factor, MCL 208.1433(9)(f),[2] when the taxpayer does not have payroll services in the renaissance zone or in Michigan under the renaissance zone tax credit leads to an absurd result. The Department agrees that literal application of the formula is impossible under such circumstances, but it contends that the Tribunal erred when it disregarded the Department's interpretation of the statute. We conclude that the Tribunal lacked cogent reasons to disregard the Department's interpretation, which was not contrary to the statute, and we reverse and remand.

I. BACKGROUND

The amount of a taxpayer's credit depends on the taxpayer's renaissance zone business activity factor.

[1] The act has been repealed with regard to most businesses, but some businesses have been permitted to continue filing returns using the act to claim refundable tax credits. 2011 PA 39. The act will not be fully repealed until the last of those credits are claimed. 2011 PA 39, enacting § 1.

[2] Part of the renaissance zone tax credit.

See MCL 208.1433(1)(a)(*i*) and (9)(g). "Renaissance zone business activity factor" is defined as

> a fraction, the numerator of which is the ratio of the average value of the taxpayer's property located in a designated renaissance zone to the average value of the taxpayer's property in this state plus the ratio of the taxpayer's payroll for services performed in a designated renaissance zone to all of the taxpayer's payroll in this state and the denominator of which is 2. [MCL 208.1433(9)(f).]

The following formula illustrates the factor as an equation, where X represents the renaissance zone business activity factor:

$$X = \frac{\left(\frac{\text{average value of zone property}}{\text{average value of Michigan property}} + \frac{\text{payroll for services performed in zone}}{\text{payroll in Michigan}}\right)}{2}$$

Andersons filed for a $514,579 renaissance zone tax credit for 2010 under the Michigan Business Tax Act. Andersons did not have any payroll attributable to services performed in a renaissance zone or in Michigan. Accordingly, its payroll ratio was 0/0, which is an undefined number.[3] Relying on guidance from the former Single Business Tax Act,[4] Andersons did not divide the combined averages in the numerator by two, despite that MCL 208.1433(9)(f) states the denominator is two. The Department concluded that Andersons had failed to properly divide by two and, accordingly, only granted Andersons a $257,290 credit for 2010.

Andersons appealed its final assessment and bill for taxes due in the Tax Tribunal. The Department moved for summary disposition, asserting that in such cir-

[3] See Sal Khan, *The Problem with Dividing Zero by Zero* <https://www.khanacademy.org/math/algebra/introduction-to-alegbra/division-by zero/v/why-zero-divided-by-zero-is-undefined-indeterminate> (accessed August 16, 2016).

[4] Now repealed. 2006 PA 325.

cumstances, it should simply remove the undefined number from the formula. Andersons contended that if the Department did so, it should not have to divide the numerator by two because one of the two factors in the numerator (the ratio regarding the taxpayer's payroll) did not exist.

The Tribunal granted summary disposition to Andersons. It held that applying the formula as written would lead to an "absurd result" because "adding one factor to an undefined number and then dividing that sum by two leads to a result not quantifiable under the laws of mathematics; neutral laws that determine values." The Tribunal concluded that no reasonable lawmaker could have conceivably intended a tax credit that is an indeterminate number. It held that in such circumstances under the Single Business Tax Act, the Department had previously applied the interpretation advanced by Andersons—that the taxpayer need not apply the denominator—and concluded that it should do the same in these circumstances. The Department now appeals.

II. STANDARDS OF REVIEW

When a party does not dispute the facts or allege fraud, we review whether the Tribunal made an error of law or adopted a wrong principle. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). This Court reviews de novo the interpretation and application of tax statutes. *Id*. at 528. We review de novo the Tribunal's decision to grant or deny a motion for summary disposition. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010).

III. APPLICATION

We conclude that the Tribunal erred by granting summary disposition to Andersons. The Department's

interpretation does not conflict with the statute's language, and the Tribunal lacked cogent reasons to overturn the Department's interpretation.

When interpreting a statute, our goal is to give effect to the intent of the Legislature. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). If the plain and ordinary meaning of a statute's language is clear, we will not engage in judicial construction. *Id*. If the language of the statute is unambiguous, we must enforce the statute as written. *Id*. But "a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 675; 760 NW2d 565 (2008).

In this case, it is mathematically impossible to apply the Legislature's formula in the statute as written when one of the ratios in the numerator is 0/0. This fraction is an indeterminate number that renders the entire formula indeterminate. The parties do not dispute that the formula is unworkable in this circumstance—they dispute the solution to the problem.

An agency's interpretation of a statute is not binding and may not conflict with the plain meaning of the statute, but it is entitled to respectful consideration. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008). Courts should not overturn an agency's interpretation without cogent reasons. *Id*. at 108. An agency's interpretation "can be particularly helpful for 'doubtful or obscure' provisions." *Id*.

In this case, the Tribunal rejected the Department's interpretation because the Department's present interpretation was inconsistent with its interpretations of

an analogous provision in the now-repealed Single Business Tax Act. The Department's interpretation was of a prior—if admittedly analogous—statute. While a longstanding, consistent interpretation of a statute is entitled to more deference than a recent interpretation, it does not necessarily follow that courts may entirely disregard a new interpretation, see *In re Mich Cable Telecom Ass'n*, 239 Mich App 686, 690; 609 NW2d 854 (2000), particularly when the "long-standing" interpretation applies to a previous version of a statute. For instance, if the Department determines that past allowances were improper under a statute, it is not bound by the same mistake on subsequent determinations. See *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 539; 831 NW22 255 (2013). That the Department changed its interpretation of the renaissance zone business activity factor does not necessarily mean that its new interpretation is unreasonable. We conclude that the inconsistency of the Department's interpretations was not, in and of itself, a cogent reason to reject the Department's new interpretation.

This Court lacks other cogent reasons to reject the Department's interpretation. First, in a similar statute, the Legislature has indicated when the denominator should change in response to a missing factor in the numerator:

> [T]he taxpayer shall add the percentages . . . and divide the total by 3 and the result so obtained is the business allocation percentage. *In determining this percentage, a factor shall be excluded from the computation only when the factor does not exist anywhere insofar as the taxpayer's business operation is concerned and, in such case, the total of the percentages shall be divided by the number of factors actually used*. [MCL 141.624 (emphasis added).]

It is clear from this provision that the Legislature is aware of a method to alter a tax formula's denominator in response to missing factors in the formula's numerator. Had the Legislature wished to do so, it was free to add similar language to MCL 208.1433. It did not.

Second, the language of the statute indicates that the Legislature wished to provide a tax benefit to businesses that both (1) own property in a renaissance zone, and (2) invest payroll in the renaissance zone. It is sensible that if the taxpayer only does half these things, it would receive only half a credit.

Third, the Department's interpretation seems more consistent with rewarding investment in renaissance zones than Andersons' interpretation. We will use a few mathematical examples to illustrate how Andersons' proposed interpretation results in windfalls to companies who keep their entire payrolls out of this state versus companies who invest payroll in a renaissance zone. We reiterate that the following formula represents the statute, where X is the renaissance zone business activity factor:

$$X = \frac{\left(\frac{\text{average value of zone property}}{\text{average value of Michigan property}} + \frac{\text{payroll for services performed in zone}}{\text{payroll in Michigan}}\right)}{2}$$

Suppose that company A's average value of renaissance zone property is $50,000 and its average value of Michigan property is $100,000. If it has no Michigan payroll, then under Andersons' suggested interpretation, it would have a business activity factor of 0.5:

$$X = \frac{\left(\frac{50{,}000}{100{,}000} + \cancel{\frac{\text{payroll for services performed in zone}}{\text{payroll in Michigan}}}\right)}{\cancel{2}}$$

$$X = \frac{1}{2} = 0.5$$

Using the Department's interpretation, it would have a business activity factor of 0.25:

$$X = \frac{\left(\frac{50,000}{100,000} + \frac{\text{\sout{payroll for services performed in zone}}}{\text{\sout{payroll in Michigan}}}\right)}{2}$$

$$X = \frac{(0.5)}{2} \text{ or } 0.25$$

Suppose company B has the same average value of renaissance zone property of $50,000 and average value of Michigan property of $100,000, but company B spends $10,000 in payroll performed in a renaissance zone and $100,000 in Michigan. It would have a business activity factor of 0.3 under both parties' interpretations:

$$X = \frac{\left(\frac{50,000}{100,000} + \frac{10,000}{100,000}\right)}{2}$$

$$X = \frac{\left(\frac{1}{2} + \frac{1}{10}\right)}{2}$$

$$X = \frac{(0.6)}{2}$$

$$X = 0.3$$

Under the Department's interpretation, company B would have a slightly more favorable business activity factor than company A. This result is reasonable because company B invested payroll in the renaissance zone and company A did not. Applying Andersons' proposed interpretation is less reasonable because company A would have a business activity factor higher than company B when company B provided a greater financial contribution to the renaissance zone. It does not make sense to effectively punish company B for spending $10,000 on payroll in this state and

$100,000 in the renaissance zone, nor does it make sense to effectively reward company A for not spending any money on payroll in Michigan or in the renaissance zone.

The problem with Andersons' interpretation is more apparent in the next example. Suppose that company C has the same average value of renaissance zone property of $50,000 and average value of Michigan property of $100,000, but it spends $0 on payroll performed in a renaissance zone and $100,000 in Michigan. Under the Department's proposed interpretation, it would have a business activity factor of 0.25:

$$X = \frac{\left(\frac{50,000}{100,000} + \frac{0}{100,000}\right)}{2}$$

$$X = \frac{(0.5 + 0)}{2}$$

$$X = \frac{(0.5)}{2} = 0.25$$

Using Andersons' proposed formula, company A would have a business activity factor of 0.5, but company C would have a business activity factor of 0.25, when the *only* difference between the two is that company C spent an additional $100,000 on Michigan payroll. Again, it is not reasonable that company C would receive a less beneficial result for spending more money in this state than company A.

For these reasons, we conclude that the Tribunal erred by granting summary disposition to Andersons. Rather, it should have granted summary disposition to the Department because the Department's interpretation of MCL 208.1433(9)(f) was not contrary to the statute and the Tribunal lacked cogent reasons to overturn it.

We reverse and remand. We do not retain jurisdiction.

TALBOT, C.J., and OWENS, J., concurred with O'CONNELL, J.

In re MEDINA

Docket No. 328952. Submitted April 5, 2016, at Lansing. Decided September 13, 2016, at 9:10 a.m.

Petitioner-mother sought termination of Respondent-father's parental rights to their son, JM, in the Ingham Circuit Court, Family Division. Respondent moved to dismiss the petition, arguing that the trial court could not take jurisdiction over JM because the child remained in petitioner's care as opposed to foster care. The court, Janelle A. Lawless, J., denied respondent's motion, concluding that it was not necessary for the child to be in foster care under *In re Marin*, 198 Mich App 560 (1993). In the dispositional hearing following adjudication, the court terminated respondent's parental rights under MCL 712A.19b(3)(a)(*ii*) (desertion for 91 or more days during which custody is not sought), MCL 712A.19b(3)(i) (parental rights to a sibling of the child have been terminated due to serious and chronic neglect or physical or sexual abuse), and MCL 712A.19b(3)(n)(*i*) (parent previously convicted of first-degree criminal sexual conduct and termination is in the child's best interests because continuing the parent-child relationship would be harmful to the child). Respondent appealed.

The Court of Appeals *held*:

1. Respondent's argument that termination was improper because JM was not in foster care or a guardianship when termination occurred was never raised in the trial court; therefore, the issue was unpreserved. However, because the issue involved a question of law and because the facts necessary for its resolution were presented, it was appropriate to review the issue. In pertinent part, MCL 712A.19b(1) provides that, except as provided in MCL 712A.19b(4), if a child remains in foster care in the temporary custody of the court following a review hearing under MCL 712A.19(3) or a permanency planning hearing under MCL 712A.19a, or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney or petition of the child, guardian, custodian, concerned person, agency, or children's ombudsman, the court shall hold a hearing to determine if the parental rights to a child should be termi-

nated. *Marin* held that it was not necessary that a child be in foster care for the termination petition to be entertained, and *Marin* was properly decided. Respondent's argument that MCL 712A.19b(1) should be construed to require removal and placement with a foster parent or guardian as a condition precedent for termination allowed no room for trial judges to determine, on a case-by-case basis, whether removal was conducive to the juvenile's welfare and the best interests of the state. Respondent's proposed interpretation of MCL 712A.19b(1) was patently inconsistent with MCL 712A.1(3), which requires that provisions within Chapter XIIA of the Probate Code be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interests of the state. Additionally, MCL 712A.19b(4), which does not mention foster care or guardianship, empowers trial courts to entertain a termination petition at the initial dispositional hearing regardless of whether the minor child was placed in foster care or with a guardian. In this case, as contemplated by MCL 712A.19b(4), respondent's parental rights were terminated at the initial dispositional hearing under various subparts of MCL 712A.19b(3). The trial court did not err in that regard.

2. Respondent's argument that petitioner, as JM's custodial parent, lacked standing to file a termination petition because the term "parent" was not included in the list of those entitled to file termination petitions under MCL 712A.19b(1) failed. Established caselaw provided that a custodial parent has standing to file a petition to terminate the rights of the other natural parent. As JM's custodial parent, petitioner had standing to file the termination petition under MCL 712A.19b(1).

3. The trial court's conclusion that termination was in JM's best interests was supported by at least a preponderance of the evidence. A review of the entire record revealed that respondent's first-degree criminal sexual conduct conviction, his alleged association with street gangs, his continued association with individuals who have substantial criminal records, and his lack of interaction with the child for over half the child's life supported termination.

Affirmed.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — STANDING.

MCL 712A.19b(1) provides that, except as provided in MCL 712A.19b(4), if a child remains in foster care in the temporary

> custody of the court following a review hearing under MCL 712A.19(3) or a permanency planning hearing under MCL 712A.19a, or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or petition of the child, guardian, custodian, concerned person, agency, or children's ombudsman, the court shall hold a hearing to determine if the parental rights to a child should be terminated; it is not necessary that the child be in foster care in order for the termination petition to be entertained; a custodial parent has standing to file the termination petition.

Child Welfare Appellate Clinic (by *Timothy M. Pinto* and Lina Delmastro (under MCR 8.120(D))) for respondent.

Foster & Harmon, PC (by *Cynthia S. Harmon*), for petitioner.

Before: BOONSTRA, P.J., and WILDER and METER, JJ.

WILDER, J. Respondent-father appeals as of right the trial court's order terminating his parental rights to his son, JM. The trial court cited three statutory grounds for termination, none of which respondent contests in this appeal: (1) MCL 712A.19b(3)(a)(*ii*) (desertion for 91 or more days during which custody is not sought), (2) MCL 712A.19b(3)(i) ("Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful."), and (3) MCL 712A.19b(3)(n)(*i*) (parent previously convicted of first-degree criminal sexual conduct (CSC-I) "and the court determines that termination is in the child's best interests because continuing the parent-child relationship . . . would be harmful to the child"). We affirm.

I. FACTUAL BACKGROUND

In January 2000—before JM was born—respondent pleaded guilty to CSC-I for forcibly raping and sodomozing his nine-year-old cousin. At that time, respondent was 18 years old. In exchange for his guilty plea, the prosecution dropped additional charges stemming from respondent's admitted sexual relationship with a 14-year-old girl. As a result of his plea, respondent spent roughly eight and a half years in prison. During that time, his parental rights to his daughter, HM, were terminated because respondent was admittedly incapable of caring for HM "physically, emotionally or financially." Respondent has another son, IM, who lives in Florida.

In 2009, after respondent was paroled, he admittedly committed several parole violations—what he characterized as "some wrong decisions"—which resulted in the revocation of his parole. Specifically, respondent "broke tether," visited IM without supervision, and allegedly engaged in gang-related activity.[1] Consequently, respondent was returned to prison, where he served an additional year.

After he was again released from prison, respondent and petitioner-mother began to date. The parties gave conflicting testimony regarding the inception, extent, and duration of their relationship. But it is undisputed that their romantic entanglement resulted in an unplanned pregnancy and the subsequent birth of JM in

[1] Respondent is allegedly a member of the "Latin Kings" street gang, and in the lower court he gave somewhat inconsistent testimony regarding his affiliation with that organization. When asked at the preliminary hearing in this matter whether he had "ever been a member of the Latin Kings," respondent replied, "In a past life I've been a gang member." But when later asked the same question at trial, respondent answered, "I have never been a member of the Latin Kings."

the autumn of 2011. According to petitioner, JM was about 15 months old when petitioner learned of the factual basis for respondent's CSC-I conviction. Respondent had previously portrayed his conviction as a "Romeo and Juliet" situation involving young love—a romantic relationship between himself, when he was a teenager, and a 14-year-old family friend—but when petitioner went to the courthouse and reviewed the court file, she learned "[t]he whole truth . . . that he forcibly raped his 9-year-old cousin anally[,] vaginally[,] and orally." The revelation left petitioner "stunned." Realizing that respondent was "not a good father" and that the relationship would not work, petitioner ended the relationship.

Petitioner later met and began to date her current husband, Benjamin, who is a national guardsman and former sheriff's deputy. Upon learning of petitioner's new relationship, respondent made harassing phone calls to her, threatening to kidnap JM and kill petitioner. Petitioner and Benjamin married in August 2013, forming a blended family with JM and two of his half-siblings. Respondent thereafter began to date another woman, Monica, to whom he eventually became engaged.[2]

In December 2014, petitioner instituted this action by filing a petition seeking termination of respondent's parental rights to JM. Among other things, petitioner alleged that, upon termination of respondent's paren-

[2] Monica has prior convictions for numerous offenses, including two domestic assault convictions, a disorderly person conviction, and a probation violation for failure to report and failure to complete parenting classes. Moreover, she tested positive for marijuana in 2014—a year after her own mother was forced to seek a personal protection order against her. During the pendency of the lower court proceedings, Monica had an outstanding bench warrant for failure to pay child support in another matter.

tal rights, Benjamin would adopt JM. Petitioner further alleged that JM lacked any bond with respondent and would not recognize him, whereas JM regularly called Benjamin "Dad." Benjamin agreed that he wanted to adopt JM, explaining that he had "grown to see [JM] as [his] son" and that he wanted to provide a "solid" family setting for the child. The trial court subsequently authorized the petition and, over respondent's repeated objections, ordered that respondent would not be permitted parenting time with JM.

Several months later, in March 2015, respondent moved to dismiss the termination petition. He argued that the trial court could not take jurisdiction over JM because the child remained in petitioner's care—a "stable, suitable," and "safe environment"—not foster care. The trial court denied respondent's motion to dismiss the termination petition, citing *In re Marin*, 198 Mich App 560, 568; 499 NW2d 400 (1993), for the proposition that "it is not necessary that the child be in foster care in order for the termination petition to be entertained." Later that same month, respondent pleaded guilty to a misdemeanor violation related to his registration as a sex offender. Respondent admitted that he had moved to a different address without duly notifying the authorities.

The matter proceeded to a bench trial regarding adjudication in July 2015. At that time, JM was three years old. Petitioner testified on her own behalf and called two additional witnesses, including her husband, Benjamin. According to petitioner, in the first year of JM's life, she "was a single parent basically." During that time, respondent remained on parole for his CSC-I conviction, was subject to GPS tether restrictions, and maintained "very minimal and sporadic" contact with JM. Any contact that *did* occur was

initiated by petitioner because, at that time, she believed that maintaining a parent-child relationship between JM and respondent "was the right thing to do." But during his visits with JM, respondent seemed to lack any genuine interest in spending time with the child. He "didn't want to change [JM's] diapers and do the daily things that you have to do for a baby," instead preferring to "hang out with friends" and play video games. While doing so, respondent would often consume alcohol, which violated the terms of his parole. Respondent is prone to violent outbursts, especially while drinking, and has previously admitted to being "mentally unstable." Accordingly, when respondent used alcohol, petitioner would remove JM from the situation because she "didn't want [her] son around that." After learning of the basis for respondent's CSC-I conviction, petitioner stopped initiating visits altogether, except for one she arranged as a pretense to retrieve some of JM's personal items from respondent's home. After that visit, which occurred more than two years before the trial, respondent had no contact with JM.

Petitioner further testified that, at the time of trial, she and JM had been living with Benjamin for several years. She described Benjamin as "a great father to [JM]" who had "been there" for JM and whom JM loved.[3] Conversely, respondent was then residing at his mother's home along with his stepfather and Monica, all of whom have criminal backgrounds.

Although respondent's testimony painted a very different picture and he disputed most of the substance

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[3] Benjamin also testified regarding his relationship with JM. According to his testimony, the two have "a normal father/son relationship" and a close bond. They ride bicycles together, "go fishing . . . go boating, go to the zoo, go to the park," and are "[p]retty much inseparable."

of petitioner's testimony as well as that of her supporting witnesses, we need only note that, in deciding to assume jurisdiction over JM, the trial court repeatedly questioned respondent's credibility while accepting that of petitioner and her witnesses. The trial court noted that respondent seemed "a poor historian regarding some pretty significant things in [his] life," further noting that petitioner's testimony "made more reasonable sense than [respondent's]."

In the dispositional hearing following adjudication, after entertaining oral argument, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(a)(*ii*), (3)(i), and (3)(n)(*i*). In support of its best-interest determination, the trial court concluded that JM lacked any bond to respondent and that, in any event, respondent's ability to parent JM was "unknown" because it had been more than two years since respondent saw JM. The trial court reiterated that it found petitioner and her witnesses to be credible, but it "found that [respondent] was not very credible." The trial court also concluded that JM's need for permanency, finality, and stability favored termination, particularly in light of the fact that JM views Benjamin as his father, and that termination of respondent's parental rights was in JM's best interests.

This appeal followed.

II. STANDARDS OF REVIEW

"The clear error standard controls our review of 'both the court's decision that a ground for termination has been proven by clear and convincing evidence and . . . the court's decision regarding the child's best interest.' " *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009), quoting *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000), superseded in

part by statute on other grounds as recognized by *In re Moss*, 301 Mich App 76, 83 (2013). "A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made." *In re LaFrance Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014). Any related statutory interpretation poses a question of law reviewed de novo, *id*., as does the question whether the trial court conformed to the applicable procedural rules, *In re BZ*, 264 Mich App 286, 291; 690 NW2d 505 (2004). We "must defer to the special ability of the trial court to judge the credibility of witnesses." *LaFrance*, 306 Mich App at 723.

III. RULES OF STATUTORY CONSTRUCTION

Many of the fundamental principles of statutory construction that are relevant to this appeal were discussed in *In re MKK*, 286 Mich App 546, 556-557; 781 NW2d 132 (2009):

> Statutory language should be construed reasonably, keeping in mind the purpose of the act. The purpose of judicial statutory construction is to ascertain and give effect to the intent of the Legislature. In determining the Legislature's intent, we must first look to the language of the statute itself. Moreover, when considering the correct interpretation, the statute must be read as a whole. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language[.] [Quotation marks and citations omitted.]

Similarly, "when enacting legislation, the Legislature is presumed to be fully aware of existing laws, includ-

ing judicial decisions." *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 41; 761 NW2d 269 (2008).

IV. ANALYSIS

A. INTERPRETING MCL 712A.19b(1)

Respondent argues that, under the plain language of MCL 712A.19b(1), termination was improper because JM was not in foster care or a guardianship when termination occurred. As a preliminary matter, we note that, although respondent argued in the trial court that it was improper to assume *jurisdiction* over JM because the child remained in petitioner's care—not foster care—he never raised the instant issue in the trial court, i.e., whether *termination* was improper because JM remained in petitioner's care. Therefore, this issue is unpreserved. See *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Even so, we exercise our discretion to review this issue because it "involves a question of law and the facts necessary for its resolution have been presented[.]" See *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

1. *MARIN* IS CONTROLLING

In pertinent part, MCL 712A.19b(1) provides:

> Except as provided in [MCL 712A.19b(4)], if a child remains in foster care[4] in the temporary custody of the

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[4] Notably, as used in § 19b(1), "foster care" is defined as "care provided to a juvenile in a foster family home, foster family group home, or child caring institution licensed or approved under 1973 PA 116, MCL 722.111 to 722.128, *or care provided to a juvenile in a relative's home under a court order*." MCL 712A.13a(1)(e) (emphasis added). But in this context, although she is his mother, petitioner does not qualify as JM's "relative"

> court following a review hearing under [MCL 712A.19(3)] or a permanency planning hearing under [MCL 712A.19a] or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or petition of the child, guardian, custodian, concerned person, agency, or children's ombudsman as authorized in section 7 of the children's ombudsman act, 1994 PA 204, MCL 722.927, the court shall hold a hearing to determine if the parental rights to a child should be terminated . . . .

As respondent acknowledges in his appellate briefs, the interpretation of MCL 712A.19b(1) he asks us to adopt is directly contrary to that adopted by *Marin*, 198 Mich App at 568 (holding that, under a former version of § 19b(1),[5] "it is not necessary that the child be in foster care in order for the termination petition to be entertained"). Accordingly, citing in support the factors for overruling established precedent that are set forth in *Petersen v Magna Corp*, 484 Mich 300, 317-320; 773 NW2d 564 (2009) (opinion by KELLY, C.J.), respondent invites us to "overturn" *Marin*.

We must decline respondent's invitation to disregard *Marin*. As a threshold matter, respondent cites the incorrect "stare decisis test"; Justice KELLY's opinion in *Petersen* is—unlike *Marin*—not binding on this Court under the doctrine of stare decisis. See *Hamed v Wayne Co*, 490 Mich 1, 34; 803 NW2d 237 (2011) (noting that the "stare decisis test set forth in *Petersen* . . . is not the law of this state" because a

as that term is defined by MCL 712A.13a(1)(j). Therefore, respondent is correct that JM was not in "foster care" for purposes of § 19b(1) at the time of termination.

[5] In the numerous amendments of MCL 712A.19b(1) that have occurred since *Marin* was decided, the operative statutory language has remained nearly identical. Ergo, notwithstanding such amendments, we find *Marin* to have binding precedential authority here.

majority of our Supreme Court refused to join Justice KELLY's opinion). Moreover, respondent fails to recognize that, unlike our Supreme Court, which has authority to overrule its previous decisions, see, e.g., *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), under MCR 7.215(J)(1), this Court is *bound* to follow the rule of law established by its prior published opinions so long as those opinions were "issued on or after November 1, 1990," and have "not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . ." Because *Marin* was decided after November 1, 1990, and has not been reversed or modified, we are bound to follow its interpretation of MCL 712A.19b(1). Hence, respondent's change-of-law argument necessarily fails.

2. *MARIN* WAS PROPERLY DECIDED

Furthermore, we believe that *Marin* was properly decided and therefore reject respondent's request that we declare a "but for" conflict under MCR 7.215(J)(2) ("A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision."). In support of his request that we do so, respondent argues that the *Marin* Court's interpretation of MCL 712A.19b(1) "is directly at odds with the text of the statute," further arguing that the Court intentionally ignored the plain meaning of the statutory language, instead relying on an analysis of "legislative history" to justify its holding. We disagree.

Respondent mischaracterizes *Marin*. The *Marin* Court did not ignore the statutory language at issue; rather, after reviewing the language and concluding that § 19b(1) was equally susceptible to more than one

reasonable interpretation, the *Marin* Court turned to alternative methods of statutory construction in order to discern the Legislature's intent:

> The real question to be answered is what purpose is served by § 19b(1): (1) to establish those conditions, and only those conditions, under which the probate court may terminate parental rights (i.e., when children remain in foster care) or (2) to impose an obligation upon the probate court to conduct a termination hearing upon request by a party where a child remains in foster care. While either of these interpretations would be reasonable in light of the language employed in § 19b(1), we are persuaded that the second interpretation is the one intended by the Legislature.
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> * * *
>
> While the [former interpretation set forth] above does present a reasonable interpretation of § 19b(1), that interpretation is dependent upon an assumption or conclusion that the Legislature did not intend to allow the termination of just one parent's parental rights. In looking to the text of the statute, . . . we are not persuaded that that assumption is correct. In § 19b(3), in setting forth the grounds that justify the termination of parental rights, the statute refers to the termination of the rights of "a parent" and in various portions of § 19b(3), the statute repeatedly makes references to "a parent" or "the parent." This use of parent in the singular, rather than consistently referring to "the parents" in the plural, suggests that the Legislature envisioned and intended that the probate court could terminate the parental rights of just one parent.
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> * * *
>
> When the statute is viewed in the context of providing more efficient handling of neglected children with increased emphasis on providing permanent placement, be it in the parental home or elsewhere, as soon as possible,

> § 19b(1) now possesses meaning independent of establishing the sole conditions under which termination of parental rights may occur. . . .
>
> . . . [MCL 712A.19b(1)] mandates that the probate court hold a termination hearing upon a petition where the child remains in foster care. Thus, delays in the permanent placement of a child in foster care cannot result from the court's unwillingness to conduct a termination hearing, it being obligated to do so upon petition. That does not mean, however, that § 19b(1) otherwise limits the conditions under which a petition to terminate parental rights may be entertained by the court. That is, while the court is obligated to hold a hearing regarding a petition to terminate parental rights where the child remains in foster care, that does not imply that its authority to conduct a hearing within its discretion regarding a petition where the child does not remain in foster care is otherwise limited.
>
> For the above reasons, we conclude that the interpretation of § 19b(1) that is most consistent with the express language of the statute and that gives the greatest meaning to the intent of the Legislature is that advocated by petitioner, namely that the parental rights of one parent may be terminated without the termination of the parental rights of the other parent and it is not necessary that the child be in foster care in order for the termination petition to be entertained. [*Marin*, 198 Mich App at 563-564, 566-568.]

We do not find *Marin*'s reasoning unsound. On the contrary, we agree that the interpretation of § 19b(1) adopted in that case is consistent with both the statutory language and the underlying legislative intent.

Indeed, given the intervening passage of time since *Marin* was decided, we are afforded an advantage of perspective that the *Marin* Court necessarily lacked. The *Marin* panel could only try to anticipate what reaction, if any, the Legislature might have to the *Marin* decision. By contrast, we are able to note that, despite the interpretation of § 19b(1) that *Marin* an-

nounced, of which the Legislature is presumed to be aware, see *Alvan*, 281 Mich App at 41, and the fact that the Legislature has since amended MCL 712A.19b on 10 occasions, it has not meaningfully amended the pertinent language in § 19b(1). Accordingly, the Legislature has, seemingly at least, implicitly approved of the *Marin* interpretation on numerous occasions.[6]

An aspect of statutory context that was left unaddressed by *Marin* further bolsters our conclusion that *Marin* was properly decided. We do not read § 19b(1) in a vacuum, heedless of context. As provided by MCL 712A.1(3), all provisions within Chapter XIIA of the Probate Code, including § 19b(1),

> shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, *preferably in his or her own home*, conducive to the juvenile's welfare and the best interest of the state. *If* a juvenile is removed from the control of his or her parents, the juvenile *shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents*. [Emphasis added.]

Respondent's proposed interpretation of § 19b(1) is, of course, patently inconsistent with § 1(3). Rather than

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[6] We are mindful that, as a tool of statutory construction, the theory of legislative acquiescence is "highly disfavored" and "has been repeatedly repudiated by [our Supreme] Court because it is . . . an exceptionally poor indicator of legislative intent," requiring the judiciary "to intuit legislative intent not by anything that the Legislature actually enacts, but by the *absence* of action." *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012). Nevertheless, under the circumstances at bar, we consider the Legislature's seeming acquiescence to *Marin* not as a tool of statutory construction, but rather as one factor among several supporting our decision that a "but for" conflict is unwarranted. Although the absence of an intervening amendment is not dispositive that the Legislature is satisfied by the *Marin* interpretation of § 19b(1), neither does the absence of such an amendment support respondent's argument that *Marin* deviated grossly from the provision's "clear" meaning.

construing § 19b(1) to afford an opportunity (where practicable) for minor children to remain in their own homes during the pendency of a termination proceeding and in the continued care of a custodial parent, respondent argues that § 19b(1) should be construed to *require* removal and placement with a foster parent or guardian as a condition precedent for termination. Respondent's proposed interpretation allows no room for trial judges to determine, on a case-by-case basis, whether removal is "conducive to the juvenile's welfare and the best interest of the state." It seems to require little explanation that a blanket rule requiring removal in *all* termination cases—even cases like this one, in which removal would have been illogical, leading only to needless waste of time and expense—is a rule that would do violence to the best interests of our state and many of its children. Contrastingly, the *Marin* interpretation of § 19b(1) is harmonious with § 1(3).

Respondent's assertion that § 19b(1) prescribes foster care (or guardianship) as a prerequisite for termination in *all* cases is also inconsistent with the language that begins § 19b(1): "*Except* as provided in subsection (4) . . . ." (Emphasis added.) The referenced subsection, § 19b(4), provides:

> If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing. If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition.

Notably, unlike § 19b(1), § 19b(4) does not mention foster care or guardianship. Therefore, § 19b(4) empowers trial courts to entertain a termination petition at the initial dispositional hearing regardless of

whether the minor child is placed in foster care or with a guardian. In this case, as contemplated by § 19b(4), respondent's parental rights were terminated at the initial dispositional hearing under various subparts of § 19b(3). We find no error in that regard.

In sum, we conclude that the *Marin* Court's construction of § 19b(1) is consistent with both the plain statutory language and the surrounding statutory provisions, particularly §§ 1(3) and 19b(4). Therefore, we decline respondent's invitation to announce a "but for" conflict regarding *Marin*.

B. STANDING TO PETITION

Next, respondent argues that the trial court erred by failing to recognize that petitioner, as JM's custodial parent, lacked standing to file a termination petition. We disagree.

In pertinent part, MCL 712A.19b(1) provides:

> [U]pon petition of the prosecuting attorney . . . or petition of the child, guardian, custodian, concerned person, agency, or children's ombudsman as authorized in section 7 of the children's ombudsman act, 1994 PA 204, MCL 722.927, the court shall hold a hearing to determine if the parental rights to a child should be terminated . . . .

Respondent argues that, because MCL 712A.19b(1) does not specifically include the term "parent" in its list of those entitled to file termination petitions, parents lack standing to file termination petitions. Therefore, respondent argues, petitioner lacked standing to file the termination petition in this case.

Respondent's argument is directly contravened by established precedent:

> [W]e acknowledge that the comprehensive list of parties authorized to file a termination petition under § 19b(1) does

> not include the term "parent." However, given the Legislature's use of the apparently broad term "custodian" in § 19b(1), we can discern no statutory basis for excluding a *custodial* parent from filing a termination petition under the Juvenile Code to terminate the rights of the other natural parent. The plain and ordinary meaning of "custodian" certainly encompasses a custodial parent . . . . [*In re Huisman*, 230 Mich App 372, 380; 584 NW2d 349 (1998), overruled in part on other grounds by *Trejo*, 462 Mich 341.]

Although *Huisman* was partially overruled by *Trejo*, a close reading of *Trejo* indicates that the standing analysis from *Huisman* remains intact.[7] Accordingly, respondent's instant claim of error necessarily fails. As JM's custodial parent, petitioner had standing to file the termination petition in this case under § 19b(1).

C. BEST-INTEREST DETERMINATION

Finally, respondent argues that the trial court clearly erred when it found, by a preponderance of the evidence, that termination was in JM's best interests. We again disagree.

MCL 712A.19b(5) provides, "If the court finds that there are grounds for termination of parental rights

[7] We recognize that *In re Hudson*, 262 Mich App 612, 614 n 1; 687 NW2d 156 (2004), ignored the *Huisman* definition of "custodian" and announced a new definition for that term, reasoning that *Huisman* "no longer carries any precedential weight" because it was "fundamentally overruled" by *Trejo*. Because we disagree and conclude that the germane portion of *Huisman* remains valid, we follow *Huisman* as the earlier decided case. See MCR 7.215(J)(1); see also *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 20; 762 NW2d 911 (2009) (discussing "the 'first out' rule of MCR 7.215(J)(1)"). In large part, though, the point is academic; even if we were to follow the definition of "custodian" adopted by *Hudson*, the outcome here would remain the same. As JM's custodial parent, petitioner had "the legal duties to provide financial, emotional, and physical care and protection to the child," and therefore petitioner qualifies as JM's "custodian" under the *Hudson* definition as well. See *Hudson*, 262 Mich App at 615.

and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." Although a reviewing court must remain cognizant "that the 'fundamental liberty interest of natural parents in the care, custody, and management of their child[ren] does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the State,' " *Trejo*, 462 Mich at 373-374 (alterations in original), quoting *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), "at the best-interest stage, the child's interest in a normal family home is superior to any interest the parent has," *Moss*, 301 Mich App at 89, citing *Santosky*, 455 US at 760. Therefore, once a statutory ground for termination has been established by clear and convincing evidence, a preponderance of the evidence can establish that termination is in the best interests of the child. *Moss*, 301 Mich App at 87 ("[T]he interests of the child and the parent diverge once the petitioner proves parental unfitness. . . . Although the parent still has an interest in maintaining a relationship with the child, this interest is lessened by the trial court's determination that the parent is unfit to raise the child.").

In making its best-interest determination, the trial court may consider "the whole record," including evidence introduced by any party. *Trejo*, 462 Mich at 353.

> [T]he court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's

visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*In re White*, 303 Mich App 701, 713-714; 846 NW2d 61 (2014) (quotation marks and citations omitted).]

Furthermore, "the court *may* utilize the factors provided in MCL 722.23," *In re McCarthy*, 497 Mich 1035 (2015) (emphasis added),[8] which are as follows:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.

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[8] See also *In re JS & SM*, 231 Mich App 92, 101, 102-103; 585 NW2d 326 (1998), overruled on other grounds by *Trejo*, 462 Mich 341 (explaining that "many, if perhaps not all, of the types of concerns about parental ability underlying the best interests factors of the Child Custody Act are highly relevant to a decision concerning whether parental rights should be terminated," and consequently, while a trial court has "no obligation to do so, it is perfectly appropriate . . . to refer directly to pertinent best interests factors in the Child Custody Act in making a determination concerning whether a parent has established that termination of parental rights is . . . in a child's best interests").

> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

The "primary beneficiary" of the best-interest analysis "is intended to be the child." *Trejo*, 462 Mich at 356.

After duly considering several proper factors, the trial court concluded that a preponderance of the evidence supported termination. After reviewing the record, we are not left with a definite and firm conviction that the trial court made a mistake. On the contrary, the trial court's ruling seems altogether prudent. Respondent is a registered sex offender who pleaded guilty to CSC-I for forcibly raping and sodomizing his nine-year-old cousin. He is allegedly a member of the "Latin Kings" street gang, and, while he denies any current membership, he acknowledges that he has been a gang member at times in the past. He also continues to associate with, and live with, others who have a substantial criminal record, including domestic violence convictions. Even during his infrequent visits with JM when the child was an infant, respondent's conduct betrayed his indifference toward the child. Moreover, respondent had little or no contact with JM for nearly two and a half years—over half the child's life—immediately preceding termination. Be-

cause of such lack of interaction, JM has not developed a bond with respondent but is instead closely bonded to his stepfather, Benjamin, who now seeks to adopt JM. Therefore, we conclude that the trial court's best-interest determination was supported by at least a preponderance of the evidence.

Respondent argues that "[k]nowing who one's biological father is and having a relationship with him have intrinsic value." In a utopian world, that might be true. But ours is an imperfect world, and the "value" a child derives from the parent-child relationship is not, as respondent suggests, universally positive; if it were, there would be little need for child protective proceedings. Respondent is correct that his relationship with JM is something that *ought* to have been an asset to the child, just as respondent's relationship with his nine-year-old cousin is something that *ought* to have been characterized by love and trust instead of fear and rape. Sadly, however, the record is clear that "value" for the child in this instance lies in severing all ties with respondent and beginning life anew with Benjamin and petitioner.

Affirmed.

BOONSTRA, P.J., and METER, J., concurred with WILDER, J.

PEOPLE v BASS

Docket No. 327358. Submitted September 8, 2016, at Detroit. Decided September 13, 2016, at 9:15 a.m. Leave to appeal denied 501 Mich 871.

Walter Bass III was convicted following a jury trial in the Wayne Circuit Court of first-degree premeditated murder (first-degree murder), MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and disinterment, mutilation, defacement, or carrying away of a human body (mutilation of a human body), MCL 750.160. The charges stemmed from the disappearance and murder of defendant's girlfriend, Evelyn Gunter, who was ultimately discovered shot to death and burned by gasoline. The evidence against defendant was all circumstantial. Defendant was found in possession of her car and gave differing stories to various people for why he had the car. There was also evidence that defendant used her cell phone after she went missing, and possibly used and disposed of her credit card. The court, James A. Callahan, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to life in prison without the possibility of parole for his murder convictions, 41 to 62 years for the felon-in-possession conviction, 2 years for the felony-firearm conviction, and 41 to 62 years for the mutilation of a human body conviction. Defendant appealed as of right.

The Court of Appeals *held*:

1. Evidence that defendant had attempted to murder another woman 17 years before he allegedly committed the charged offenses in this case was duly admitted. Defendant's identity as the perpetrator was the primary issue at trial. Therefore, the similarities between the attempted murder and the facts known about the victim's death in this case had probative value. However, the trial court abused its discretion by admitting sexual-assault evidence from the same prior incident. Nevertheless, reversal was unnecessary because defendant failed to demonstrate that the erroneous admission of the sexual-assault evidence more probably than not resulted in a miscarriage of justice

in light of the limiting instruction given to the jury and the overwhelming circumstantial evidence against defendant.

2. There was sufficient evidence for a rational fact-finder to reasonably infer that defendant was the perpetrator. Defendant was in possession of the victim's vehicle after she died, and it was reasonable to infer from the record evidence that he was in possession of her cell phone. He was the last person to report seeing the victim alive, and, after she was found dead, he claimed to be the only person with whom she had been communicating. And yet, cell phone records showed no attempted phone calls or text messages between defendant's cell phone and the victim's cell phone in the almost two weeks between the date the victim disappeared until the date the victim's car was retrieved. It was reasonable to infer that defendant was lying about his communication with the victim and that his reason for lying was his desire to suggest the victim was alive when he knew she was not. Defendant's differing explanations for why he was in possession of the victim's car suggested he was lying to cover up the actual reason (that he took it after killing the victim). The similarities with the previous attempted murder 17 years earlier raised the reasonable inference that defendant was the perpetrator of both assaults. Defendant leaving work early the evening the police located the victim's car at his place of employment, his failure to collect his nightly cash pay that evening, and the fact that he never returned to collect that pay raised a reasonable inference that defendant had a guilty conscience. Moreover, the victim's credit card that was later found in the parking lot of defendant's place of employment was likely left there by defendant in an effort to rid himself of incriminating evidence. The circumstantial evidence and inferences reasonably drawn from it provided sufficient evidence from which a rational trier of fact could have concluded that defendant was the perpetrator of the charged offenses.

3. There was sufficient evidence from which a rational trier of fact could have found defendant guilty of first-degree murder. Defendant argued that the fatal gunshot could have been accidentally fired and that there was insufficient evidence of intentional killing, premeditation, and deliberation. However, there were several facts from which a rational trier of fact could infer the killing was intentional, premeditated, and deliberate: (1) the victim was shot in the back of the head, (2) her body was bound with wire and burned using gasoline as an accelerant, and (3) she was found in a deserted location.

4. Felony murder requires killing a human being with the intent to kill, to do great bodily harm, or to create a very high risk

of death or great bodily harm with knowledge that death or great bodily harm was the probable result, while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). All types of larceny are included in the specified felonies. The victim was killed, which satisfied the first element. That she was killed by a gunshot wound to the back of the head permitted a reasonable inference that the gunshot was inflicted with the intent to kill or do great bodily harm, or create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, and met the second element. Finally, because defendant was in possession of the victim's car and cell phone following her death, it was reasonable to infer that defendant killed the victim during the commission of a larceny. Therefore, there was sufficient evidence from which a jury could have found defendant guilty of felony murder.

5. There was sufficient evidence for the jury to have found defendant guilty of felon-in-possession. The parties stipulated that defendant had previously been convicted of a felony that made him ineligible to possess a firearm on March 12, 2013. Although the victim went missing on March 10, the jury could infer that defendant shot the victim on March 12 because the body was found in plain sight in an open garage on that day.

6. Felony-firearm simply requires possession of a firearm during the commission of a felony. In this case, there was sufficient evidence to infer that defendant committed first-degree murder and felony murder, both of which are felonies, and the cause of death in both cases was a gunshot wound to the back of the head, raising the reasonable inference that the perpetrator committed the felonies with a firearm. Therefore, there was sufficient evidence from which the jury could have found that defendant committed felony-firearm.

7. A defendant is guilty of mutilation of a human body under MCL 750.160 if the defendant (1) without any legal authorization to do so, (2) causes permanent damage to a portion of a dead body, defaces a portion of a dead body by marring its appearance, or removes or carries away from the whole a portion of the dead body. It was reasonable to infer that defendant killed the victim. It was also reasonable to infer that defendant attempted to conceal the murder by burning her body with gasoline. The body was almost totally charred, and portions of it were totally consumed by fire. It was reasonable to infer from the record that defendant lacked any legal authority to burn the victim's body.

Therefore, there was sufficient evidence from which the jury could have found defendant guilty of mutilation of a human body.

8. Defendant argued that he was denied his right to a fair trial because the prosecution knowingly elicited false testimony from three different witnesses and used that testimony to secure defendant's convictions. Defendant failed to show that the testimony was actually false and, therefore, did not meet his burden of demonstrating that the eliciting of the testimony constituted plain error that affected his substantial rights.

9. Defendant was not denied the effective assistance of counsel. Defendant's claim regarding counsel's failure to file a motion to suppress the arrest warrant failed for multiple reasons. First, defendant cited no record evidence that he ever told his counsel about the alleged false statements supporting the arrest warrant or that counsel failed to investigate the matter. Second, defendant failed to explain why counsel's failure to file a motion to suppress the warrant more probably than not affected the outcome of the proceedings. Even assuming the arrest warrant was so deficient that it constituted the metaphorical "poison tree" for purposes of the exclusionary rule, none of the evidence used to convict defendant appeared to be "fruit" of that tree, so none of the evidence would have been suppressed. Therefore, defendant's claim failed. Likewise, defendant's claim that counsel was ineffective for failing to do additional DNA testing on the victim's credit card failed. Not only did defendant misstate the testimony of the prosecution's DNA analyst, but defendant's argument was that it *could have* yielded exculpatory evidence. Because additional DNA testing might have yielded incriminating evidence, it was a matter of trial strategy whether to request further testing. Defendant failed to rebut the presumption that trial counsel's decision was strategic and effective. Finally, defendant argued that trial counsel was ineffective for failing to consult with and retain an expert in cell phone analysis. Defendant failed to prove that an expert was not retained and consulted with; defendant only showed one was not called as a witness by the defense. In any case, this was also a matter of trial strategy, and defendant failed to rebut the presumption that defense counsel's decision was strategic and effective.

10. The circuit court did not abuse its discretion by denying defendant's motion to quash. Although the evidence against defendant at the preliminary examination was circumstantial, there was more than enough to satisfy the probable cause standard.

Affirmed.

CRIMINAL LAW — OFFENSES — MUTILATION OF A HUMAN BODY — ELEMENTS.

A defendant is guilty of mutilation of a human body under MCL 750.160 of the Michigan Penal Code, MCL 750.1 *et seq.*, if the defendant (1) without any legal authorization to do so, (2) causes permanent damage to a portion of a dead body, defaces a portion of a dead body by marring its appearance, or removes or carries away from the whole a portion of a dead body.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Research, Training, and Appeals Chief, and *David A. McCreedy*, Lead Appellate Attorney, for the people.

Neil J. Leithauser for defendant.

Before: GADOLA, P.J., and WILDER and METER, JJ.

PER CURIAM. Defendant, Walter Bass III, appeals as of right from his April 15, 2015 jury trial convictions of first-degree, premeditated murder (first-degree murder), MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and disinterment, mutilation, defacement, or carrying away of a human body (mutilation of a human body), MCL 750.160. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to life without the possibility of parole for his murder convictions, 41 to 62 years for the felon-in-possession conviction, 2 years for the felony-firearm conviction, and 41 to 62 years for the mutilation of a human body conviction. We affirm.

I. FACTUAL BACKGROUND

This case arises out of the March 10, 2013 disappearance of Evelyn Gunter (the victim), whose badly

charred remains were eventually discovered in the garage of an abandoned house in Detroit. The evidence against defendant in the trial court was almost entirely circumstantial.

At the time of her disappearance, the victim had an intimate, romantic relationship with defendant. The victim introduced her daughter, Jemmima Gunter, to defendant—who introduced himself as "Tiko"—in December 2012. The victim's teenaged grandson, Dalon Gunter, is the last known family member to have seen the victim alive. Dalon last saw the victim around 5:00 p.m. on March 10, 2013. She arrived at his house alone in her red Impala. The victim dropped off some groceries, spoke with Dalon for roughly five minutes, and then left in her vehicle, again alone. Dalon was unaware of her intended destination.

Early the next morning—March 11, 2013, sometime between midnight and 1:00 a.m.—Jemmima received a text message from the victim's cell phone stating "that she [the victim] was going to Chicago to help a friend" and would be back the next night. "Chicago" was misspelled, which was unusual because the victim "was a very intelligent person." Moreover, the victim "had no friends in the Chicago area that [Jemmima] knew of." Suspecting that the victim was being untruthful about her whereabouts, Jemmima responded via text, accusing the victim of lying to conceal substance abuse.[1] In reply, Jemmima received another text from the victim's cell phone. On the basis of the tone and content, Jemmima suspected the text message had not actually been sent by the victim. After Jemmima sent another message, "someone" re-

[1] Although the victim had been "clean" for "over 20 years," Jemmima thought her unusual behavior might have been evidence that she had relapsed into drug use.

sponded, "I'm just going to Chicago to help my friend move. I'll be back tomorrow." The message referred to Jemmima by her nickname, "Mya," which was also unusual; the victim "always" called Jemmima by her first name rather than her nickname.

The next day, Jemmima received another text message from the victim's number that appeared to be intended for "someone named Mike" and that contained a request for narcotics, specifically "an eight ball and a 20 bag." Jemmima responded, "[Y]ou sent that message to the wrong person." The response from the victim's phone number indicated that the text had been sent to "Mike" by the victim's "friend," not the victim.

Daniel Hines is the victim's son and was living with her at the time of her disappearance. Hines last saw the victim on March 9, 2013. Thereafter, he noticed that her mail was accumulating, unopened. He later received a call from the victim's employer of 15 years indicating that the victim had not been reporting to work. Daniel was concerned and contacted his sister, Jemmima; it was unusual for the victim to be "missing from the house like that." After the last time Hines saw the victim, he tried calling her several times on her cell phone. At first, "somebody would answer it" but remain silent. Later, around March 12 or March 13 of 2013, Hines called again and heard "a man's voice on the phone[.]" Hines asked, "Who is this?" The man responded, "Tiko."

On the afternoon of March 12, 2013, a burned body was discovered in the garage of an abandoned house in Detroit. Genetic testing subsequently indicated that the body almost certainly belonged to the victim. The body was "burned pretty much beyond recognition," bound with some kind of wire, and laid out on a green

plastic tarp, which was also burned. In places, the body was burned so severely that bone was visible. A blue "Bic lighter" was found in the driveway in front of the garage.[2] The lighter "stood out because it wasn't weathered at all." A watch and necklace belonging to the victim were found near the body.

An "expert in fire investigation, cause and origin of a fire" subsequently determined that the fire "[o]riginated at the body." Chemical testing and burn pattern analysis indicated that gasoline was used as an accelerant. In order to "consume bone as with a cremation," as this fire had, it would necessarily have been "extremely hot."

On March 13, 2013, Dr. Lokman Sung, who is an assistant medical examiner and was qualified as "an expert in the field of anatomic and forensic pathology," performed an autopsy on the victim. There were "extensive burns to 100% of the body with consumption of much of the soft tissue, internal organs and fragmentation of most of the bones." A gunshot wound was discovered, with the entry wound situated in "the left top of the head behind the ear" and the exit wound located in "the left forehead region." "[T]hree fragments of a nonjacketed bullet" were "recovered from the skull." Sung determined that the burns were postmortem and occurred after the victim was shot. There "were seven loops of copper wire wrapped around the body." Sung was unable to determine

[2] Although it was tested, no DNA was recovered in a sample created by swabbing the blue lighter. According to a witness qualified as an expert "in DNA analysis," there are several probable explanations for why no DNA was detected: "nobody touched it [the lighter], there was too little DNA from whomever may have touched it," there was "an inhibiting substance on the sample" (such as dirt or soil), the lighter was deliberately or inadvertently cleaned or wiped, or exposure to the elements destroyed any DNA.

whether the wire was wrapped around the victim before death or afterward. Toxicology testing returned positive results for four substances: (1) iron levels consistent with normal bodily function, (2) carbon monoxide, (3) carboxyhemoglobin (a byproduct of carbon monoxide), and (4) caffeine. The victim did not test positive for cocaine, marijuana, or alcohol. Had she used cocaine or marijuana on or after March 10, 2013, those substances would have been detected in the toxicology screening. The cause of death was determined to be the gunshot wound to the victim's head.

Kateesha Bouldin was a patron of Detroit's "Club Celebrity" several times in February and March 2013 and met defendant there, where he worked as security. After speaking with defendant briefly on the evening that she met him, Bouldin gave him her cell phone number. Thereafter, she began to regularly receive telephone calls and text messages from defendant that originated from his cell phone number. However, at 2:30 a.m. on March 15, 2013—several days after the victim's body was discovered—Bouldin received a telephone call from defendant that originated from the victim's cell phone number.

On March 16, 2013, Jemmima received a telephone call from defendant, who inquired whether Jemmima still[3] wanted him to paint her house. Jemmima declined. During the conversation, defendant never mentioned the victim or her vehicle, nor did he say anything about trying to return the victim's vehicle.

After speaking with her brother, Hines, on March 22, 2013, and learning that the victim "had been no call, no-show to work for all of the days since [Jem-

[3] The victim had previously asked defendant how much he would charge to paint Jemmima's house, but Jemmima never asked him to do so.

mima last] talked to her," Jemmima became very concerned. The victim "never misse[d] work," and on the rare occasions when she did, she did so with good cause after informing her employer that she would be absent. Accordingly, Jemmima went to the police station and reported the victim missing, informing the police that the victim's Impala was equipped with Onstar.

Later that same day, March 22, 2013, the victim's Impala was located outside Club Celebrity. Defendant was working as security at the club that evening. One of the managers knew him by the nickname "Tiko." Earlier that night, Club Celebrity's deejay, Cortlant Smith—who also knew defendant as "Tiko"—had seen defendant arrive at the club alone driving the victim's Impala.

Several witnesses gave varying accounts regarding what took place at Club Celebrity on the evening of March 22, 2013. Along with her partner, Sergeant Shannon Jones of the Detroit Police Department (DPD) was dispatched to Club Celebrity after the victim's Impala was located using Onstar. The officers discovered the victim's Impala in the parking lot of Club Celebrity and, after searching it and finding no signs of "foul play," had it towed and impounded. Despite the location and the March weather, the vehicle's sunroof was open, which led Jones to believe that the person who had parked it was likely still nearby. The Impala was parked just two spaces from Club Celebrity's main entrance, where the security personnel—including defendant—were stationed. A leather jacket bearing defendant's DNA was recovered from the Impala's rear floor well.

According to Jemmima, after learning that the victim's Impala had been located, Jemmima, Hines, and

other family members went to Club Celebrity and began asking the employees if anyone knew who had been driving the Impala. While Jemmima was at the club, a security guard handed Jemmima a phone; it was a call from defendant's number. Jemmima asked defendant why he had been driving the victim's Impala, and defendant responded that, on her way out of town to Chicago with her friend "Lori," the victim had stopped at defendant's house, given him the keys to the Impala, and "[t]old him to keep her car; she was going to Chicago." When Jemmima asked, "When you called me on the 16th, why didn't you tell me then you had my mom's car?" defendant "really didn't have an answer." Instead, he complained about the Impala, indicating "that he kept calling [the victim] trying to get her to come and get her car back because he couldn't afford to keep putting gas in it and he was tired of hiding it from his girlfriend." After Jemmima sent a text to the victim's number indicating that Jemmima intended to call the police and report the victim as missing, she got a response that read, "I'm okay, just leave me alone."

According to Smith (the deejay), after arriving, the police instructed Smith to make an announcement asking whether anyone present was driving an Impala. After Smith made the requested announcement, defendant "disappeared."

According to Avria McKelvey, who is a manager at Club Celebrity and a friend of Jemmima, while the police were trying to gain access to the Impala, defendant approached and asked the police, "What are you doing by my car? What are you doing with my car?" Consistent with McKelvey's description, the victim's cousin Arbie Campbell testified that defendant approached the police who were "standing around" the Impala and spoke to them, although Campbell was

unable to hear what was said. Contrastingly, however, Sergeant Jones specifically denied that anyone ever approached the officers or claimed ownership of the vehicle.

McKelvey further testified that defendant explained his possession of the Impala to Club Celebrity's staff as "a crack rental," i.e., he claimed that the victim was allowing defendant to "rent" her Impala in exchange for crack cocaine. According to McKelvey, defendant remained at Club Celebrity for an indeterminate period of time after the police arrived, then left abruptly on foot in the middle of his shift without receiving his nightly cash pay. To McKelvey's knowledge, defendant never returned to Club Celebrity.

Cleophus Clark, Jr., who is a manager at Club Celebrity, testified that he arrived at Club Celebrity on the evening in question while the victim's vehicle was being towed, at which time defendant approached him. Defendant informed Clark that "he gave [the victim] drugs to use her car," and Clark replied, "I have to call the police." As Clark called the police, defendant left the club without collecting his nightly pay. Defendant never returned to Club Celebrity. A "cleanup man" found the victim's credit card in the Club Celebrity parking lot that evening and passed the card along to the club's owner, who in turn passed it to Clark. Eventually, the card was given to the police. Genetic testing performed on the credit card was inconclusive.

According to Campbell (victim's cousin), that same evening Campbell initiated a conversation with defendant—who called himself "Tiko"—via cell phone and text message. Campbell asked defendant "if he knew where [the victim] was," and defendant responded as follows:

> He [defendant] told me [Campbell] that he wanted to talk, but he was scared, and he wanted to let us know. He told me that she was okay at first. He was letting me know that she was his aunt. Then he later on was trying to figure out where she was. . . . I told him I was her cousin. He then, after so long, just stopped replying.

During the conversation, defendant indicated that he was "the only person that [the victim] ha[d] been keeping in contact with."

The next month, on the morning of April 10, 2013, defendant provided the following statement to the police "in his own words" regarding "the nature of his last contact with [the victim]":

> Evelyn [the victim] came to my home to bring me some beer. She met me on my street. While outside talking to [her] she asked me to keep her car for her, and after some discussion I agreed. She said that she was going to Chicago with a friend. A few moments later a lady in a Black Ford Fusion pulled up, and Evelyn got out her [sic] car and into the Fusion with the lady whom I heard her being referred to as Lori or Laura.[4] Evelyn then asked me did I know where she could get three eight balls from, and I said[,] 'Yes.' I then went up the street to a guy I know who sells eight balls and et cetera.
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> I motioned for them to drive up the street when he said that he had it. They gave me the money, and I gave it to him and got the eight balls. We then went back up the street and Evelyn showed me how to use the Onstar on her car and gave me the proof of insurance and registration. Evelyn then got back in the Fusion and drove off. I haven't seen or spoken to Evelyn since that date.

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[4] The officer in charge of the investigation, Sergeant William Hart of the DPD, was never able to identify a person named Laura or Lori associated with the victim.

The victim's cell phone records showed "no movement outside of the state of Michigan" and likewise no movement outside the "immediate metro Detroit area[.]" Notably, however, the victim's cell phone usage changed dramatically after March 10, 2013. After that date, "there was no longer much evidence of actual outgoing phone calls, and the text messages became very minimal." The victim's credit card statement showed purchases made in the Detroit area after the victim was last seen.[5]

Sergeant Michael McGinnis of the DPD was qualified, without objection, "as an expert in the field of historical cell phone record analysis and tower mapping." From March 14, 2013, through March 23, 2013, there were 15 incidents when the victim's cell phone and defendant's cell phone "were communicating with the same sector, same tower within the city of Detroit." From March 10, 2013, until March 23, 2013, there were no attempted phone calls or text messages between defendant's cell phone and the victim's cell phone. But on March 23, 2013—after the victim's Impala was located—10 separate communications took place between those phones. The last recorded communication between the victim's cell phone and a cell phone tower took place on March 23, 2013, at which time the cell phone was in communication with the tower that services the area where Club Celebrity is situated. After she disappeared, the "home tower" of

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[5] A March 11, 2013 purchase from "Big Daddy Liquor" using the victim's credit card generated a credit card receipt that was recovered by the police. Jemmima was shown the credit card sales receipt and opined that the signature did not appear to be in her mother's handwriting. But using only the limited handwriting samples provided by the DPD, a forensic document examiner employed by the Michigan State Police was unable to determine whether the signature on the credit card receipt matched the handwriting of either defendant or the victim.

the victim's cell phone (i.e., the cell phone tower most often used) changed to coincide with the "home tower" of defendant. In McGinnis's opinion, the data strongly indicated that defendant was in possession of, and used, the victim's cell phone after her death.

Defendant elected not to testify at trial and was convicted and sentenced as noted earlier. The instant appeal ensued.

II. ANALYSIS

A. OTHER-ACTS EVIDENCE UNDER MRE 404(b)

On appeal, defendant first argues that the trial court abused its discretion by holding that other-acts evidence was admissible under MRE 404(b). The evidence in question regarded defendant's sexual assault of and attempt to murder a female victim, CB, 17 years before he allegedly committed the charged offenses in this case. Defendant contends that the evidence regarding the sexual assault and attempted murder was inadmissible under MRE 404(b) and that any probative value of such evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. We conclude that evidence of the attempted murder was duly admitted, but the trial court abused its discretion by admitting the sexual-assault evidence. Nevertheless, reversal is unnecessary because defendant has failed to carry his burden of demonstrating that the erroneous admission of the sexual-assault evidence more probably than not resulted in a miscarriage of justice.

"We review for an abuse of discretion a trial court's decision to admit or exclude evidence," while reviewing de novo any preliminary legal questions regarding admissibility. *People v Mann*, 288 Mich App 114, 117;

792 NW2d 53 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Cameron*, 291 Mich App 599, 608; 806 NW2d 371 (2011) (quotation marks and citation omitted).

The other-acts evidence at issue in this case involves the testimony of two prosecution witnesses: (1) CB, whom defendant sexually assaulted and tried to murder in 1996, and (2) retired detective Robert Henderson, the officer to whom defendant provided a signed admission that he had assaulted CB. CB testified that, on the evening of October 8, 1996, she was alone at her house in Detroit when defendant stabbed and sexually assaulted her. At the time, CB was a 19-year-old college student. She had known defendant since middle school and considered him to be a friend. Defendant came to CB's house around 8:30 p.m. and knocked on the door. She let him in and the two watched television, then "messed around a little bit," with defendant performing oral sex on CB. CB "made him stop," after which they sat together and watched more television. Defendant asked CB if she had "any rope or tape or something because it was cold and he needed to do something to the windows." Defendant then left briefly. After calling a friend, CB realized that she was uncertain whether she had locked the door after defendant left. As CB walked back to the door to ensure that it was locked, defendant let himself back into the house. CB "felt nervous"; she had not expected defendant to return. CB and defendant walked back to the den. CB informed defendant that she had to go pack some clothing because a friend of hers was on the

way to pick her up, then she locked herself in her bedroom. Defendant came to the door and "kept asking" if anything was wrong and whether he would have to "get" CB out of her room.

Eventually CB emerged, thinking that perhaps there was nothing wrong and that it was "just [her] nerves." Defendant was standing in the hallway. As CB stepped past him, she felt a "puncture" in her back. She reached back and touched the area. When she pulled her hand away, "it was full of blood." CB tried to run, but defendant "grabbed [her] from behind" and "started slicing [her] neck" with a knife. CB continued to struggle as defendant stabbed her repeatedly—more than 20 times. She broke loose, but defendant grabbed her again and started "slicing" her neck again. Defendant dragged her to the basement. CB tried "to play dead," but when defendant poured a liquid of some kind[6] on her—which smelled like gasoline—CB coughed. In response, defendant "socked" her in the jaw and said, "Why won't you die, bitch?" CB "just laid there quiet." Defendant mounted her, sexually assaulted her vaginally, and then wrapped her up in "a carpet or something." While wrapped up, CB heard defendant slip and fall, after which he unwrapped her and placed her on a couch. At that point, CB's mother arrived home and called CB's name, and defendant fled. The police were summoned, along with an ambulance. CB informed the first responders that defendant was the person who had assaulted her.

Detective Henderson subsequently interviewed defendant, who provided a signed statement. A copy of defendant's statement was admitted into evidence over

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[6] CB described the unidentified liquid as follows: "like some water or something, liquid." But she also indicated that the liquid smelled like gasoline.

defendant's continued objection. In the statement, defendant stated as follows in response to Henderson's question, "What happened last night?":

> I just had a rage. When I came in the house, she was on the phone. I started to look at TV, Tool Time, and after it ended we were just talking. She went into the bedroom, and a short time later she came out. That is when the rage came over me. At first we were just fighting. Then I pulled out a knife I had on me, a kitchen knife. All I remember is stabbing at her. I then took her downstairs to the basement. I was just walking around looking at her and all of the blood.
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> * * *
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> Until her mother came home, then I ran out the side door.

While speaking with Detective Henderson, defendant denied having sexually assaulted CB, insisting: "We had sex, but it was before the fight. I never had sex with her after the fight[.]"

In pertinent part, MRE 404(b) provides:

> (b) *Other crimes, wrongs, or acts*.
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> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Similarly, MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant

> which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

Other-acts evidence is admissible only if

> (1) the evidence is offered for some purpose other than under a character-to-conduct theory, or a propensity theory, (2) the evidence is relevant to a fact of consequence at the trial, and (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. If requested, the trial court may provide a limiting instruction under MRE 105. [*People v Ackerman*, 257 Mich App 434, 440; 669 NW2d 818 (2003).]

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. When balancing the probative value of evidence of prior bad acts against the danger of unfair prejudice from the evidence, a court must be cognizant that "[p]ropensity evidence is prejudicial by nature[.]" *People v Watkins*, 491 Mich 450, 486; 818 NW2d 296 (2012). However, MRE 403 "does not prohibit prejudicial evidence; only evidence that is unfairly so." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*.

In ruling on this issue, the trial court treated CB's testimony as if it involved just one prior bad act. Conceptually, however, we conclude that the testimony

regarded two distinct prior bad acts: attempted murder and rape. The first of those prior bad acts has logical relevance to the facts of this case; the latter does not.

1. ATTEMPTED-MURDER EVIDENCE

Contrary to defendant's argument on appeal, the evidence regarding his attempt to murder CB bears logical relevance to a fact of consequence in this case, specifically whether defendant is the person who shot and killed the victim, then tried to dispose of her body using fire. Moreover, given the similarities, the evidence regarding the CB incident tends to show defendant's scheme, plan, or system in committing the charged offenses.

Defendant contends that there is little, if any, factual similarity between his assault against CB and the facts here. We disagree. Although there are certain differences, there are a number of notable similarities: (1) CB was attacked from behind and, similarly, the victim here was shot from behind (in the back of the head), (2) both are women defendant had known for a substantial time, (3) both are women with whom defendant had some sexual[7] relationship at the time of offense, (4) defendant poured a liquid that smelled like gasoline on CB, and, similarly, gasoline was used as an accelerant to burn the victim's body, and (5) after stabbing her and slitting her throat, defendant wrapped CB "in a carpet or something," and, similarly, the victim's body was found bound with wire atop a plastic tarp. Thus, it seems that evidence of the CB incident was both offered for a purpose other than

[7] It is true that CB denied that she was defendant's "girlfriend," but she acknowledged that defendant performed oral sex on her before sexually assaulting and attempting to murder her.

defendant's propensity to commit the charged offenses and relevant to a fact of consequence in this case.

It is a closer question whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Obviously, the testimony regarding defendant's brutal assault against CB when she was a teenager was highly prejudicial. As defendant admits in his appellate brief, however, given the circumstantial nature of the proofs against him, his identity as the perpetrator was a "primary" issue at trial. Accordingly, the similarities between his assault against CB and the facts known about the victim's death had a heightened probative value. Given the balancing nature of this inquiry, and the fact that this scenario presents a close call, we do not find the trial court's ruling in this regard to be an abuse of discretion. See *Cameron*, 291 Mich App at 608 ("[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion."). The decision to admit the attempted-murder evidence fell within the range of reasonable and principled outcomes.

2. SEXUAL-ASSAULT EVIDENCE

Conversely, we conclude that the trial court abused its discretion by admitting CB's testimony that defendant sexually assaulted her. Such testimony has no seeming relevance to a fact of consequence in this case. Defendant was not charged with criminal sexual conduct here, and there is no evidence that the victim in this case was ever sexually assaulted. Given its lack of relevance, the only logical purpose for the introduction of the sexual-assault evidence was the improper character purpose, i.e., proof that defendant is a bad person and therefore probably committed the charged offenses.

Most significant, however, is the danger of unfair prejudice under MRE 403. Had defendant been charged with a sexual offense in this case, our analysis would be much different. But here, the sexual-assault evidence has no seeming probative value, and any marginal probative value that might exist was substantially outweighed by the danger of unfair prejudice. Sex offenders are a loathed class—rightfully so. But knowledge that defendant is a rapist did nothing to help the jurors decide whether he committed the charged offenses. Instead, without any attendant benefit, the evidence invited jurors to make the impermissible character inference—to decide that if defendant would sexually assault CB, a teenage girl he knew well, he is just the sort of "bad" person who might kill his girlfriend and burn her body. Therefore, the trial court abused its discretion by admitting evidence that defendant sexually assaulted CB.

3. REVERSAL IS UNWARRANTED

Even so, reversal is unwarranted. Reversal of a criminal conviction on the basis of a trial court's erroneous evidentiary ruling is only necessary when the error prejudiced the defendant and resulted in a miscarriage of justice. MCL 769.26; *People v Snyder (After Remand)*, 301 Mich App 99, 111; 835 NW2d 608 (2013). A defendant seeking reversal "has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Although the evidence in this case was largely circumstantial, in ruling on defendant's motion for a directed verdict, the trial court aptly reasoned that the circumstantial evidence was "overwhelming" of defendant's guilt. As discussed further later, we agree with

that assertion—the circumstantial evidence against defendant *was* overwhelming. Hence, aside from the sexual-assault evidence, there was more than ample evidence to convince the jurors of defendant's guilt. Moreover, the trial court gave a limiting instruction regarding CB's testimony that explicitly forbade the jurors from considering that evidence for improper character purposes. It is presumed that the jurors followed that instruction. See *People v Roscoe*, 303 Mich App 633, 646; 846 NW2d 402 (2014) ("[T]he trial court provided a limiting instruction, which can help to alleviate any danger of unfair prejudice, given that jurors are presumed to follow their instructions."). Therefore, despite the erroneous admission of the sexual-assault evidence, defendant is not entitled to reversal. He has failed to carry his burden of demonstrating that the erroneous admission of such evidence more probably than not resulted in a miscarriage of justice.

B. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that there was insufficient evidence to support his convictions. We disagree.

1. IDENTITY

"[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Defendant's primary argument on appeal is that, although the prosecution proved that *someone* committed the charged offenses, it failed to prove beyond a reasonable doubt that defendant was the perpetrator. After plenary review of the record evidence, we conclude that there was sufficient evidence for a rational fact-finder to reasonably infer that defendant was the perpetrator.

Viewing the evidence in the light most favorable to the prosecution, although the identity evidence is circumstantial and sometimes requires reliance on an inference founded on an inference,[8] there was sufficient evidence for a rational fact-finder to conclude that defendant was the perpetrator. Defendant was in possession of the victim's Impala after she died, and it is reasonable to infer from the record evidence that he was in possession of her cell phone as well. Defendant is the last person to report seeing the victim alive, and—after she was found dead—he claimed to be "the only person" with whom the victim had been communicating. Cell phone records, however, showed no attempted phone calls or text messages between defendant's cell phone and the victim's cell phone from March 10, 2013, until March 23, 2013. From such evidence, it is reasonable to infer that defendant was lying about his purported communications with the victim, and, in turn, it is reasonable to infer that his reason for lying was his desire to suggest that the victim was alive when he knew that she was not. It is further reasonable to infer that defendant used the victim's cell phone to send text messages suggesting that she was alive in order to deter investigation into her death. The fact that the victim's body was badly burned also supports these inferences.

From the evidence that defendant (1) left work early on March 22, 2013, after the police located the victim's car at Club Celebrity, (2) did not collect his nightly cash pay, and (3) never returned to collect that pay, it is reasonable to infer that defendant had a guilty conscience. People do not generally perform work at a paid

[8] See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (rejecting the "flawed" rule that an inference built on an inference could not be used in a sufficiency-of-the-evidence analysis).

job but then fail to collect the pay owed. It is also reasonable to infer that the victim's credit card, which was found in Club Celebrity's parking lot that same evening—March 22, 2013—was deposited there by defendant in an effort to rid himself of incriminating evidence. Additionally, from the numerous similarities between the victim's death and the attempted murder of CB, it is reasonable to infer that defendant was the perpetrator of both assaults.

Moreover, defendant's differing explanations for why he was in possession of the victim's Impala suggest that he was lying to cover up the actual reason (that he took the vehicle after killing the victim). Defendant explained his possession of the Impala to Club Celebrity's staff as "a crack rental," i.e., he claimed that the victim was allowing defendant to "rent" her Impala in exchange for crack cocaine. But he told Jemmima and the police that the victim had entrusted him to keep her Impala while she traveled to Chicago. When Jemmima asked defendant, "When you called me on the 16th, why didn't you tell me then you had my mom's car?" defendant "really didn't have an answer."

Given the circumstantial evidence and the inferences fairly drawn from it, there was sufficient evidence for a rational trier of fact to conclude that defendant was the perpetrator of the charged offenses. Aside from identity, however, defendant also argues that there was insufficient evidence to support each of the essential elements of the offenses for which he was convicted. We will examine each offense in turn.

2. FIRST-DEGREE MURDER

"The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation

and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (quotation marks and citation omitted). "Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation." *Id*. at 301. "Though not exclusive, factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *Id*. at 300.

Defendant argues that the fatal gunshot "could have been accidentally fired," and that, therefore, there is insufficient evidence of an *intentional* killing, of premeditation, and of deliberation. There are several facts, however, from which a rational trier of fact could infer that the killing was intentional, premeditated, and deliberate, most notably: (1) the victim was shot in the back of the head, (2) her body was bound with wire and burned using gasoline as an accelerant, and (3) she was found in a deserted location. Moreover, the reasonable inferences from the evidence that support defendant's identity as the perpetrator also support an inference that the killing was intentional, premeditated, and deliberate. Therefore, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find defendant guilty of first-degree murder.

3. FELONY MURDER

"The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b)." *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). The predicate felony relied on by the prosecution here was larceny, and "larceny of any kind" is a specifically enumerated predicate felony under MCL 750.316(1)(b).

It is undisputed that the victim was killed, and the fact that the victim was killed by a gunshot to the back of her head is sufficient for a rational fact-finder to reasonably infer that the gunshot was inflicted with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. Thus, the first two elements for felony murder were satisfied. Moreover, given the evidence that defendant was in possession of the victim's Impala and her cell phone following her death, it is reasonable to infer that defendant killed the victim during the commission, or attempted commission, of a larceny of any kind. Hence, there was sufficient evidence for a rational trier of fact to find defendant guilty of felony murder.

4. FELON-IN-POSSESSION

Felon-in-possession is a statutory offense that is set forth by MCL 750.224f, which was recently amended by 2014 PA 4. Notwithstanding that amendment, however, the two essential elements of felon-in-possession

remain the same as before 2014 PA 4: (1) the defendant is a felon who possessed a firearm (2) before his right to do so was formally restored under MCL 28.424. See MCL 750.224f; *People v Perkins*, 473 Mich 626, 629; 703 NW2d 448 (2005).

Regarding the felon-in-possession conviction, at trial, rather than introducing the judgments of sentence from defendant's prior felony convictions, the parties stipulated that defendant had previously been convicted of a felony that made him ineligible to possess a firearm *on March 12, 2013*. It is unclear from the record why the stipulation focused solely on March 12, 2013, which is the day that the victim's body was discovered but two days *after* she disappeared.

Nevertheless, despite the inexact stipulation, there was sufficient evidence for a rational trier of fact to conclude that defendant possessed a firearm on March 12, 2013—when he was ineligible to do so—and used that firearm to shoot and kill the victim. Specifically, such an inference was reasonable on the basis of the evidence that, although it was in plain sight within the open garage, the victim's body was not found until the afternoon of March 12, 2013. In other words, a rational juror could reasonably infer that defendant shot the victim on March 12, 2013—not on March 10 or March 11.

5. FELONY-FIREARM

Felony-firearm is set forth by MCL 750.227b, which was recently amended by 2015 PA 26. Despite that amendment, we conclude that the elements of the offense remain the same.[9] "The elements of felony-

[9] After careful review of the prior and amended versions of the statute, we have determined that the only substantive change is that an

firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

As we have previously explained, there was sufficient evidence for a rational fact-finder to infer that defendant committed first-degree murder and felony murder, both of which are felonies. From the evidence that the victim's cause of death was a gunshot to the back of the head, it is reasonable to infer that defendant possessed a firearm during the commission of those felonies. Ergo, there was sufficient evidence for a rational fact-finder to find defendant guilty of felony-firearm.

6. MUTILATION OF A HUMAN BODY

No published authority has yet set forth the essential elements of mutilation of a human body under MCL 750.160. We take this opportunity to do so. The statute provides, in pertinent part:

> A person, not being lawfully authorized so to do . . . who shall mutilate, deface, remove, or carry away a portion of the dead body of a person, whether in his charge for burial or otherwise, whenever the mutilation, defacement, removal, or carrying away is not necessary in any proper operation in embalming the body or for the purpose of a postmortem examination, and every person accessory thereto, either before or after the fact, shall be guilty of a felony, punishable by imprisonment for not more than 10

offender can now be guilty either by possessing a "firearm" under Subsection (1) or by possessing a "pneumatic gun" *and using it* under Subsection (2). In other words, Subsection (2) describes a new "pneumatic gun" offense that is distinct from felony-firearm. Because a firearm is at issue in this case—not a pneumatic gun—we do not consider the essential elements of the "pneumatic gun" offense under MCL 750.227b(2).

> years, or by fine of not more than $5,000.00. This section shall not be construed to prohibit the digging up, disinterment, removal or carrying away for scientific purposes of the remains of prehistoric persons by representatives of established scientific institutions or societies, having the consent in writing of the owner of the land from which the remains may be disinterred, removed or carried away. [MCL 750.160.]

Using a plain language analysis involving dictionary definitions, an unpublished opinion of this Court recently interpreted the statute as follows:

> *Black's Law Dictionary* (8th ed) defines "mutilation" as the "act of cutting off or permanently damaging a body part." To "mutilate" is otherwise defined as "to injure or disfigure by removing or irreparably damaging parts." *Random House Webster's College Dictionary* (2001). To "deface" means "to mar the surface or appearance of; disfigure." *Random House Webster's College Dictionary* (2001). To "remove" means "to move or shift from a place or position." *Random House Webster's College Dictionary* (2001). Thus, according to the plain language[2] of the statute, a person may not cause irreparable or permanent damage or injury to, change the appearance of, or remove a portion of, the dead body.
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> [2] Because the plain language of the statute is clear and unambiguous, we decline to adopt defendant's more restrictive definition of mutilation for which he finds support in this Court's cases related to the common-law tort for mutilation of a dead body. See *Dampier v Wayne Co*, 233 Mich App 714, 729; 592 NW2d 809 (1999) (defining mutilation as the "active incision, evisceration, or dismemberment of a dead body"). We are not persuaded that this tort definition has become a technical, common-law definition, which should affect our analysis of the criminal statute. We note that other defendants have been criminally convicted of this crime where they burned a dead body. *People v Williams*, 265 Mich App 68, 70; 692 NW2d 722 (2005). Burning does not involve cutting, eviscerating, or

> dismembering a body.
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> [*People v Peña*, unpublished opinion of the Court of Appeals, issued March 13, 2008 (Docket No. 275508), p 3.]

We agree with this persuasive analysis. Accordingly, we hold that a defendant is guilty of mutilation of a human body under MCL 750.160 if the defendant (1) without any legal authorization to do so, (2) causes permanent damage to a portion of a dead body, defaces a portion of a dead body by marring its appearance, or removes or carries away from the whole a portion of a dead body.

Hence, it is clear that there was sufficient evidence for a rational fact-finder to find defendant guilty of mutilation of a human body. As we have explained, it is reasonable to infer from the record evidence that defendant shot and killed the victim. In turn, it is reasonable to infer that defendant is the person who attempted to conceal the murder by burning the victim's body with gasoline. The body was almost totally charred, and portions of it were entirely consumed by the fire. The damage was so serious that it could not be visually determined by Dr. Sung whether the body belonged to a male or a female. And it is reasonable to infer from the record evidence that defendant lacked any legal authority to burn the victim's body. Therefore, there was sufficient evidence that defendant irreparably damaged a portion[10] of the body and defaced it, and his conviction of mutilation of a dead body should be affirmed.

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[10] The word "portion" generally denotes a "limited part of a whole," *Merriam-Webster's Collegiate Dictionary* (11th ed), and we construe it by that plain meaning here. The fire irreparably damaged only a portion of the victim's body, not the whole, as evidenced by witness reports of visible toenail polish on one of the victim's toenails and the fact that intact bone fragments were used for DNA testing. Therefore, we need not—and do

C. PROSECUTORIAL MISCONDUCT[11]

In his pro se Standard 4 brief, defendant argues that he was denied his right to a fair trial when the prosecution knowingly elicited "false" testimony from three different witnesses and used that testimony to secure defendant's convictions. Because defendant did not object in the trial court to the testimony in question, this issue is unpreserved, and our review is for plain error affecting defendant's substantial rights. See *Bennett*, 290 Mich App at 475. "To avoid forfeiture, the defendant bears the burden to show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings." *Cameron*, 291 Mich App at 618. In this case, because defendant has failed to show that the testimony elicited by the prosecution was actually false, he cannot meet his burden of demonstrating that the elicitation of such testimony constituted plain error that affected his substantial rights.

> It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Stated differently,

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not—consider whether the term "portion" in MCL 750.160 also encompasses damage or defacement of a *whole* human body.

[11] As recently noted in *People v Jackson*, 313 Mich App 409, 425 n 4; 884 NW2d 297 (2015), "although the term 'prosecutorial misconduct' has become a term of art often used to describe any error committed by the prosecution, claims of inadvertent error by the prosecution are better and more fairly presented as claims of 'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.' " (Quotation marks and citation omitted.)

> a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment. Thus, it is the misconduct's effect on the trial, not the blameworthiness of the prosecutor, which is the crucial inquiry for due process purposes. The entire focus of our analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. [*People v Aceval*, 282 Mich App 379, 389-390; 764 NW2d 285 (2009) (quotation marks, citations, and brackets omitted).]

Defendant first challenges Hines's testimony that, after Hines last saw the victim, he placed calls to the victim's cell phone that were answered. Defendant incorrectly contends that the victim's cell phone records "indicate that at no time was there a[n] answered call from . . . Hines['s] number . . . or from any other number." Accordingly, defendant argues, Hines's testimony was false.

Hines testified that, after he last saw the victim on March 9, 2013, he tried calling her several times on her cell phone. According to Hines, at first, "every time [he] call[ed] her phone, somebody would answer it, and it be [sic] quiet." Later, "about" March 12 or March 13 of 2013, Hines called again and heard "a man's voice on the phone[.]" Hines asked, "Who is this?" The man responded, "Tiko." Notably, in his testimony, Hines did not specify that he called the victim exclusively from his own cell phone. Also, he was uncertain regarding the *specific* dates on which he called, and consequently he provided an approximate date: "about the 12th or the 13th" of March 2013. Therefore, the telephone calls about which Hines testified could have originated from a number other than his cell phone number and might have taken place on days other than March 12 or March 13 of 2013.

On the basis of the victim's cell phone records, defendant argues that Hines's testimony was false. The cell phone records, however, do not substantiate defendant's argument. The records demonstrate that Hines tried unsuccessfully to call the victim from his cell phone number at least 16 times between March 11 and March 22, 2013. All such attempts were forwarded to the victim's voicemail. Calls forwarded to voicemail are not, as defendant argues, patently inconsistent with Hines's testimony that he perceived an "answer" by "somebody" with ensuing silence. Additionally, defendant is incorrect that there were no incoming answered calls on the victim's cell phone from "any" number during the germane timeframe. According to the records, there was such a call on March 20, 2013, at 8:44 p.m., lasting one minute. Consequently, defendant's claim of error regarding Hines's testimony necessarily fails under plain error review. Defendant has failed to carry his burden of demonstrating that Hines's testimony was actually false, and, therefore, he has not demonstrated that the prosecution's elicitation of that testimony constituted plain error affecting his substantial rights.

For similar reasons, defendant's claim of error regarding Bouldin's testimony also necessarily fails under plain error review. On the basis of Bouldin's prior statements that she could not "recall" the specifics of such a call, defendant argues that Bouldin's testimony that she received a call from defendant on March 15, 2013, was actually false.

Defendant's argument is entirely unconvincing. First, Bouldin's trial testimony is not inconsistent with her prior statements. The fact that Bouldin remembered the specifics of the call at trial, whereas she had been unable to in previous statements, is explained by

the fact that Bouldin was permitted to review her cell phone records to refresh her memory at trial. Second, even assuming, for the sake of argument, that Bouldin's trial testimony *was* inconsistent with her prior statements, such inconsistencies do not establish that Bouldin's trial testimony was actually false. Although an inconsistent prior statement may be a mechanism to impeach a witness's credibility at trial, it is not definitive evidence that the trial testimony is false. Finally, the victim's cell phone records confirm that an outgoing call to Bouldin's number originated from the victim's cell phone on the date in question, March 15, 2013, at 2:30 a.m. Thus, independent evidence supports the veracity of Bouldin's testimony. Since defendant has failed to demonstrate that Bouldin's testimony was actually false, his claim of error in this respect merits no relief.

Finally, defendant asserts that the prosecution knowingly elicited false testimony from CB. Specifically, given the fact that in a prior statement to the police CB described the liquid that defendant poured on her as "water," defendant contends that her trial testimony that the liquid smelled like gasoline was necessarily false. Again, however, the existence of a prior inconsistent statement is not evidence that CB's trial testimony was actually false. Although defendant's trial counsel used the prior inconsistent statement, on cross-examination, to impeach Bouldin's credibility, it does not definitively prove that her trial testimony was false.

D. EFFECTIVE ASSISTANCE OF COUNSEL

The next argument presented in defendant's Standard 4 brief is that his trial counsel performed ineffec-

tively in three distinct ways. Accordingly, defendant argues, he is entitled to a new trial. We disagree.[12]

Defendant first argues that, despite the fact that his trial counsel was purportedly aware of false statements in the subscribing officer's statement, counsel failed to investigate the matter or to file a motion to "suppress" defendant's arrest warrant. For dual reasons, defendant's claim of error merits no relief. First, defendant has failed to prove the factual predicate of his claim. He has cited no record evidence that he ever told his trial counsel about the alleged "false statements" supporting the arrest warrant, nor has he cited any record support for his claim that counsel failed to investigate the matter. Second, defendant offers no explanation of how or why counsel's failure to file such a motion to "suppress" the arrest warrant more probably than not affected the outcome of the lower court proceedings. This Court will not supply such argument on his behalf. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."). And even assuming,

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[12] As a threshold consideration, to the extent that defendant now requests that this Court remand this matter for a *Ginther* hearing to permit him to substantiate his claims of ineffective assistance, his request for such relief is improperly made; it appears in the text of his Standard 4 brief, not in a proper motion to remand under MCR 7.211(C)(1). See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). On that basis, we deny defendant's request.

arguendo, that the arrest warrant was so deficient that it constituted the metaphorical "poison tree" for purposes of the exclusionary rule, it is not apparent from the record that any evidence used to convict defendant was "fruit" of that poisonous tree. In other words, regardless of any alleged deficiencies in the arrest warrant, it is unclear from the record whether the arrest itself resulted in evidence that the trial court could have suppressed under the exclusionary rule. Hence, defendant's claim of error regarding the arrest warrant necessarily fails.

Defendant's second ineffective assistance argument is that his counsel performed ineffectively by failing to file a motion seeking additional DNA testing of the victim's credit card, which, defendant contends, could have uncovered exculpatory evidence that someone other than the victim or defendant had been in possession of that card. In support, defendant claims that Andrea Young, one of the prosecution's expert witnesses in DNA analysis, testified that defendant "was excluded as a DNA donor to the credit card and that the major donor to the credit card was from a[n] unknown person[.]"

Defendant misstates Young's testimony. She did not testify that defendant was "excluded" as being one of the several "donors," i.e., people whose DNA was discovered on the credit card. On the contrary, Young testified that the sample drawn from the credit card provided "a partial profile with a mixture of at least two individuals," at least one of whom was male. Defendant was "excluded as being a major donor" in the credit card sample, but it could not be determined whether he was a "minor donor."

In any event, on this record defendant's argument is entirely unpersuasive. Defendant argues that addi-

tional DNA testing "could have" yielded exculpatory evidence, but he has produced no record evidence in support of that claim. Without any evidence of what such testing actually would have produced, it is impossible to gauge whether the evidence would have been exculpatory, inculpatory, or inconclusive.

Moreover, defendant's argument fails to recognize that counsel's decision is presumed to have been a matter of trial strategy. See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002) ("Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."). "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Accordingly, there is a "strong presumption that trial counsel's performance was strategic," and "[w]e will not substitute our judgment for that of counsel on matters of trial strategy[.]" *Id*. at 242-243. Given the fact that Young's testing of the credit card was inconclusive—i.e., she could neither exclude defendant as a DNA donor nor include him as one—defense counsel might have reasonably concluded that a motion for additional DNA testing would have been imprudent. Put differently, counsel might have reasonably feared that additional testing could have revealed inculpatory DNA evidence from which it could be determined that defendant's DNA was on the credit card. Hence, defendant has failed to rebut the strong presumption that his trial counsel's decision in this regard was both strategic and effective.

Finally, defendant argues that his trial counsel performed ineffectively by failing to consult with and

retain an expert in cell phone data analysis. Defendant has again failed to prove the factual predicate for his claim. He cites no record evidence indicating whether his trial counsel ever consulted or retained such an expert. The mere fact that such an expert was never called as a witness by the defense does not show that one was never consulted or retained. Additionally, counsel's decision whether to retain an expert witness is a matter of trial strategy. See *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defendant has presented no evidence to rebut the strong presumption that his trial counsel's decision whether to retain an expert in cell phone data analysis was both strategic and effective.

E. MOTION TO QUASH

After he was bound over on the charges against him in district court, defendant filed a motion to quash in the circuit court, arguing that there was insufficient evidence presented at the preliminary examination to satisfy the applicable probable cause standard. The circuit court denied defendant's motion. In the final argument in his Standard 4 brief, defendant argues that the circuit court abused its discretion by so ruling. We disagree.

"A district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). However, "[t]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010).

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it. MCR 6.110." *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). "The prosecutor need not establish beyond a reasonable doubt that a crime was committed. He need present only enough evidence" to satisfy the probable cause standard, i.e., sufficient evidence "on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt." *Id*. (quotation marks, citations, and brackets omitted). "Thus, charges should not be dismissed merely because the prosecutor has failed to convince the reviewing tribunal that it would convict. That question should be reserved for the trier of fact." *Id*.

Although the evidence presented against defendant at the preliminary examination was circumstantial, there was more than enough to satisfy the probable cause standard. Most notably, there was testimony (1) that defendant saw the victim on the evening that she disappeared, (2) that he possessed the victim's cell phone and used it to call Bouldin *after* the victim had been discovered dead, (3) that he possessed and used the victim's car after she died, (4) that he abruptly left Club Celebrity in the middle of his shift after Clark called the police, (5) that the victim's cell phone "went dark" that same night near Club Celebrity, and (6) that the next day the victim's credit card was located in the parking lot of Club Celebrity. Such evidence was more than ample to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief

of defendant's guilt. Therefore, the circuit court did not abuse its discretion by denying defendant's motion to quash.

Affirmed.

GADOLA, P.J., and WILDER and METER, JJ., concurred.

MICHIGAN BATTERY EQUIPMENT, INC v EMCASCO INSURANCE COMPANY

Docket No. 326945. Submitted September 7, 2016, at Detroit. Decided September 15, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 982.

Michigan Battery Equipment, Inc., brought this action in the Genesee Circuit Court against EMCASCO Insurance Company, contesting EMCASCO's denial of its claim for damages to Michigan Battery's warehouse. The trusses in the warehouse roof rotted and the roof dropped a few feet because water had for some time leaked through deteriorating rubber grommets in the roof and caused the trusses to rot. According to Michigan Battery's policy, wet rot was a risk not covered by EMCASCO and, in fact, was a cause of damage specifically excluded from coverage under the policy. EMCASCO moved for summary disposition, and the court, Archie L. Hayman, J., granted the motion. Michigan Battery appealed, and EMCASCO cross-appealed.

The Court of Appeals *held*:

An insurance policy is interpreted according to contract principles and must be enforced according to the terms of the policy. To determine whether the parties to an insurance contract intended the claimed loss to be covered, a court must examine the language of the contract to determine whether the policy provides coverage to the insured under the circumstances. If coverage is provided, the court must then determine whether the coverage is negated by an exclusion stated in the policy. Insurance policy exclusion clauses are strictly construed in favor of the insured. In this case, Michigan Battery was covered by EMCASCO under an all-risk policy. The policy contained various exclusions, and it contained a specific exclusion for damages caused by fungus, wet rot, dry rot, and bacteria. But the policy also contained three exceptions to this exclusion: (1) when fire or lightning caused the fungus, wet or dry rot, or bacteria, (2) when, and to the extent that, coverage for the loss was included in an additional-coverage provision, and (3) when the conditions resulted in a specified cause of loss. There was no dispute that wet rot caused the damage to Michigan Battery's warehouse roof. The first two exceptions did not apply to the damage caused by the wet rot. The wet rot was not caused by fire or lightning, and the damage was not included in any additional

coverage under the policy. According to the third exception, if the fungus, wet or dry rot, or bacteria resulted in a specified cause of loss, that loss was excepted from the exclusionary clause and EMCASCO would be liable for the damages caused by the specified cause of loss. But Michigan Battery's loss was not a result of a specified cause of loss. That is, the damage was not caused by any of the conditions expressly listed in the policy's definition of specified causes of loss. Because no exception to the policy's exclusion of damages caused by fungus, wet or dry rot, or bacteria existed in this case, Michigan Battery's loss was not covered by the policy and the trial court properly granted summary disposition in favor of EMCASCO.

Affirmed.

Jo Robin Davis, PLLC (by *Jo Robin Davis*), for Michigan Battery Equipment, Inc.

Merry, Farnen & Ryan, PC (by *John J. Schutza*), for EMCASCO Insurance Company.

Before: CAVANAGH, P.J., and SAAD and FORT HOOD, JJ.

SAAD, J. In this insurance coverage dispute, plaintiff, Michigan Battery Equipment, Inc. (Michigan Battery), appeals the trial court's order that granted summary disposition in favor of defendant, EMCASCO Insurance Company (EMC).[1] The trial court granted summary disposition because it held that the loss was caused by wet rot, which was a risk not covered but instead was specifically excluded from coverage under the policy. For the reasons provided below, we affirm.[2]

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[1] EMC filed a cross-appeal in this case. But on cross-appeal EMC does not challenge any ruling or action by the trial court. Instead, EMC merely argues that the trial court's ruling should be affirmed. Under these circumstances, a cross-appeal is not necessary, even when the appellee is asserting an alternative ground to affirm. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

[2] We review a trial court's decision on a motion for summary disposition de novo. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). "A motion under MCR 2.116(C)(10) tests the

I. BRIEF FACTS AND GENERAL PRINCIPLES REGARDING INSURANCE CONTRACTS

Due to prolonged water infiltration through deteriorated rubber grommets in the roof, the roof trusses of Michigan Battery's warehouse rotted. In January 2014, snow and ice accumulated on the roof, which caused the rotted trusses to split, crack, and fall down a few feet. The question on appeal is whether EMC's insurance policy covers the damage to Michigan Battery's roof. To resolve this dispute, we must examine the terms of the insurance policy and determine whether the damage is excluded from coverage under any exclusion in the policy. Insurance contracts must be enforced in accordance with their terms. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). "The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). To determine the intent of the

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factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). To decide a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120; MCR 2.116(G)(5). "Summary disposition pursuant to MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Also, the interpretation of an insurance contract and whether an ambiguity exists are questions of law that we review de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

parties, a court must first ascertain whether the policy provides coverage to the insured. *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014). Then, it must determine "whether that coverage is negated by an exclusion." *Id*. "While it is the insured's burden to establish that his claim falls within the terms of the policy, the insurer should bear the burden of proving an absence of coverage." *Id*. (quotation marks, citations, and alterations omitted). Where a contract provision is ambiguous, the contract is construed in favor of the insured. *Henderson*, 460 Mich at 354. However, "a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise." *Id*. Instead, contract terms should be interpreted using their plain and ordinary meanings. *Id*.

II. ALL-RISK POLICY AND EXCLUSION FOR WET ROT

Michigan Battery insured its warehouse and attached offices with an "all-risk" policy issued by EMC. "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 148-164. Here, the policy provides for various exclusions, of which two were the focus of the arguments in the trial court: (1) the exclusion for damage caused by collapse and (2) the exclusion for damage caused by fungus, wet rot, dry rot, and bacteria. "Exclusionary clauses in insurance policies are strictly construed in favor of the insured." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). However, "[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*.

Because the language of the policy is controlling, we turn our attention to the rot exclusion in the policy, which 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.
>
> * * *
>
> **h. "Fungus", Wet Rot, Dry Rot And Bacteria**
>
> Presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria.
>
> But if "fungus", wet or dry rot or bacteria results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".
>
> This exclusion does not apply:
>
> **1.** When "fungus", wet or dry rot or bacteria results from fire or lightning; or
>
> **2.** To the extent that coverage is provided in the Additional Coverage—Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria with respect to loss or damage by a cause of loss other than fire or lightning.
>
> Exclusions **B.1.a.** through **B.1.h.** apply whether or not the loss event results in widespread damage or affects a substantial area.

As the trial court properly held, the plain language of the above-quoted insurance policy provisions excludes from coverage damage caused by fungus, wet rot, dry rot, and bacteria. However, this exclusion has exceptions: (1) when the fungus, wet rot, dry rot, or bacteria results from fire or lightning; (2) when, and to the extent that, coverage is provided in the "Additional Coverage" provision; and (3) when the fungus, rot, or

bacteria "results in a 'specified cause of loss.' " As a result, because there is no question that wet rot caused the damage at issue, we must determine if any one of the exceptions to the rot exclusion applies.

The first exception does not apply because there is nothing on the record to show, and the parties do not argue, that the wet rot here was the result of fire or lightning. Indeed, the record shows that the wet rot was caused by water leakage through grommets located in the roof.

Additionally, the second exception related to the rot being covered under the "Additional Coverage" provision does not apply. Under this "Additional Coverage," damage from fungus, rot, and bacteria is covered where the fungus, rot, or bacteria is the result of (1) "a specified cause of loss" other than fire or lightning or (2) flood. The term "specified causes of loss" is defined as meaning

> fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

And "water damage" is further defined as

> accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam.

Here, there is nothing on the record to establish, and the parties do not argue, that the wet rot in the warehouse was the result of or caused by a specified cause of loss. Likewise, there is nothing in the record to

suggest that the damage was caused by flood. As already noted, the wet rot damage was caused by water intrusion through deteriorated rubber grommets in the roof. Accordingly, because the wet rot was not the result of a "specified cause of loss" and was not the result of flood, the "Additional Coverage" provision simply does not apply.

Similarly, the third exception is not implicated. The rot in the trusses caused the roof and the trusses to fall down a couple feet, which, importantly, is not one of the enumerated specified causes of loss.

Therefore, we hold that the wet rot and resulting damage is not covered under the policy because it is excluded under the general exclusion in Section B.1.h and none of the exceptions applies. In brief, the policy plainly identifies the risks that EMC was willing to and did contract to cover, and unfortunately for Michigan Battery, wet rot is not one of those risks. Indeed, this risk was specifically excluded from coverage, and had Michigan Battery desired to obtain coverage, it could have purchased a rider for this specific loss. Consequently, because EMC identified wet rot as a particular type of risk that it was unwilling to insure, Michigan Battery cannot recover under the policy. See *Auto-Owners*, 440 Mich at 567 ("It is impossible to hold an insurance company liable for a risk it did not assume."). And because this exclusion specifically precludes coverage, we need not address how any other exclusion or any other "additional coverage" in the policy applies. See *id*. ("[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims."); *Brown v Farm Bureau Gen Ins Co of Mich*, 273 Mich App 658, 661; 730 NW2d 518 (2007).

Accordingly, we affirm the trial court's grant of summary disposition in favor of EMC. EMC, as the prevailing party, may tax costs pursuant to MCR 7.219.

CAVANAGH, P.J., and FORT HOOD, J., concurred with SAAD, J.

AB PETRO MART, INC v ALI T BEYDOUN INSURANCE AGENCY, INC

Docket No. 327481. Submitted September 7, 2016, at Detroit. Decided September 15, 2016, at 9:05 a.m. Leave to appeal denied 501 Mich 851.

A. B. Petro Mart, Inc., and Aref Bazzi brought an action in the Wayne Circuit Court against Ali T. Beydoun Insurance Agency, Inc., Ali Beydoun, and Prime One Insurance after Prime One denied plaintiffs' claim for loss suffered after one of the gasoline pumps located at Petro Mart's place of business was destroyed. Beydoun and his insurance agency were later dismissed from the proceedings. Plaintiffs moved for summary disposition of their breach of contract claim against Prime One, arguing that the insurance policy's clear and unmistakable language named the gasoline pumps as property covered by the policy. The issue was whether Prime One was liable to either plaintiff for the damage when Petro Mart was the named insured but Bazzi, the sole shareholder in and owner of Petro Mart, owned the pumps. Plaintiffs contended that Prime One was aware that Bazzi owned the pumps named in Petro Mart's policy with Prime One and that Petro Mart had an insurable interest in the pumps despite the fact that it did not own them and was not responsible for repairing them. Plaintiffs further argued that if Petro Mart had no insurable interest the contract was illusory, and alternatively, that Bazzi was entitled to the claim proceeds as a third-party beneficiary to the insurance contract. Prime One argued that there was no issue of genuine material fact that Petro Mart did not have an insurable interest in the gasoline pumps and that a corporation and its shareholders are separate entities so that Bazzi, who was nowhere named in the policy, had no claim under Petro Mart's policy. Finally, Prime One asserted that Bazzi was not a third-party beneficiary of the contract because nothing in the contract indicated that Prime One ever directly promised anything to Bazzi. The trial court, Daniel P. Ryan, J., concluded that neither plaintiff was entitled to recover from Prime One for the damaged gas pump and granted summary disposition under MCR 2.116(I)(2) to Prime One because Prime One was entitled to judgment as a matter of law. Plaintiffs appealed.

The Court of Appeals *held*:

1. Ownership of property is not synonymous with an insurable interest in property. A party may have an insurable interest in property even if the party has no legal interest in the property and is not financially responsible for repairing damage to the property. An insured's pecuniary interest in the insured property may be sufficient to constitute an insurable interest in the property. In this case, Prime One denied Petro Mart's claim because Bazzi, not Petro Mart, owned the damaged gas pump and Bazzi was not the named insured on the policy with Prime One. According to the trial court, Petro Mart could not recover under its insurance contract with Prime One because Petro Mart had no insurable interest in the gas pumps. However, Petro Mart had a pecuniary interest in the operation of the gas pumps because its business depended on the operability of the pumps. Because Petro Mart suffered direct pecuniary damage as a result of the destroyed gas pump, Petro Mart had an insurable interest that should have been covered by the insurance policy it held with Prime One. Therefore, the trial court erred when it held that because Petro Mart did not own the gas pumps used at its gas station, Petro Mart did not have an insurable interest in the pumps.

2. A party may not sue an insurance company for breach of contract unless the party can show that there existed a contract between it and the insurance company. In this case, Bazzi was not the named insured in the policy with Prime One, and there was no evidence that the policy was intended to cover Bazzi's ownership interest in the gas pumps or that Bazzi was an intended third-party beneficiary of Petro Mart's policy for the gas pumps. Rather, Bazzi was only incidentally benefited by Prime One's coverage of the gas pumps. Prime One had never extended to Bazzi a direct promise that indicated an intent that Bazzi would benefit from Petro Mart's insurance coverage on the pumps. Therefore, the trial court did not err by granting summary disposition to Prime One regarding Bazzi's claim against it.

Affirmed in part, reversed in part, and remanded.

INSURANCE — PROPERTY — INSURABLE INTEREST.

Ownership of property is not synonymous with an insurable interest in property; a party may have an insurable interest in property if the loss of or damage to the property would cause the party to suffer a direct and actual pecuniary loss, even when the party has no legal title to the property and is not responsible for repairing any damage caused to the property; an insurable

> interest exists when a party receives any kind of benefit from the property insured or when a party would suffer loss if the property was damaged or destroyed; an insurable interest may take the form of possession, enjoyment, profits of the property, security or lien on the property, and other benefits from or dependent on the property.

Hammoud Dakhlallah & Associates, PLLC (by *Kassem M. Dakhlallah*), for plaintiffs.

Gregory and Meyer, PC (by *Kurt D. Meyer*), for defendant.

Before: CAVANAGH, P.J., and SAAD and FORT HOOD, JJ.

SAAD, J. In this insurance coverage dispute, plaintiffs, A. B. Petro Mart, Inc. (Petro Mart) and Aref Bazzi, appeal the trial court's order that granted summary disposition in favor of defendant Prime One Insurance (Prime One).[1] For the reasons provided below, we affirm in part, reverse in part, and remand.

I. NATURE OF THE CASE

Plaintiffs filed this suit to recover insurance benefits related to the destruction of a gas pump at a gas station Petro Mart operated. There is no question that Petro Mart did not own the gas pumps—Bazzi did. Petro Mart instead operated the pumps in the course of selling gasoline at the gas station. There also is no dispute that Petro Mart insured the gas pumps with Prime One. The trial court granted summary disposition in favor of Prime One with respect to Petro Mart's claim because it determined that Petro Mart did not possess an insurable interest in the gas pumps.

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[1] The other defendants, Ali T. Beydoun Insurance Agency, Inc., and Ali Beydoun, were dismissed earlier in the proceeding and are not part of this appeal.

Pursuant to Michigan law, an insurance contract to protect an insured from loss of property is an aleatory indemnity contract. See *Kingston v Markward & Karafilis, Inc*, 134 Mich App 164, 174; 350 NW2d 842 (1984). And in order to be entitled to indemnity under such an insurance contract, the insured must have an insurable interest in the property. The question posed by this appeal is whether the trial court correctly applied Michigan law to hold that the insured must have a legal interest in or must be financially responsible for any damages to the insured property in order to have an insurable interest in the property.

In Michigan, legal interest is not synonymous with insurable interest because an insured's pecuniary interest in the insured property is sufficient to constitute an insurable interest. And because Petro Mart's ability to operate its gas station was financially affected by the functioning or nonfunctioning of the insured gas pumps, regardless of whether it was responsible for repairing any damage to the pumps, we hold that Petro Mart had an insurable interest in the pumps, and the trial court erred when it ruled otherwise.

II. BASIC FACTS

This dispute arises from an incident in which an automobile ran into and caused the destruction of one of the gas pumps located at the gas station at 3735 East Vernor in Detroit. The crash started a fire and destroyed the pump. Bazzi was the sole shareholder and owner of Petro Mart, and Petro Mart was the entity that operated the gas station. However, the gas pumps themselves were owned by Bazzi. Petro Mart insured the gas pumps by purchasing an insurance policy with Prime One, which provided, among other things, $30,000 in coverage for gas pumps. After the

accident, Petro Mart filed a claim with Prime One. Prime One eventually declined coverage because it asserted that Petro Mart did not have an insurable interest in the gas pumps, as Bazzi—not Petro Mart—owned the pumps.

Plaintiffs sued Prime One for breach of contract because the gas pumps were expressly named and covered under the policy. Plaintiffs moved for summary disposition and argued that the clear and unmistakable language of the policy showed that the gas pumps were indeed covered under the policy. Plaintiffs further maintained that the fact that the policy was in the name of Petro Mart and the fact that Bazzi was the one who owned the pumps was not fatal because Prime One was well aware that Bazzi was the sole owner of Petro Mart and acknowledged this in its own claim file, where it referred to Bazzi as the "insured" many times. Thus, plaintiffs asserted that Prime One should not be allowed to claim that the insured party, Petro Mart, was not covered because it had no insurable interest in the pumps. Plaintiffs further argued that if there was no coverage due to the lack of an insurable interest, then the policy would be illusory because, even though premiums were paid for coverage on the gas pumps, no one could ever recover for any damage to the pumps. Plaintiffs also contended that Bazzi was entitled to the claim proceeds because he was a third-party beneficiary under the insurance contract.

Prime One responded to the motion and argued that there was no genuine issue of material fact that the policy holder, Petro Mart, did not have an insurable interest in the gas pumps. Prime One noted that even if Petro Mart was a closely held corporation with only Bazzi as its owner, the outcome would not change because Michigan law is clear that corporations are

separate entities from their owners or stockholders. Further, Prime One asserted that it was not under any obligation to investigate the interest of the applicant, Petro Mart, in the subject property. Prime One argued that Bazzi cannot be considered a third-party beneficiary to the contract because there is nothing in the policy to demonstrate that Prime One directly promised to give anything to or do anything for Bazzi. Prime One also claimed that the contract was not illusory because had Petro Mart actually owned the property, the policy would have provided coverage.

The trial court noted that there was no dispute that Bazzi owned the pumps and that Petro Mart merely operated them without any leasehold agreement. The court agreed with Prime One's arguments and ruled that Petro Mart had no legal ownership interest in the pumps and no obligation to repair the pumps. According to the court, recovery was precluded because Petro Mart did not suffer a pecuniary loss and therefore did not have an insurable interest in the property. The court further ruled that Bazzi could not recover as a third-party beneficiary because nothing in the policy directly provided any benefit for Bazzi. The trial court also held that the policy was not illusory because "[i]n the event that Petro Mart had actually owned the property and/or had some insurable interest in the property, the Policy would have provided coverage for at least a portion of the loss." Consequently, the trial court denied plaintiffs' motion and instead granted summary disposition in favor of Prime One pursuant to MCR 2.116(I)(2).

III. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v*

Recca, 492 Mich 169, 173; 821 NW2d 520 (2012). Prime One moved for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a complaint and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "Summary disposition pursuant to MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). " 'Summary disposition is properly granted [under MCR 2.116(I)(2)] to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment.' " *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003), quoting *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996) (alteration in original).

Likewise, the interpretation of an insurance contract and whether the named insured has an "insurable interest" are questions of law that we review de novo. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007); *Morrison v Secura Ins*, 286 Mich App 569, 572; 781 NW2d 151 (2009).

IV. ANALYSIS

A. PLAINTIFF BAZZI

Under the clear language of the policy, the only named insured is Petro Mart. While Bazzi signed the insurance application,[2] he is not named anywhere in

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[2] Notably, in the area for "Name Insured" on the application, it only states "A B Petro Mart Inc." Moreover, the fact that Bazzi signed the

the policy itself. Indeed, the policy provides that "A B Petro Mart, Inc." is the sole named insured. Therefore, because Bazzi is not a party to the insurance contract, he cannot maintain a breach of contract claim against Prime One. See *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014) (stating that it is essential to establishing a breach of contract claim that a plaintiff prove that there was a contract between the parties).

Plaintiffs assert that Bazzi nonetheless could have sustained a claim against Prime One because he is a third-party beneficiary of the contract. We disagree. Michigan's third-party beneficiary statute states, in pertinent part, the following:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person. [MCL 600.1405.]

"[N]ot every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise . . . ." *Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002). "Thus, only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor."

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application is not of great significance, as it is well established that corporations can only act through their agents. *Mossman v Millenbach Motor Sales*, 284 Mich 562, 568; 280 NW 50 (1938). We further note that the fact that Bazzi is the sole owner of Petro Mart does not affect our analysis, as corporations and their shareholders are separate entities, "even where one individual owns all the corporation's stock." *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004).

Schmalfeldt v North Pointe Ins Co, 469 Mich 422, 427; 670 NW2d 651 (2003). Accordingly, "[a] person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person." *Id*. at 428 (quotation marks omitted). As already noted, the insurance contract simply does not refer to Bazzi. Hence, with no reference to Bazzi in the contract, it is clear that the contract itself did not provide any basis to conclude that Prime One (the promisor) undertook any promise directly to or for Bazzi. Therefore, as a matter of law, Bazzi is not a third-party beneficiary.

Because Bazzi is neither a party to the contract nor a third-party beneficiary, he cannot maintain his action for breach of contract against Prime One. Accordingly, the trial court correctly granted summary disposition in favor of Prime One against Bazzi.

B. PLAINTIFF PETRO MART

Plaintiffs argue, and we agree, that the trial court erred when it ruled that Prime One had no obligation to pay because the insured, Petro Mart, did not have an insurable interest in the gas pumps.

"[U]nder Michigan law, an insured must have an 'insurable interest' to support the existence of a valid . . . insurance policy." *Allstate Ins Co v State Farm Mut Auto Ins Co*, 230 Mich App 434, 439; 584 NW2d 355 (1998). The reason for this requirement is based on public policy concerns. "Specifically, it arises out of the venerable public policy against 'wager policies'; which, as eloquently explained by Justice COOLEY, are insurance policies in which the insured has no interest, and they are held to be void because such policies present insureds with unacceptable temptation to commit wrongful acts to obtain payment."

Morrison, 286 Mich App at 572, citing *O'Hara v Carpenter*, 23 Mich 410, 416-417 (1871); see also *Crossman v American Ins Co of Newark, NJ*, 198 Mich 304, 308; 164 NW 428 (1917). Therefore, " 'a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge.' " *Morrison*, 286 Mich App at 572, quoting *Agricultural Ins Co v Montague*, 38 Mich 548, 551 (1878).

However, Michigan's common law instructs that an "insurable interest" is not synonymous with "ownership." Instead, an insurable interest can arise from "*any kind of benefit* from the thing so insured or any kind of loss that would be suffered by its damage or destruction." *Morrison*, 286 Mich App at 572-573 (emphasis added); see also *VanReken v Allstate Ins Co*, 150 Mich App 212, 219; 388 NW2d 287 (1986); 3 Couch, Insurance, 3d, § 41:1, p 41-3 (" 'An insurable interest' may be defined as any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage."). Our Supreme Court instructed a hundred years ago that "[an insurable] interest may be derived by possession, enjoyment, or *profits of the property*, security or lien resting upon it, or it may be other certain benefits growing out of or dependent upon it." *Crossman*, 198 Mich at 308-309 (emphasis added).

In dismissing Petro Mart's claim, the trial court principally relied on the fact that Petro Mart did not have either an ownership or leasehold interest in the gas pumps.[3] While it is true that Petro Mart had

[3] The trial court primarily relied on *Secura Ins Co v Pioneer State Mut Ins Co*, 188 Mich App 413; 470 NW2d 415 (1991). In *Secura*, there was a question regarding whether a person who sold a home but still lived in the home after the closing had an insurable interest in the property. The plaintiff insurance company insured the buyers and sought contribution from the seller's insurance company for the loss. The plaintiff argued

neither of these interests and was not responsible for repairing the pumps, these facts, standing alone, do not preclude finding an insurable interest. See *id.*; *Morrison*, 286 Mich App at 572-573. One of the aspects of Petro Mart's business was selling gasoline at the insured's business location. Therefore, it is incontrovertible that Petro Mart had more than an incidental, pecuniary interest in the gas pumps. Petro Mart necessarily received income and profits from the use of the gas pumps, including the one that was destroyed in the accident. As already noted, an insurable interest can be found absent any actual ownership interest if one merely obtains "profits of the property," *Crossman*, 198 Mich at 308-309, or derives "*any kind of benefit* from the thing so insured," *Morrison*, 286 Mich App at 572-573 (emphasis added).

Indeed, the salient inquiry to answer when determining whether an insurable interest exists revolves around whether the insured would suffer a direct, pecuniary loss from the property's destruction. If the answer to the inquiry is "yes," then there is an insurable interest. See *Crossman*, 198 Mich at 308-311, and cases cited therein. Given the circumstances here, we must answer this question in the affirmative. Clearly, Petro Mart would gain some advantage by the continuing existence of the gas pumps and, conversely, would suffer some loss or disadvantage by the destruction of the pumps. Importantly, this is not an instance where

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that the sellers "had an insurable interest either as tenants or as parties to the purchase agreement." *Id*. at 414. Due to the issues raised by the parties, this Court analyzed the matter in the context of whether the sellers maintained an insurable interest in the property based either on a leasehold theory or on a contractual theory. *Id*. at 415. But to read *Secura* as standing for the proposition that these are the *only* avenues for any party to maintain an insurable interest, as the trial court implied, is incorrect. *Secura* simply analyzed the issues as presented and did not limit or alter the existing caselaw on insurable interests.

the loss Petro Mart suffered was "indirect or sentimental"; instead, because Petro Mart generated income from the sale of gasoline through the use of the pumps, the loss of one of those gas pumps resulted in a "direct and actual" pecuniary loss. *Id*. at 309 (quotation marks and citation omitted). The fact that Petro Mart was not financially responsible for repairing any damage to the pumps is not controlling—it still had a pecuniary interest because of the commercial business it operated. We note that while any lost business profits appear to not be recoverable under the insurance policy, this fact is immaterial in determining whether Petro Mart had an insurable interest in the gas pumps themselves. Therefore, because Petro Mart had a clear, substantial, and direct pecuniary interest in the pumps, we hold that it had an insurable interest in the damaged gas pump. Our finding is in keeping with the longstanding public policy underlying the insurable-interest doctrine. Accordingly, the trial court erred by dismissing Petro Mart's breach of contract claim against Prime One.[4]

Plaintiffs also argue that Petro Mart is entitled to receive 12% penalty interest under MCL 500.2006(1) of the Uniform Trade Practices Act, MCL 500.2001 *et seq*., for Prime One's alleged unreasonable delay in paying on the claim. But because the trial court never addressed this issue, although it may do so on remand, we decline to address it here for the first time. See *Autodie, LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014) (declining to address an unpreserved issue).

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[4] Because we hold that Petro Mart had an insurable interest in the gas pumps, plaintiffs' alternate contention that the insurance contract was illusory is rendered moot, and we need not address it. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

We affirm the grant of summary disposition in favor of Prime One against plaintiff Bazzi, but we reverse the grant of summary disposition in favor of Prime One against plaintiff Petro Mart because Petro Mart had an insurable interest in the gas pumps. We remand for proceedings not inconsistent with this opinion. We do not retain jurisdiction. No costs are taxable, as neither side prevailed in full. MCR 7.219.

CAVANAGH, P.J., and FORT HOOD, J., concurred with SAAD, J.

DENTON v DEPARTMENT OF TREASURY

Docket No. 327406. Submitted July 13, 2016, at Lansing. Decided September 20, 2016, at 9:00 a.m.

Leet and Patsy Denton brought an action in the Small Claims Division of the Michigan Tax Tribunal (MTT), appealing the Department of Treasury's denial of their request for a waiver of interest on a tax set forth in a corrected tax bill issued after their principal residence exemption was denied. Respondent asserted that the request was supported by insufficient documentation to show that an assessor's error occurred. In seeking the interest waiver, petitioners filed the required tax assessor's affidavit and attached to it a 2007 Florida Other County/State Benefit Cancellation Form. The form gave notice of petitioners' homestead exemption application in Florida, requested that the appropriate assessor in Michigan remove residency-based exemptions or benefits for petitioners' Grosse Pointe Shores home for the 2007 tax year, and was signed in December 2007 by the Michigan tax assessor for Lake Township. The assessor averred that he thought he took the appropriate steps to adjust the village records to rescind the principal residence exemption and had not asked petitioners to complete Michigan Department of Treasury Form 2602 because he already had the Florida certification, which included a written request to rescind their principal residence exemption. The MTT held that an assessor did not have authority to rescind a principal residence exemption when Form 2602 was not filed by the property owner and that respondent properly exercised its discretion in determining that the assessor did not fail to rescind the exemption for the tax years at issue as no proper rescission form was filed.

The Court of Appeals *held*:

MCL 211.7cc(8) of the General Property Tax Act (GPTA), MCL 211.1 *et seq*., states that respondent may waive interest on a tax set forth in a corrected tax bill if the assessor of the local taxing unit files an affidavit stating that the tax is the result of the assessor's failure to rescind the principal residence exemption after the owner requested in writing that the exemption be rescinded. The gravamen of this case was the meaning of the

expression “in writing” as used in MCL 211.7cc(8). The term “in writing” was not defined in the GPTA, so resorting to a dictionary was appropriate. “Writing” is broadly defined as letters or characters that serve as visible signs of ideas, words, or symbols, and as a letter, note, or notice used to communicate or record. Notably, “in writing” is used twice in the statute, and “rescission form” is used three times, all in relation to the principal residence exemption. Given the use of different language, the Legislature clearly did not intend for “in writing” to be synonymous with filing the rescission form prescribed by respondent, i.e., Form 2602. The MTT also erred by concluding that respondent did not abuse its discretion in denying petitioners’ waiver request. Respondent’s error of law in the interpretation of the statute was necessarily an abuse of discretion. The case had to be remanded to respondent for respondent to process petitioners’ interest waiver request and determine whether the form provided to the assessor in 2007 was an adequate written request to rescind the exemption.

Reversed and remanded.

TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL RESIDENCE EXEMPTION — INTEREST WAIVER REQUEST — ASSESSOR’S ERROR — WORDS AND PHRASES — IN WRITING.

The phrase “requested in writing” as used in MCL 211.7cc(8) of the General Property Tax Act, MCL 211.1 *et seq*., is not synonymous with filing the rescission form prescribed by the Michigan Department of Treasury, that is, Form 2602; the department cannot reject an interest waiver request on the basis that Form 2602 was not filed by the property owner.

Howard & Howard Attorneys PLLC (by *Bradley J. Knickerbocker*) for petitioners.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Adam P. Sadowski*, Assistant Attorney General, for respondent.

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

STEPHENS, P.J. Petitioners appeal as of right the final opinion and judgment of the Michigan Tax Tribunal

(MTT) denying their request to waive the interest assessed against them on a corrected tax bill issued after respondent determined that petitioners improperly claimed a principal residence exemption (PRE)[1] for tax years 2010 through 2013. For the reasons discussed in this opinion, we reverse the MTT's judgment and remand this case to respondent for further proceedings.

I. BACKGROUND

Petitioners, Leet and Patsy Denton, once resided in Grosse Pointe Shores, Michigan. At some point, petitioners moved to Florida, and they applied for a homestead exemption there in 2007. Petitioners were required to submit an "Other County/State Benefit Cancellation Form" to a Florida county property appraiser to show that the PRE for their Michigan home was cancelled. The form gave notice of petitioners' homestead exemption application in Florida and requested that the appropriate assessor in Michigan remove "residency based" exemptions or benefits for the Grosse Pointe Shores home for the 2007 tax year.

[1] "A principal residence is exempt from the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the revised school code, 1976 PA 451, MCL 380.1211, if an owner of that principal residence claims an exemption as provided in this section." MCL 211.7cc(1). To qualify for the principal residence exemption in Michigan, a property owner must file an affidavit averring that the property is owned and occupied as a principal residence on the date the affidavit is signed. MCL 211.7cc(2). The term "principal residence" is statutorily defined as "the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established." MCL 211.7dd(c). "The department of treasury shall determine if the property is the principal residence of the owner claiming the exemption." MCL 211.7cc(8).

In December 2007, the Michigan tax assessor for Lake Township signed the form without specifying what benefits or exemptions were cancelled. In any event, the form was accepted by the county office in Florida, and petitioners were thereafter granted a Florida homestead exemption.

The Michigan assessor did not remove the PRE for petitioners' Grosse Pointe Shores home, however, and in September 2013, after an audit, respondent informed petitioners that it was denying PRE exemptions for the years 2010 through 2013 because the property was not being occupied as a principal residence.[2] Petitioners were assessed back taxes and interest in the matter, which apparently they paid. In February 2013, the local tax assessor in Michigan,[3] at petitioners' behest, filed Department of Treasury Form 4813, titled "Assessor's Affidavit to Waive Principal Residence Exemption (PRE) Denial Interest," and requested that respondent waive $18,521.49 in interest.[4] In that form, the assessor identified "an assessor's failure to rescind the exemption after the owner requested, in writing, that the exemption be rescinded"

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[2] At that time, respondent was authorized only to "review the validity of exemptions for the current calendar year and for the 3 immediately preceding calendar years." MCL 211.7cc(8), as amended by 2010 PA 17. MCL 211.7cc was amended, effective October 22, 2013, to allow respondent to deny an improperly claimed exemption "before the 3 immediately preceding tax years . . . ." MCL 211.7cc(21), as amended by 2013 PA 140. Unless otherwise noted, we apply the version of the statute in effect for the tax years involved. See, e.g., *Uniroyal, Inc v City of Allen Park*, 138 Mich App 156, 162; 360 NW2d 156 (1984) ("[T]hese amendments were not in effect for the tax years involved in the instant case and we thus do not consider the effect of such legislation . . . .").

[3] The assessor who signed the Florida form in 2007 yielded the office to a successor.

[4] The assessor filed an additional Form 4813 in February 2014 to correct the amount of interest that respondent was being asked to waive from $18,521.49 to $22,651.64.

as the error occasioning the corrected tax bill. The form provided the following instruction for when that error was asserted:

> If the corrected or supplemental tax bill(s) was a result of an assessor's failure to rescind the exemption after the owner requested in writing that the exemption be rescinded, the error must be thoroughly detailed in this section. Copies of an appropriately date-stamped Request to Rescind Homeowner's Principal Residence Exemption, Form 2602, *or other similar request to rescind the exemption* must be submitted with this Affidavit. [Emphasis added.]

Attached to the tax assessor's affidavit was the 2007 Florida "Other County/State Benefit Cancellation Form."

In a letter dated May 22, 2014, respondent informed petitioners that their interest waiver request was denied because "insufficient documentation was submitted to show that an assessor's error occurred as required by MCL 211.7cc(8)." In June 2014, petitioners filed a petition in the Small Claims Division of the MTT, appealing respondent's decision and asserting that respondent was provided with all the necessary information and that there was "no doubt that a written request to rescind the PRE was made by the Petitioners in 2007 as required by MCL 211.7cc(8)." Attached to the petition was an affidavit from the tax assessor who in 2007 received the Florida homestead exemption form from petitioners. The assessor averred that he "thought [he] had taken the appropriate steps to adjust the Village records so as to rescind the Personal [sic] Residence Exemption" on petitioners' Grosse Pointe Shores property near the time he received the 2007 Florida form. The assessor also averred that he "did not ask (or suggest) that [petitioners] complete a Michigan [Department of] Treasury

form 2602 as [he] already had the Florida Certification which included a written request to rescind their Personal Residence Exemption." In its answer, respondent argued that petitioners were required to seek rescission of the PRE by filing Form 2602 and that "[a]n assessor does not have the authority to rescind an exemption where a request to rescind the exemption has not been filed." Respondent thus maintained that no assessor error had occurred under MCL 211.7cc(8).

Following a hearing on January 14, 2015, an MTT hearing referee issued a proposed opinion and judgment. The referee agreed with respondent that an assessor did not have authority to rescind a PRE when Form 2602 was not filed. It noted that MCL 211.7cc(8) allows for requests to be made "in writing" but concluded that respondent properly exercised its discretion under that subsection in denying the request.

Petitioners filed exceptions to the proposed opinion and judgment and argued that the referee's reading of MCL 211.7cc(8) would render the statute meaningless as applied to interest waivers given that MCL 211.7cc(15) precludes the assessment of interest when Form 2602 is timely filed and the assessor fails to remove the PRE. Petitioners contended that respondent's position—that respondent was prevented from considering a request to rescind when Form 2602 was not filed—constituted a failure to exercise any discretion.

In its final opinion and judgment, the MTT rejected petitioners' argument, noting that MCL 211.7cc(8) remained applicable to untimely filed rescission forms. The MTT also rejected petitioners' argument that respondent abused its discretion by failing to exercise any discretion in the matter.

Petitioners sought reconsideration on April 3, 2015. Again, petitioners argued that the MTT incorrectly interpreted MCL 211.7cc(8). In denying petitioners' motion, the MTT clarified that its final opinion "held that a waiver request based on an assessor's failure to rescind is limited to requests resulting from the filing of a proper rescission form." It also stated that respondent "properly exercised its discretion in determining that the assessor did not fail to rescind the PRE for the tax years at issue as no proper rescission form had been filed."

II. STANDARD OF REVIEW

"In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28. "[W]hen statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010).

"While we recognize that tax exemptions are strictly construed against the taxpayer because exemptions represent the antithesis of tax equality, we interpret statutory language according to common and approved usage, unless such construction is inconsistent with the manifest intent of the Legislature." *Elias Bros Restaurants, Inc v Dep't of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv*, 485 Mich at 76. "The words contained in a statute provide the most reliable evidence of the Legislature's intent." *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 345; 745 NW2d 137

(2007). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). However, "[t]ax laws generally will not be extended in scope by implication or forced construction, and when there is doubt, tax laws are to be construed against the government." *LaBelle Mgt, Inc v Dep't of Treasury*, 315 Mich App 23, 29; 888 NW2d 260 (2016).

III. ANALYSIS

Michigan's PRE is governed by MCL 211.7cc and MCL 211.7dd of the General Property Tax Act (GPTA), MCL 211.1 *et seq*. *EldenBrady v Albion*, 294 Mich App 251, 256; 816 NW2d 449 (2011). While the factual backdrop here is one of a rescission of a PRE, the gravamen of this case is the meaning of the expression "in writing" as used in MCL 211.7cc(8):

> The department of treasury may waive interest on any tax set forth in a corrected or supplemental tax bill for the current tax year and the immediately preceding 3 tax years if the assessor of the local tax collecting unit files with the department of treasury a sworn affidavit in a form prescribed by the department of treasury stating that the tax set forth in the corrected or supplemental tax bill is a result of the assessor's classification error or other error or the assessor's failure to rescind the exemption after the owner requested *in writing* that the exemption be rescinded. [Emphasis added.]

Respondent contends that "in writing" means, specifically, to use Michigan Department of Treasury Form 2602. Petitioners contend that "in writing" means a written request. The MTT agreed with respondent. We conclude that "in writing" is not synonymous with

filing Form 2602 and that the MTT committed an error of law in its interpretation of the expression in MCL 211.7cc(8).

In support of its interpretation, respondent relies on MCL 211.7cc(5). That subsection provides, in pertinent part:

> Except as otherwise provided in this subsection, not more than 90 days after exempted property is no longer used as a principal residence by the owner claiming an exemption, that owner shall rescind the claim of exemption by filing with the local tax collecting unit *a rescission form prescribed by the department of treasury*. [MCL 211.7cc(5) (emphasis added).]

It is undisputed that Michigan Department of Treasury Form 2602 is the rescission form prescribed by respondent in MCL 211.7cc(5). Respondent reasons that when MCL 211.7cc(8) states that "[e]xcept as otherwise provided in subsection (5)," the statute means that MCL 211.7cc(8) gives respondent the discretion to waive interest on a corrected tax bill subject to the specific requirements of MCL 211.7cc(5).[5] Respondent concludes that because MCL 211.7cc(5) clearly refers to a rescission form, and MCL 211.7cc(8)

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[5] This portion of MCL 211.7cc(8) provides as follows:

> The department of treasury may review the validity of exemptions for the current calendar year and for the 3 immediately preceding calendar years. *Except as otherwise provided in subsection (5)*, if the department of treasury determines that the property is not the principal residence of the owner claiming the exemption, the department shall send a notice of that determination to the local tax collecting unit and to the owner of the property claiming the exemption, indicating that the claim for exemption is denied, stating the reason for the denial, and advising the owner claiming the exemption of the right to appeal the determination to the department of treasury and what those rights of appeal are. [MCL 211.7cc(8) (emphasis added).]

refers to MCL 211.7cc(5), the filing of Form 2602 is the request "in writing" to be made by petitioners as a prerequisite to respondent exercising its discretion to waive the interest on a corrected tax bill.

"In writing" is not defined within the GPTA. When a statute does not define a word, we presume the Legislature intended the word to have its plain and ordinary meaning, which we may discern by consulting a dictionary. *Autodie LLC v Grand Rapids*, 305 Mich App 423, 434; 852 NW2d 650 (2014). In relevant part, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "writing" as "letters or characters that serve as visible signs of ideas, words, or symbols" and "a letter, note, or notice used to communicate or record." "When the Legislature uses different words, the words are generally intended to connote different meanings." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). "In writing" is used twice in MCL 211.7cc in connection with the PRE. See MCL 211.7cc(8) and (24). "Rescission form" is used three times in the statute, also in regard to the PRE. See MCL 211.7cc(5), (15), and (18). The Legislature's use of "rescission form" elsewhere in the statute shows that when it wishes to condition the effect of a statutory provision on the filing of a prescribed form, it does so in plain words.[6] Therefore, had the Legislature wanted to restrict the discretionary waiver of interest to when an owner has used Form 2602 to request rescission of the PRE, MCL 211.7cc(8) would refer to the assessor's failure to rescind an exemption upon the filing of "a rescission form prescribed by the department" instead of simply a "writing." That the Legislature chose not to do so evinces its intent for

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[6] See, e.g., MCL 211.7cc(5) ("conditional rescission form").

"writing" to mean something broader than a specific rescission form. See *US Fidelity*, 484 Mich at 14. We also cannot overlook the fact that respondent's Form 4813 allows a tax assessor requesting an interest waiver to attach to his or her affidavit either Form 2602 *or other similar request to rescind the exemption*. Given the broad definitions of "writing" and explicit reference to "rescission form" elsewhere in the statute, we conclude that under MCL 211.7cc(8), "in writing" clearly encompasses more than Form 2602. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.").

We also consider "the context in which the words are used," *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002), as well as the placement of words in the statutory scheme, *Ketchum Estate v Dep't of Health & Human Servs*, 314 Mich App 485, 500; 887 NW2d 226 (2016). "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. Thus, the various words and clauses of a statute will not be divorced from those words preceding and following." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005) (quotation marks and citations omitted). When read in its entirety, MCL 211.7cc(8) clearly places the responsibility to file a form prescribed by respondent on the tax assessor and the responsibility to request in writing that the exemption be rescinded on the property owner. The Legislature could have easily required that the property owner also use a form prescribed by respondent to request that the exemption be rescinded, but it

did not. We do not see that intent in MCL 211.7cc(8). The MTT's holding "that a waiver request based on an assessor's failure to rescind is limited to requests resulting from the filing of a proper rescission form" is contradicted by the plain language of MCL 211.7cc(8) and by the Legislature's use of "rescission form" elsewhere in the statute.

This interpretation is not inconsistent with the requirement of MCL 211.7cc(5) that an owner file Form 2602 within 90 days of the subject property's loss of its PRE eligibility. Clearly, the Legislature wanted an owner to use Form 2602 when a PRE was no longer valid, having authorized a $200 penalty when that form is not filed as required. MCL 211.7cc(5). But to hold that the Legislature intended to preclude assessors from rescinding a PRE when so requested by an owner simply because he or she did not use the preferred form would be to overextend the specificity set forth in MCL 211.7cc(5).

Petitioners also argue that the MTT erred by concluding that respondent did not abuse its discretion in denying their waiver request. We agree. An error of law necessarily constitutes an abuse of discretion. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009). The decision of the MTT was based on an erroneous determination that, as a matter of law, it could not properly process an interest waiver request when Form 2602 was not filed. As discussed earlier, this was an incorrect interpretation of the pertinent statute. Accordingly, respondent abused its discretion under MCL 211.7cc(8). See *id*. at 170. The MTT erred by concluding otherwise.

For these reasons, we reverse the MTT's judgment and remand this case to respondent for it to process

petitioners' interest waiver request.[7] We remand this case with the expectation that respondent will conscientiously fulfill the duty the Legislature entrusted to it to exercise discretion in the matter.

Reversed and remanded. We do not retain jurisdiction.

SERVITTO and GLEICHER, JJ., concurred with STEPHENS, P.J.

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[7] We pass no judgment on whether the form petitioners provided to the assessor in 2007 constitutes a written request for rescission of the PRE. As petitioners conceded, that is for respondent yet to determine.

ALLY FINANCIAL, INC v STATE TREASURER

SANTANDER CONSUMER USA, INC v STATE TREASURER

Docket Nos. 327815, 327832, and 327833. Submitted September 13, 2016, at Lansing. Decided September 20, 2016, at 9:05 a.m. Leave to appeal sought.

In Docket No. 327815, Ally Financial, Inc., brought an action in the Court of Claims against the State Treasurer, the State of Michigan, and the Department of Treasury, alleging that it was entitled to a bad-debt tax credit under MCL 205.54i after purchasers of motor vehicles had defaulted on their installment contracts, Ally had repossessed and sold the vehicles pursuant to its right to repossess the collateral and enforce the debt, and Ally had claimed any remaining unpaid balances on the contracts as bad debts under 26 USC 166. The court, MICHAEL J. TALBOT, C.J., granted defendants summary disposition under MCR 2.116(C)(10), determining that Ally was not entitled to a bad-debt tax credit under MCL 205.54i. Ally appealed.

In Docket Nos. 327832 and 327833, Santander Consumer USA, Inc., brought two separate actions in the Court of Claims against the State Treasurer, the State of Michigan, and the Department of Treasury, also alleging that it was entitled to bad-debt tax credits under MCL 205.54i after claiming unpaid balances on installment contracts as bad debts under 26 USC 166. The court, MICHAEL J. TALBOT, C.J., entered separate orders granting defendants summary disposition under MCR 2.116(C)(8) and (10), determining that Santander was not entitled to a bad-debt tax credit under MCL 205.54i. Santander appealed. The Court of Appeals consolidated the appeals in Docket Nos. 327832 and 327833 with the appeal in Docket No. 327815.

The Court of Appeals *held*:

1. MCL 205.54i(3) provides that after September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met: (a) no deduction or

refund was previously claimed or allowed on any portion of the account receivable, and (b) the account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009. The plain language of MCL 205.54i(3) creates a condition precedent to a tax refund: a taxpayer seeking a refund must maintain a written election designating which party may claim the deduction. Ally was not entitled to a refund because there were no written elections designating which party may claim a deduction. The language of Ally's written election forms applied to "[a]ccounts currently existing or created in the future," but the forms were signed and dated after the date on which Ally wrote off the bad debt for federal income tax purposes. Because this language was unambiguous, the forms were not applicable to the already written-off loans. The Court of Claims did not err when it found that Ally's written elections did not satisfy the requirements of the bad-debt statute.

2. MCL 205.54i(4) provides that any claim for a bad-debt deduction under MCL 205.54i shall be supported by that evidence required by the department; the department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to MCL 205.54i and shall ensure that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt. The phrase "supported by that evidence required by the department" granted defendants the authority to determine the evidence necessary to support the refund. Defendants were permitted to limit a taxpayer's ability to prove its right to a refund by requiring that the taxpayer submit RD-108 forms (Application for Michigan Title & Registration–Statement of Vehicle Sale) to the exclusion of any other method of proof under MCL 205.54i(4). Defendants were not obligated to promulgate a rule that a taxpayer submit an RD-108 form to demonstrate payment of sales tax under the Administrative Procedures Act, MCL 24.201 *et seq*., because the Department was exercising its discretionary authority, which was not subject to formal rulemaking, and there was no evidence that the Department lacked a rational basis for its policy. Therefore, the Court of Claims properly ruled that both plaintiffs failed to demonstrate a right to a refund or an exemption because both plaintiffs failed to submit proper documentation that the sales taxes had been paid in RD-108 forms.

3. MCL 205.54i(1)(a) defines "bad debt" as any portion of a debt that is related to a sale at retail taxable under the General

Sales Tax Act, MCL 205.51 *et seq*., for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to 26 USC 166; a bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property. In these cases, defendants considered all repossessed property to be excluded as bad debt. Defendants' interpretation was consistent with the plain and unambiguous language of the bad-debt statute stating that "a bad debt shall not include . . . repossessed property." Therefore, bad debt did not include repossessed property under MCL 205.54i(1)(a), and the Court of Claims did not err by affording defendants consideration when interpreting the bad-debt statute.

Affirmed.

1. TAXATION — GENERAL SALES TAX ACT — BAD-DEBT STATUTE — WRITTEN ELECTION FORMS.

MCL 205.54i(3) provides that after September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met: (a) no deduction or refund was previously claimed or allowed on any portion of the account receivable, and (b) the account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009; the plain language of MCL 205.54i(3) creates a condition precedent to a tax refund: a taxpayer seeking a refund must maintain a written election designating which party may claim the deduction.

2. TAXATION — GENERAL SALES TAX ACT — BAD-DEBT STATUTE — EVIDENCE REQUIRED TO SUPPORT A CLAIM FOR DEDUCTION.

MCL 205.54i(4) provides that any claim for a bad-debt deduction under MCL 205.54i shall be supported by that evidence required by the Department of Treasury; the department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to MCL 205.54i and shall ensure that the deduction on any bad debt does not result in

the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt; the department has the authority to determine the evidence necessary to support the refund; the department may limit a taxpayer's ability to prove its right to a refund by requiring the taxpayer to submit RD-108 forms to the exclusion of any other method of proof under MCL 205.54i(4).

3. TAXATION — GENERAL SALES TAX ACT — BAD-DEBT STATUTE — DEFINITION OF BAD DEBT — REPOSSESSED PROPERTY.

MCL 205.54i(1)(a) defines bad debt; for purposes of the exemption from sales tax, a bad debt does not include repossessed property.

Bodman PLC (by *Joseph J. Shannon*) and *Akerman LLP* (by *Peter O. Larsen* and *Brian R. Harris*) for Ally Financial, Inc.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Emily C. Zillgitt*, Assistant Attorney General, for the State Treasurer, the State of Michigan, and the Department of Treasury in Docket No. 327815.

Akerman LLP (by *Steven L. Cottrell*, *Michael J. Bowen*, and *Peter O. Larsen*) for Santander Consumer USA, Inc.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jessica A. McGivney*, Assistant Attorney General, for the State Treasurer, the State of Michigan, and the Department of Treasury in Docket Nos. 327832 and 327833.

Before: JANSEN, P.J., and K. F. KELLY and O'BRIEN, JJ.

PER CURIAM. In Docket No. 327815, plaintiff, Ally Financial, Inc. (Ally), appeals as of right an order

granting defendants, the State Treasurer, the State of Michigan, and the Department of Treasury (the Department), summary disposition pursuant to MCR 2.116(C)(10) and determining that there was no genuine issue of material fact that Ally was not entitled to a "bad debt" tax credit under MCL 205.54i. In Docket Nos. 327832 and 327833, plaintiff, Santander Consumer USA, Inc. (Santander), appeals as of right two separate, though nearly identical, orders granting the Department summary disposition pursuant to MCR 2.116(C)(8) and (10), determining that Santander was likewise not entitled to a "bad debt" tax credit under MCL 205.54i. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs are financing companies that financed the purchase of motor vehicles from various retailers (dealerships) around the state. Under the retail installment contracts, car purchasers agreed to pay the entire amount financed, including sales tax, over a period of time. The dealerships assigned all their rights under the installment contracts to plaintiffs, which included the right to enforce the debt and repossess collateral. In exchange, plaintiffs paid the retailers the entire amount financed under the installment contracts, including the portion of the financed sales tax. The dealerships then remitted the sales tax due to the state. However, some purchasers would default on their retail installment contracts, meaning that they did not repay the full amount of the purchase price or sales tax. In some instances, plaintiffs repossessed the vehicles and sold them, applying the sale proceeds to the remainder of the purchase price and sales tax. Still, there were times when the contracts had unpaid

balances even after the sale. Once plaintiffs determined such installment contracts worthless, they claimed the remaining balances as "bad debts" under § 166 of the Internal Revenue Code, 26 USC 166, on their federal tax returns.

Plaintiffs sought a sales tax refund from the Department premised on the bad debts and filed suit after the Department denied the refunds. The Department sought summary disposition in all three cases. It noted that claiming a debt as a bad debt under § 166 of the Internal Revenue Code is not the sole determining factor for whether a claimant is entitled to a bad-debt deduction under MCL 205.54i; rather, an entity claiming a refund must satisfy the specific requirements set forth in MCL 205.54i. The Department denied the refunds because plaintiffs had included repossessed property in their respective claims, and repossessed property was specifically excluded under MCL 205.54i(1)(a), *DaimlerChrysler Servs of North America, LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 288347), and Revenue Admin Bull (RAB) 1989-61. Additionally, the Department maintained that plaintiffs failed to submit proper documentation that the sales taxes had been paid in RD-108 forms (Application for Michigan Title & Registration–Statement of Vehicle Sale). Finally, specifically as to Ally, the Department argued that Ally's election forms were not sufficient to determine whether Ally or the dealerships were entitled to the refund. The Department noted that under MCL 205.54i, either a retailer *or* a lender could seek a refund for sales tax on bad debts, but that there had to be a clear election between the retailer and the lender as to who would be entitled to pursue the refund. The Department argued that although Ally had recently provided several documents purporting to

be election agreements with retailers, those documents were signed and dated *after* the date Ally wrote off the bad debt for federal income tax purposes. Because the election forms applied only to "[a]ccounts *currently* existing or created in the *future*," they were not applicable to the already written-off loans. (Emphasis added.) Moreover, the Department argued that Ally could not simply rely on the written assignment of retail installment contracts between the retailers and Ally.

The Court of Claims entered three separate orders granting the Department summary disposition. In the Ally case, summary disposition was granted pursuant to MCR 2.116(C)(10), and in the Santander cases, summary disposition was granted pursuant to both MCR 2.116(C)(8) and (10).

The Court of Claims first addressed whether Ally's written elections with the retailers satisfied the statute and concluded that they did not because they applied only to "currently existing" loans and, therefore, did not cover the accounts for which Ally sought a deduction. The Court of Claims then went on to find that the Department could require a claimant to submit an RD-108 form when the Legislature had empowered the Department to determine what evidence it needed. Finally, while recognizing it as a nonbinding case, the Court of Claims cited and relied on the *DaimlerChrysler* case when it concluded that repossessed property was excluded as bad debt.

II. STANDARDS OF REVIEW

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo on appeal. *Urbain v Beierling*, 301 Mich App 114, 121; 835 NW2d 455 (2013).

> In evaluating a motion for summary disposition brought under Subrule (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition is properly granted if the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75; 854 NW2d 521 (2014) (citations omitted).]

Additionally, in the Santander cases, the trial court granted the Department summary disposition pursuant to MCR 2.116(C)(8). Unlike a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim, "[a] motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001) (citations omitted).

This case also involves statutory interpretation. "Statutory interpretation is a question of law that we review de novo." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604-605; 886 NW2d 135 (2016).

Likewise, in Ally's case, contract interpretation presents a question of law, which requires review de novo. *White v Taylor Distrib Co, Inc*, 289 Mich App 731, 734; 798 NW2d 354 (2010).

III. THE BAD-DEBT STATUTE

The facts of the cases are not in issue or disputed. At issue is the Court of Claims' interpretation of Michigan's "bad debt" tax credit provision. MCL 205.54i provides, in relevant part:

(1) As used in this section:

(a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.

(b) Except as provided in subdivision (c), "lender" includes any of the following:

(*i*) Any person who holds or has held an account receivable which that person purchased directly from a taxpayer who reported the tax.

(*ii*) Any person who holds or has held an account receivable pursuant to that person's contract directly with the taxpayer who reported the tax.

* * *

(e) "Taxpayer" means a person that has remitted sales tax directly to the department on the specific sales at retail transaction for which the bad debt is recognized for federal income tax purposes or, after September 30, 2009, a lender holding the account receivable for which the bad debt is recognized, or would be recognized if the claimant were a corporation, for federal income tax purposes.

(2) In computing the amount of tax levied under this act for any month, a taxpayer may deduct the amount of bad debts from his or her gross proceeds used for the computation of the tax. The amount of gross proceeds deducted must be charged off as uncollectible on the books and

records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectible in the claimant's books and records and must be eligible to be deducted for federal income tax purposes. For purposes of this section, a claimant who is not required to file a federal income tax return may deduct a bad debt on a return filed for the period in which the bad debt becomes worthless and is written off as uncollectible in the claimant's books and records and would be eligible for a bad debt deduction for federal income tax purposes if the claimant was required to file a federal income tax return. If a consumer or other person pays all or part of a bad debt with respect to which a taxpayer claimed a deduction under this section, the taxpayer is liable for the amount of taxes deducted in connection with that portion of the debt for which payment is received and shall remit these taxes in his or her next payment to the department. Any payments made on a bad debt shall be applied proportionally first to the taxable price of the property and the tax on the property and second to any interest, service, or other charge.

(3) After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:

(a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.

(b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

(4) Any claim for a bad debt deduction under this section shall be supported by that evidence required by the department. The department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to this section and shall ensure that the deduction on any bad debt does

> not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt.

The issues on appeal center on three primary considerations: (1) whether Ally's election forms constitute "a written election designating which party may claim the deduction" for purposes of MCL 205.54i(3); (2) whether the Department may limit a taxpayer's ability to prove its right to a refund by requiring the taxpayer to submit RD-108 documents to the exclusion of any other method of proof under MCL 205.54i(4); and (3) whether "bad debt" includes repossessed property under MCL 205.54i(1)(a).

IV. ALLY'S WRITTEN ELECTION FORMS

Ally argues that the trial court erred when it concluded that Ally's written elections did not satisfy the requirements of the bad-debt statute. We disagree.

Relevant to this issue, MCL 205.54i(3) provides:

> After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:
>
> (a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.
>
> (b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

The plain language of the statute requires that a taxpayer seeking a refund maintain a written election designating which party may claim the deduction. Our Court has recently admonished:

> The proper role of the judiciary is to interpret and not write the law . . . . Accordingly, this Court enforces a statute as written if the statutory language is unambiguous. While a term must be applied as expressly defined within a given statute, undefined words are to be given their plain and ordinary meaning, taking into account the context in which the words are used. We may consult a dictionary to ascertain common and ordinary meanings. This Court must avoid an interpretation that would render any part of a statute surplusage or nugatory. [*Williams v Kennedy*, 316 Mich App 612, 616; 891 NW2d 907 (2016) (quotation marks, citations, and brackets omitted).]

The statutory language creates a condition precedent to a tax refund. Specifically, "*if* a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid . . . ." MCL 205.54i(3) (emphasis added). Our Court has noted: "The Legislature's use of the word 'if' at the start of the subsection and the relevant clause is critical. *The Random House Webster's College Dictionary* (2001) offers several definitions of 'if,' the more pertinent being: '1. in case that; granting or supposing that; on condition that[.]' " *In re Casey Estate*, 306 Mich App 252, 260; 856 NW2d 556 (2014). Therefore, in this case, in the absence of a written election designating which party may claim a deduction, there is no entitlement to a refund.

To satisfy this requirement, Ally and the dealerships entered into two similar written elections. The first provided:

> Entitlement to Tax Refund or Deduction on Accounts Under MCL 205.54i. The Retailer and the Lender agree that the Lender is the party entitled to claim any potential sales tax refunds or deductions under MCL 205.54i as a

> result of bad debt losses charged off after September 30, 2009, on any and all Accounts currently existing or created in the future which have been assigned from the Retailer to the Lender. The Retailer agrees that it has not and will not claim a deduction or refund under MCL 205.54i with respect to any Accounts currently existing or created in the future and hereby relinquishes to the Lender all rights to the Accounts and all rights to claim such deductions or refunds.

The second provided:

> Entitlement to Tax Refund or Deduction on Accounts Under MCL 205.54i. The Retailer and the Creditor agree and elect that the Creditor is the party entitled to claim any potential sales tax refunds or deductions under MCL 205.54i as a result of bad debt losses charged off after September 30, 2009, on any and all Accounts currently existing or created in the future which have been funded by the Creditor and assigned to the Creditor by the Retailer. The Retailer agrees that it has not and will not claim a deduction or refund under MCL 205.54i with respect to any Accounts currently existing or created in the future which have been funded by the Creditor and assigned to the Creditor by the Retailer and hereby relinquishes to the Creditor all rights to the Accounts currently existing or created in the future which have been funded by the Creditor and assigned to the Creditor by the Retailer.

Just as the language in the bad-debt statute is clear, the language of the parties' later-drafted written election forms is equally clear and applies to "[a]ccounts currently existing or created in the future." We reject Ally's request to look beyond the plain language of the forms and consider the relevant surrounding circumstances. Because an "unambiguous contractual provision is reflective of the parties' intent as a matter of law," *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 111; 812 NW2d 799

(2011) (citation and quotation marks omitted), extrinsic evidence of the parties' intent may be considered only if the language is ambiguous, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470; 663 NW2d 447 (2003). "A contract is said to be ambiguous when its words may reasonably be understood in different ways." *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999) (citation and quotation marks omitted). The forms were not ambiguous.

> [W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not contrary to public policy. A contract must be interpreted according to its plain and ordinary meaning.
>
>> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning.
>
> [*Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership (On Remand)*, 300 Mich App 361, 386; 835 NW2d 593 (2013) (quotation marks and citations omitted).]

The Court of Claims aptly noted: "Plaintiff's interpretation [of its election agreements] gives no meaning to the phrase 'currently existing' in the election agreements. The sheer repetition of the phrase three times in a single paragraph in the 'Creditor' version of the agreement, including twice within a single sentence,

indicates that the parties intended the phrase to have some significance."[1] "Just as [c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory, courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468 (quotation marks and citation omitted). Because there was no ambiguity, the Court of Claims did not err when it found that Ally's written elections did not satisfy the requirements of the bad-debt statute.

V. RD-108 FORMS

Both plaintiffs contend that the Court of Claims erred when it found that the Department was within its right to require plaintiffs to submit RD-108 forms as proof that the taxes had, in fact, been paid. We disagree.

As previously stated, MCL 205.54i(4) provides:

> Any claim for a bad debt deduction under this section shall be supported by that evidence required by the department. The department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to this section and shall ensure that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt.

[1] Nor was the Court of Claims persuaded that the financing contracts themselves sufficed as written elections: "The assignment from the dealership to the financing company does not specify 'which party may claim the deduction,' as an election form must to satisfy MCL 205.54i(3)." While Ally pursued this argument in the Court of Claims, it appears to have abandoned the argument on appeal.

The Court of Claims found that the Department could require a claimant to submit an RD-108 form as proof that the taxes had been paid. It disagreed that such a requirement was an artificial barrier and concluded: "In MCL 205.54i(4), the Legislature specified that the deduction must be supported by evidence required by the Department. This Court will not overrule the Department's judgment in a matter that the Legislature has explicitly placed in the Department's control. Even assuming that the information is available in the Department's records, the claimant has the obligation to establish the right to a refund."

The Court of Claims properly ruled that plaintiffs failed to demonstrate a right to a refund or an exemption. "Exemption from taxation effects the unequal removal of the burden generally placed on all [taxpayers] to share in the support of . . . government. For that reason, exemption is the antithesis of tax equality, which justifies placing the burden of showing entitlement to an exemption on the taxpayer." *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 171 n 26; 853 NW2d 310 (2014) (quotation marks and citations omitted). Deductions are similarly treated. *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 473-474; 838 NW2d 736 (2013).

> In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute, the favor would be

> extended beyond what was meant. [*Id*. at 474-475, quoting *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948).]

In rejecting an argument by retailers that would have placed the retailers in the same place as "taxpayers" or financing companies under the statute, the *Menard* Court addressed the bad-debt statute and confirmed that not only does the taxpayer bear the burden of proof, but courts must adhere to the plain language of the statute:

> [O]ur role is to discern the legislative intent from the plain language of the amended statute, enforce the statute as written if the language is clear and unambiguous, or to construe the statute as necessary to give effect to every word in the statute and avoid a construction that would render part of the statute surplusage or nugatory. Because a tax exemption or deduction is sought by plaintiffs, they have the burden of proof, the statute is strictly construed against them as the taxpayer, and the exemption must be expressed in clear and unambiguous terms[.] [*Menard*, 302 Mich App at 479 (citations omitted).]

Given the rules regarding statutory construction in general, as well as the rules applicable to tax exemptions and deductions, the Court of Claims did not err when it found that the Department was within its right to require plaintiffs to submit RD-108 forms as proof that the taxes had, in fact, been paid. The plain language of MCL 205.54i(4) clearly provides that a "claim for a bad debt deduction under this section shall be supported by that evidence *required by the department*." (Emphasis added.) The Department was granted authority to determine the evidence necessary to support the refund. Additionally, contrary to plaintiffs' arguments, the Department was not obligated to promulgate a rule that a taxpayer submit an RD-108 form to demonstrate payment of sales tax under the Adminis-

trative Procedures Act, MCL 24.201 *et seq*., because the Department was exercising its discretionary authority, which is not subject to formal rulemaking, and there is no evidence that the Department lacked a rational basis for its policy. See *Guardian Indus Corp v Dep't of Treasury*, 198 Mich App 363, 382; 499 NW2d 349 (1993). In an unpublished case, this Court has held:

> [W]e reject plaintiffs' position that defendant was required to promulgate an administrative rule under the procedures set forth in the Administrative Procedure[s] Act, MCL 24.201 *et seq*., in order to enforce its policy. Defendant's policy is an exercise of its discretionary authority, and defendant is not required to promulgate a rule in order to enforce discretionary authority that is granted to it by the Legislature. See *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 164-165 n 26; 445 NW2d 428 (1989) (finding that clearly expressed legislative procedures and requirements are "in no way dependent upon the adoption of formal procedural rules"). [*CMS Energy Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2013 (Docket No. 309172), p 7.]

Though *CMS Energy* is an unpublished case and does not carry the weight of precedent, it may be considered helpful and instructive. MCR 7.215(C)(1); *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). Here, the fact that the Department has not engaged in formal rulemaking does not mean that it has been divested of discretion in determining what evidence must be produced to support a taxpayer's claim under the bad-debt statute.

VI. REPOSSESSED PROPERTY

Finally, both plaintiffs argue that the Court of Claims erred when it concluded that repossessed property was excluded as a deduction under the bad-debt statute. We disagree.

MCL 205.54i(1)(a) defines "bad debt" as

> any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. *A bad debt shall not include* any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and *repossessed property*. [Emphasis added.]

The Department considers all repossessed property to be excluded as bad debt while, plaintiffs ask for a kinder interpretation to allow for a pro rata deduction. In granting the Department summary disposition, the Court of Claims noted:

> As an additional basis for granting summary disposition, the Department argues that plaintiff has included repossessed property in its bad debt refund claim. . . . Plaintiff contends that the Department's interpretation is contrary to the approach that other states have taken with respect to similar statutory language. For example, plaintiff cites Wisconsin's statute defining "bad debt" as:
>
>> the portion of the sales price or purchase price that the seller has previously reported as taxable under this subchapter, and for which the seller has paid the tax, and that the seller may claim as a deduction under section 166 of the Internal Revenue Code. "Bad debt" does not include financing charges or interest, sales or use taxes imposed on the sales price or purchase price, uncollectible amounts on tangible personal property or items, property, or

> goods under s. 77.52(1)(b), (c), or (d) that remain in the seller's possession until the full sales price or purchase price is paid, expenses incurred in attempting to collect any debt, debts sold or assigned to 3rd parties for collection, and *repossessed property* or items. [WSA 77.585(1)(a) (emphasis added).]

The Wisconsin Administrative Code 11.30 states in part:

> When property, items, or goods on which a receivable exists are repossessed, a bad debt deduction is allowable only to the extent that the seller sustains a net loss of the sales price upon which tax was paid. A net loss occurs when the sum of the pro rata portion of all payments, credits and the wholesale value of the repossessed property, item, or good attributable to the cash sales price of the property, item, or good, is less than the cash sales price upon which sales or use tax was paid.

Thus, a portion of bad debt from repossessed property may be deducted in Wisconsin. Plaintiff advocates that a bad debt deduction should not be disallowed in its entirety where property has been repossessed. Rather, the amount of the bad debt should be reduced by the value of the repossessed property.

Nevertheless, plaintiff recognizes that the Department's interpretation is consistent with the approach taken by the Court of Appeals in *DaimlerChrysler* . . . . Plaintiff contends that the Court "did not engage in any real analysis of the statute, but instead simply deferred to the Department's position in [RAB] 1989-61."

Although under MCR 7.215(C)(1) the unpublished decision is not binding, this Court agrees with its straightforward analysis. Until such time as the Legislature amends the statute or the Department adopts regulations like those in Wisconsin, this Court is not persuaded that it should depart from the interpretation adopted by the Department and affirmed by the Court of Appeals in *DaimlerChrysler*.

The Court of Claims did not err by affording the Department consideration when interpreting the bad-debt statute. "[A]gencies' constructions of statutes are entitled to respectful consideration, but are not binding on courts and cannot conflict with the plain language of the statute . . . ." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 111-112; 754 NW2d 259 (2008). The Court of Claims did not rely exclusively on, nor did it simply defer to, the Department's interpretation. Rather, the Court of Claims also had for its consideration the *DaimlerChrysler* case.

The exact issue of whether repossessed vehicles were includable in the calculation of a refund under the bad-debt statute was at issue in *DaimlerChrysler*. Unlike the case at bar, the Court of Claims judge in *DaimlerChrysler* concluded that transactions involving repossessed vehicles *were* includable in the calculation of a refund. *DaimlerChrysler*, unpub op at 3. This Court reversed. After noting the general principles of statutory construction, this Court set forth the exception to the definition of "bad debt" under the statute:

> A bad debt does not include:
>
> 1) interest or sales tax on the purchase price;
>
> 2) uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid;
>
> 3) expenses incurred in attempting to collect any accounts receivable that have been sold to a third party for collection; and
>
> 4) repossessed property.
>
> The plain and unambiguous language of the statute provides that for purposes of the exemption from sales tax, a bad debt does not include . . . *repossessed property*. [*Id*. at 4-5.]

The *DaimlerChrysler* Court also looked to the Department's historical interpretation:

> Defendant has regularly interpreted and applied the bad debt statute consistent with this interpretation. Indeed, a Revenue Administrative Bulletin (RAB) was issued under MCL 205.3(f), which allows defendant to "issue bulletins that index and explain current department interpretations of current state tax laws." See *JW Hobbs Corp v Revenue Div, Dep't of Treasury*, 268 Mich App 38, 46; 706 NW2d 460 (2005). RAB 1989-61, issued October 3, 1989, provides in relevant part:
>
> > The bad debt deduction for sales tax purposes shall not include any amount represented by the following:
> >
> > * * *
> >
> > 6. Sales tax charged on property that is subsequently repossessed.
>
> While a RAB is only an interpretation of the applicable statute and does not have the force of law, *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004), defendant's interpretation of the statute at issue is entitled to respectful consideration. *Id*. at 654-655. Defendant's longstanding policy with respect to bad debt deductions for repossessed property is consistent with the plain and unambiguous language of the statute and we therefore give it deference.
>
> In sum, we conclude that the Court of Claims erred to the extent that it included transactions involving repossessed property in the calculation of the bad debt deduction. [*DaimlerChrysler*, unpub op at 5.]

The same is true here. The Department's interpretation is consistent with the plain and unambiguous language of the bad-debt statute. Plaintiffs encourage this Court to depart from the plain language of the statute because they believe that failure to do so would be unfair. However, as previously stated, "[t]he proper role of the judiciary is to interpret and not write the

law . . . . Accordingly, this Court enforces a statute as written if the statutory language is unambiguous." *Williams*, 316 Mich App at 616 (quotation marks and citation omitted). "The wisdom of a statute is for the Legislature to decide and the law must be applied as written." *Ramsey v Kohl*, 231 Mich App 556, 563; 591 NW2d 221 (1998).

Affirmed. As the prevailing party, the Department may tax costs. MCR 7.219.

JANSEN, P.J., and K. F. KELLY and O'BRIEN, JJ., concurred.

In re DeCOSTE ESTATE

In re FLETCHER ESTATE

Docket Nos. 327990 and 327993. Submitted September 14, 2016, at Lansing. Decided September 20, 2016, at 9:10 a.m.

Mark A. DeCoste, personal representative of his deceased mother's estate, moved in the Jackson County Probate Court for waiver or suspension of the probate filing fee required to file for informal probate of the estate. DeCoste asserted that he was indigent and argued that MCR 2.002 required the court to waive or suspend the filing fee. The court, Diane M. Rappleye, J., denied DeCoste's motion on the basis that the estate's assets were sufficient to pay the filing fee, and DeCoste moved for reconsideration, which the court also denied. DeCoste appealed, and the Court of Appeals, METER, P.J., and WHITBECK and RIORDAN, JJ., reversed in an unpublished opinion per curiam, issued November 6, 2014 (Docket No. 316896). According to the Court, the probate court should have temporarily suspended the filing fee and later required DeCoste to pay it when the reason for the suspension was no longer present. On remand, the probate court granted DeCoste's fee waiver because he received public assistance, and DeCoste filed the application for informal probate. DeCoste filed the estate inventory showing a single asset—the home he had shared with his mother, which was valued at $56,200—and then moved to waive or suspend payment of the inventory fee. The probate court denied DeCoste's motion, reasoning that adequate funds existed in the estate to pay the fee. DeCoste appealed.

Gloria K. Doty moved the Jackson County Probate Court, after the Court of Appeals' decision in *DeCoste*, to waive the filing fee in the probate of the Fletcher estate for which she had been appointed personal representative. The probate court, Diane M. Rappleye, J., granted the request. Doty filed the estate's inventory, which included a sole asset—a home valued at $64,242. She also filed another request for waiver—this time for waiver of the inventory fee—but the probate court denied her request for the same reasons that it had denied DeCoste's request. Doty appealed. DeCoste's and Doty's appeals were consolidated.

The Court of Appeals *held*:

Under MCL 600.871(1), the inventory fee in probate court is an expense of the administration of an estate, and the fee is calculated under that statute according to the value of all assets in the estate. The purpose of the inventory fee is to collect a fee that approximately corresponds to the amount of work it takes the probate court to administer the estate. The amount of work is determined by the size of the estate. MCL 700.3706(1) and MCR 5.307(A) require a personal representative to file an inventory of the estate within 91 days after issuance of the letters of authority. Under MCR 5.307(A) and MCL 600.871(3), the personal representative of an estate must pay the inventory fee no later than one year after appointment or sooner depending on the specific circumstances of the case. The inventory fee is not chargeable to the personal representative of an estate, and therefore it is irrelevant whether that party is indigent or receives public assistance. MCR 2.002 provides no basis under these circumstances for a waiver or suspension of the inventory fee because that court rule applies only to filing fees required by law to be paid by a particular party. Similarly, although MCL 600.880d provides for waiver or suspension of required fees when a party is indigent or lacks the ability to pay, that statute says nothing about the inventory fee, which is not dependent on a party's ability to pay. The inventory fee is not a filing fee, and the estate, not a party, is required to pay the fee. According to MCL 700.3805(1), a personal representative is the actor making payment for administration of an estate, but the statute clearly indicates that payment of those costs is to be made from the estate itself. In the instant cases, the probate court correctly concluded that waiver or suspension of the inventory fee was not appropriate because neither party was required to personally pay the fee from his or her own funds. Rather, the fee was an expense of administering the estate and was chargeable to the estate and not to any party. In addition, the inventory fee was based on the value of each estate's inventory, not on the personal representative's ability to pay. Further, under MCL 700.3701, MCL 700.3703(1), and MCL 700.3711, DeCoste and Doty possessed the immediate power to liquidate their respective estate's assets if necessary to fulfill their duty to pay the inventory fee or other claims against the estates under their control. Because both of the estates' assets were sufficient to pay the inventory fee due in each case, there was no basis for a waiver or suspension of the fee in either case.

Affirmed and remanded.

ESTATES — PROBATE COURT — WAIVER OR SUSPENSION OF FEES — INVENTORY FEES.

The inventory fee required by MCL 600.871(1) is an expense of the administration of an estate; the inventory fee is chargeable to the estate and is to be paid from the estate's assets when the estate has sufficient assets from which the fee can be paid; a personal representative's indigence or receipt of public assistance has no effect on the obligation to pay the inventory fee.

Legal Services of South Central Michigan (by *Erica L. Zimny* and *Elisa M. Gomez*) for Mark A. DeCoste and Gloria K. Doty.

Before: JANSEN, P.J., and K. F. KELLY and O'BRIEN, JJ.

PER CURIAM. In these consolidated appeals, appellants appeal as of right probate court orders denying waivers of the probate inventory fee imposed under MCL 600.871. We affirm and remand for further proceedings consistent with this opinion.

I. FACTS

The sole issue presented in these consolidated appeals is whether the probate court must waive or suspend the inventory fee assessed during probate of an estate when the personal representative is indigent or receives public assistance. The inventory for the estates at issue in this case reflects that each estate contained only one asset—the decedent's home. Both appellants requested a waiver or suspension of the inventory fee on the basis that appellants received public assistance.

A. DECOSTE ESTATE

Appellant Mark DeCoste (DeCoste) lived with his mother, Bonnie DeCoste (Bonnie), in the house that is

the sole asset listed on the inventory of the estate. DeCoste inherited the house when Bonnie died in 2013. After her death, DeCoste attempted to file an application for informal probate and appointment of a personal representative, but he could not afford the filing fee. DeCoste also filed an application for a waiver or suspension of the filing fee. DeCoste's request for a waiver of the filing fee was denied, and the word "POLICY" was written next to the denial box on the form.

DeCoste moved for reconsideration, asserting that he had no means to pay the fees involved in the case and the house could not be liquidated until after probate. He argued that without the means to pay the filing fee and other fees, probate could not commence. The probate court refused to grant the waiver, stating during the hearing on the motion for reconsideration, "Mr. DeCoste is indigent. However, the estate itself is not indigent, and I'm unaware of any statute or any case law that would indicate that if there are assets in the estate that fees should be waived based on the financial situation of the proposed heir." The court explained that the estate contained assets, and DeCoste was the sole heir. The court reasoned:

> So he's not indigent. He may not have cash available to him, but he's anticipating receipt of a residence that he's lived in virtually what, the past 10, 12 years?
>
> * * *
>
> With no mortgage payment. So I just can't see that the filing fee rules that are in place as they relate to estates are special as they relate to this circumstance because there are no liquid assets.
>
> If I were to follow your thought process, we, for example, could have a piece of real estate that is worth a million dollars, but the estate potentially wouldn't be able

> to be opened if I didn't waive the filing fee, assuming the heir doesn't have the money to pay the filing fee.
>
> A lot of our estates could fall under that circumstance, and I don't believe that this is an appropriate application.

The probate court entered an order denying the motion for suspension of the filing fee and closed the case.

After his motion was denied, DeCoste appealed in this Court. This Court reversed, stating that the probate court had "impermissibly read an exception into [MCR 2.002(C)]." *In re DeCoste Estate*, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2014 (Docket No. 316896), p 2. This Court added that the proper procedure would have been to temporarily suspend the fee, but then require DeCoste to pay the fee when the reason for the suspension disappeared. *Id*.

On remand, the probate court granted DeCoste's fee waiver because he was receiving public assistance, and DeCoste was allowed to file the application for informal probate. DeCoste was appointed as personal representative, and the letters of authority noted, "You are authorized to perform all acts authorized by law unless exceptions are specified below." No exceptions were specified. The letters of authority also listed specific duties of the personal representative, including the duty to complete the administration of the estate and the duty to file an inventory of the assets of the estate within 91 days of the date the letters of authority were issued or as otherwise ordered by the court. DeCoste filed the inventory, which showed a single asset of real estate valued at $56,200. DeCoste then moved for waiver or suspension of fees and costs. The probate court denied the motion. The order stated that "[t]he application is denied . . . with respect to the inventory fee. Adequate funds exist in the estate to pay the fee."

The probate court subsequently entered a supplemental order denying the waiver of the inventory fee in which the court stated, "Due to questions about this matter raised through the State Court Administrator's Office, the Court desires to more fully explain the reasoning for that denial." The court noted that under MCL 600.880d, the inventory fee required by MCL 600.871 must be waived or suspended "upon presentation of an affidavit of indigency or inability to pay." The court then turned to MCR 2.002(C) and reasoned that the inventory fee is not a fee " 'as to that party' " as contemplated by MCR 2.002(C) because the inventory fee is not chargeable to any particular party, but is instead chargeable directly to the estate. The court reasoned that the inventory fee is an expense of administration of the decedent's estate and the issue whether a personal representative is indigent or receiving public assistance is not material to the inventory fee. The court concluded that because the estate had $56,200 in assets, a waiver of the inventory fee was not appropriate.

B. FLETCHER ESTATE

Appellant Gloria Doty (Doty) filed a petition in December 2014, after this Court issued the opinion in *DeCoste*, and she attached a fee-waiver request. The probate court granted the request. The decedent had died in 1997, and he devised his house to Doty in his will.[1] Doty was appointed personal representative by the probate court. The letters of authority stated, "You

[1] In his will, the decedent appointed his mother as personal representative of his estate. However, there is no indication that the decedent's mother took any action with regard to the estate. After Doty initiated probate, all of the interested parties agreed to appoint her as personal representative.

are authorized to perform all acts authorized by law unless exceptions are specified below," and no exceptions were specified. The letters of authority also listed specific duties of the personal representative, including the duty to complete the administration of the estate and the duty to file an inventory of the assets of the estate within 91 days of the date the letters of authority were issued or as otherwise ordered by the court. When Doty filed the inventory, which reflected that the only asset in the estate was a home worth $64,242, she attached another waiver request, but the probate court denied the waiver request. The court stated, "The application is denied . . . with respect to the inventory fee. Adequate funds exist in the estate to pay the fee." The probate court issued a supplemental order nearly identical to the one issued with regard to the DeCoste estate.

II. STANDARD OF REVIEW

"In general, an appeal from a probate court decision is on the record, not de novo." *In re Nale Estate*, 290 Mich App 704, 706; 803 NW2d 907 (2010). However, we review de novo questions of law, including issues of statutory construction. *Id*. We similarly review de novo a lower court's interpretation and application of a court rule. *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010).

III. ANALYSIS

Appellants contend that the probate court erred when it refused to waive the inventory fee because appellants receive public benefits. We disagree.

Resolution of the issue presented in this case requires the interpretation of several statutes. We must

consider the plain language of these statutes and enforce clear and unambiguous language as written. See *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013).

> The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. [*In re Jajuga Estate*, 312 Mich App 706, 712; 881 NW2d 487 (2015) (quotation marks and citation omitted; alteration in original).]

This case also involves the interpretation of MCR 2.002. We analyze court rules using the same rules of construction that are used to analyze statutes. *Leete Estate*, 290 Mich App at 655. "Our goal in interpreting the meaning of a court rule is to give effect to the intent of the drafters." *Id*. We first examine the language of the court rule. *Id*. "The drafters are assumed to have intended the effect of the language plainly expressed, and we must give every word its plain and ordinary meaning." *Id*. at 655-656. If the language is plain and unambiguous, we apply the language as it is written in the court rule. *Id*. at 656. "In such instances, judicial construction is neither necessary nor permitted." *Id*.

We conclude that waiver or suspension of the inventory fee is inappropriate because each estate contains

sufficient assets to pay the fee. We assume for the purposes of this appeal that appellants receive public assistance and are indigent. Nevertheless, we conclude that appellants' ability to pay the inventory fee is not dispositive regarding the issue of waiver or suspension of the fee. The requirement that a personal representative submit an inventory and the payment of the inventory fee is governed by both statute and court rule. MCL 700.3706 provides:

> (1) Within 91 days after appointment or other time specified by court rule, a personal representative, who is not a special personal representative or a successor to another representative who has previously discharged this duty, shall prepare an inventory of property owned by the decedent at the time of death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of an encumbrance that may exist with reference to each listed item.
>
> (2) The personal representative shall send a copy of the inventory to all presumptive distributees and to all other interested persons who request it, and may also file the original of the inventory with the court. The personal representative shall submit to the court on a timely basis information necessary to calculate the probate inventory fee.

Similarly, MCR 5.307(A) provides:

> Within 91 days of the date of the letters of authority, the personal representative must submit to the court the information necessary for computation of the probate inventory fee. The inventory fee must be paid no later than the filing of the petition for an order of complete estate settlement under MCL 700.3952, the petition for settlement order under MCL 700.3953, or the sworn statement under MCL 700.3954, or one year after appointment, whichever is earlier.

With regard to the calculation of the probate fee, MCL 600.871 provides:

> (1) In all decedents' estates in which proceedings are instituted for probate, the probate court shall charge and collect the following fees as an expense of administration on the value of all assets, as of the date of death of the decedent, as follows:
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> (a) In an estate of value of less than $1,000.00, $5.00 plus 1% of the amount over $500.00.
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> (b) In an estate of value of $1,000.00 or more, but less than $3,000.00, $25.00.
>
> (c) In an estate of value of $3,000.00 or more but less than $10,000.00, $25.00 plus 5/8 of 1% of the amount over $3,000.00.
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> (d) In an estate of value of $10,000.00 or more but less than $25,000.00, $68.75 plus 1/2 of 1% of the amount over $10,000.00.
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> (e) In an estate of value of $25,000.00 but less than $50,000.00, $143.75 plus 3/8 of 1% of the amount over $25,000.00.
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> (f) In an estate of value of $50,000.00 but less than $100,000.00, $237.50 plus 1/4 of 1% of the amount over $50,000.00.
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> (g) In an estate of value of $100,000.00 to $500,000.00, $362.50 plus 1/8 of 1% of the amount over $100,000.00.
>
> (h) For each additional $100,000.00 value, or larger fraction thereof, over $500,000.00, $62.50.
>
> (i) For each additional $100,000.00 value, or larger fraction thereof, over $1,000,000.00, $31.25.
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> (2) Until December 31, 2017, in calculating a fee under subsection (1), if real property that is included in the estate is encumbered by or used as security for an indebtedness, the amount of the indebtedness shall be deducted from the value of the real property.
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> (3) The fees in subsection (1), rounded to the whole dollar, are due and payable to the probate court on or

before the closing of the estate or within 1 year after the commencement of probate proceedings, whichever occurs first. A final accounting shall not be accepted by the probate court until the fees are paid in full and shown as part of the final accounting. An official receipt shall be issued to the payer when the fees are collected.

(4) By March 31, 2015 and each March 31 until March 31, 2018, the probate court shall do all of the following:

(a) Calculate the value of all assets in each estate in the immediately preceding calendar year.

(b) If real property that is included in the estate is encumbered by or used as security for an indebtedness, subtract from the result of the calculation in subdivision (a) the total amount of the indebtedness.

(c) Calculate the total amount of all fees collected under subsection (1) in the immediately preceding calendar year.

(d) Submit to the state court administrative office the results under subdivisions (a), (b), and (c).

The probate court correctly concluded that waiver or suspension of the inventory fee was not appropriate because the *estates* contained sufficient assets to pay the inventory fee. The language of MCL 600.871(1) supports this conclusion. MCL 600.871(1) provides that the inventory fee is calculated "as an expense of administration on the value of all assets." Therefore, the inventory fee is considered an expense of administration of the estate, rather than an expense that the personal representative is required to pay from his or her own funds. Additionally, the inventory fee is determined based on the value of the assets in the estate, rather than on the ability of the personal representative to pay the fee. Therefore, the plain language of the statute governing the inventory fee supports the probate court's conclusion. See MCL 600.871(1).

In addition, the reason for the inventory fee indicates that waiver or suspension of the fee was not

warranted in this circumstance. "[T]he 'services required from a court in probate proceedings are, in the main, in proportion to the appraised value of the estate; that the more valuable the estate, the greater the time required of the court in the probate thereof, and consequently the respective higher statutory fee scheduled.' " *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 328; 725 NW2d 80 (2006) (citation omitted). "Thus, the purpose of the statute is to assess a fee that approximately corresponds to the amount of work that the probate court will have to perform to administer the estate." *Id*. The work that the probate court must perform to administer the estate is tied to the value of the estate. Therefore, the value of the estate, rather than the ability of the personal representative to pay the fee from his or her personal funds, dictates the amount of the inventory fee. The fact that appellants were unable to pay the inventory fee from their personal funds is irrelevant because the estates contained sufficient assets to pay the inventory fee. Accordingly, we conclude that the reason for the inventory fee indicates that the assets in the estate control whether a waiver or suspension is appropriate.

Appellants contend that MCL 600.880d and MCR 2.002 require the waiver or suspension of the inventory fee. MCL 600.880d provides, "A judge of probate shall order that the payment of any fee required under this chapter be waived or suspended, in whole or in part, upon a showing by affidavit of indigency or inability to pay." However, MCL 600.880d is not dispositive in this case because it does not specify which person or entity is responsible for payment of the inventory fee. In this case, both estates were able to pay the inventory fee. The DeCoste estate contained a home worth $56,200, and the Fletcher estate contained a home worth $64,242. Therefore, both estates contained assets that

well exceeded the amount of the respective inventory fees, which were calculated based on the assets in each estate. Because MCL 600.880d is silent regarding which person or entity is liable to pay the inventory fee, the waiver or suspension of the inventory fee was not required under MCL 600.880d.

MCR 2.002 also does not require the waiver of the inventory fee. MCR 2.002 governs the waiver or suspension of fees and costs. MCR 2.002(A)(2) provides, "Except as provided in subrule (F),[2] for the purpose of this rule 'fees and costs' applies *only to filing fees* required by law." (Emphasis added.) MCR 2.002(C) provides, "If a party shows by ex parte affidavit or otherwise that he or she is receiving any form of public assistance, the payment of fees and costs *as to that party* shall be suspended." (Emphasis added.) Similarly, MCR 2.002(D) provides, "If a party shows by ex parte affidavit or otherwise that he or she is unable because of indigency to pay fees and costs, the court shall order those fees and costs either waived or suspended until the conclusion of the litigation."

The language of MCR 2.002(A)(2) clarifies that the phrase "fees and costs" only applies to filing fees required by law. Therefore, MCR 2.002 does not apply in this context because the inventory fee is not a filing fee, but rather an expense of administration of the estate. See MCL 600.871(1); MCR 5.307(A). Thus, while MCR 2.002 entitled appellants to a waiver of the initial filing fees in this case, the estates were not entitled under MCR 2.002 to a waiver or suspension of the inventory fee. Furthermore, as discussed, both estates contained sufficient assets to pay their respective inventory fee. Therefore, even assuming the court rule applied, neither estate was entitled to waiver or

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[2] MCR 2.002(F) is not relevant to the issues presented in this case.

suspension under MCR 2.002(C) or (D) because the estates were not receiving any form of public assistance and were not indigent, which is required for waiver or suspension under the court rule provisions. See MCR 2.002(C) and (D).

We also note that the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., requires appellants to pay the inventory fee as the first claim or allowance from the assets of an estate. MCL 700.3805(1) governs the priority of claims and allowances and provides, in part:

> If the applicable *estate property is insufficient* to pay all claims and allowances in full, the personal representative shall make payment in the following order of priority:
>
> (a) Costs and expenses of administration. [Emphasis added.]

MCL 700.3805(1) indicates that the personal representative is the actor making the payment for the costs and expenses of administration. However, the statute clarifies that the claims are paid *from the estate property*, rather than from the personal representative's property. The statute further provides that the costs and expenses of administration take first priority with regard to all claims and allowances. Therefore, it is proper to look at the assets in the estate to determine whether sufficient assets exist to pay the claims and allowances. In this case, there was sufficient property in the estate to pay the inventory fee, which is considered part of the costs and expenses of administration. Regardless of whether appellants paid the inventory fee out-of-pocket and were later reimbursed, or whether appellants liquidated the assets of the estate and paid the fee directly from the estate, there was sufficient property in the estate to pay the inventory fee.

EPIC also clarifies that appellants had the ability to liquidate the assets in the estate in order to pay the costs and expenses of administration. MCL 700.3701 provides that the personal representative's powers and duties to the estate commence when he or she is appointed. The personal representative has control over the title and possession of the decedent's property. MCL 700.3711 clarifies, "Until termination of the appointment, a personal representative has the same power over the title to estate property that an absolute owner would have, in trust, however, for the benefit of creditors or others interested in the estate. This power may be exercised without notice, hearing, or court order." MCL 700.3709 adds that the personal representative has the right to take possession or control of the decedent's property if necessary for the purposes of administration of the estate. Thus, appellants had the ability to liquidate the property in the estates in order to pay the inventory fee. Indeed, appellants' fiduciary duty to the estate required them to do so. MCL 700.3703(1) provides:

> A personal representative is a fiduciary who shall observe the standard of care applicable to a trustee as described by [MCL 700.7803]. A personal representative is under a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred by this act, the terms of the will, if any, and an order in a proceeding to which the personal representative is party for the best interests of claimants whose claims have been allowed and of successors to the estate.

Appellants were required to ensure that the inventory fee was paid because appellants had the duty to settle and distribute the estate in accordance with EPIC,

which requires payment of the costs and expenses of administration. See MCL 700.3805(1). While appellants, as devisees, may not have wished to liquidate the assets in the estates, their fiduciary duty as personal representatives was to pay the costs and expenses of administration. See *id*. Therefore, appellants were not entitled to a waiver or suspension of payment of the inventory fee because each estate contained sufficient assets to pay its respective fee, and appellants had the ability to liquidate the assets in order to pay the fee.[3]

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

JANSEN, P.J., and K. F. KELLY and O'BRIEN, JJ., concurred.

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[3] Appellants rely, in large part, on this Court's unpublished opinion in *O'Brien v O'Brien*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2007 (Docket No. 271625). However, *O'Brien* is distinguishable from the instant case because the issue in *O'Brien* involved the costs and fees required to enter a judgment of divorce, as opposed to the inventory fee assessed to an estate. See *id*. at 1. In *O'Brien*, the trial court required the plaintiff to pay fees and costs as a prerequisite to entry of the judgment of divorce. *Id*. In contrast, the probate court required the two *estates* to pay the inventory fee in these consolidated cases. Therefore, *O'Brien* does not apply in the context of an inventory fee. Further, *O'Brien* is an unpublished opinion and, therefore, is not binding on this Court under the rule of stare decisis. See MCR 7.215(C)(1); *In re Pollack Trust*, 309 Mich App 125, 142 n 3; 867 NW2d 884 (2015).

ADAIR v STATE OF MICHIGAN

Docket No. 311779. Submitted July 27, 2016, at Lansing. Decided September 20, 2016, at 9:15 a.m. Leave to appeal denied 500 Mich 991.

Daniel Adair and others brought a declaratory judgment action in the Court of Appeals against the state of Michigan, the Department of Education, and several state officials, alleging that the Legislature violated §§ 25 and 29 of the Headlee Amendment, Const 1963, art 9, §§ 25 to 34, by failing to appropriate sufficient funds to reimburse the school districts of this state for the necessary costs associated with the districts' compliance with the recordkeeping requirements of the Center for Educational Performance and Information (CEPI) as mandated by *Adair v Michigan*, 486 Mich 468 (2010) (*Adair I*) (holding that the state violated the "prohibition on unfunded mandates" (POUM) provision when it required plaintiff school districts to collect, maintain, and report to the CEPI certain types of data for use by the state without providing funds to reimburse the school districts for the necessary costs incurred by the districts in order to comply with the new mandates). Plaintiffs further alleged that the Legislature violated the Headlee Amendment by imposing a new or an increased level of activities on the school districts through amendments of certain provisions of the Revised School Code, MCL 380.1 *et seq*., and the teacher tenure act, MCL 38.71 *et seq*., without appropriating any funding to reimburse the school districts for the necessary costs associated with the new mandates. Finally, plaintiffs challenged the method by which the Legislature funded the appropriations. Defendants moved for summary disposition with regard to the underfunding claim. The Court of Appeals, SAAD, P.J., and MURRAY and GADOLA, JJ., referred the claim to a special master for the taking of proofs and the reporting of proposed factual findings while reserving the remaining legal questions for resolution at the conclusion of the proceedings before the special master. In a March 31, 2016 report, the special master recommended that defendants' motion for summary disposition be granted, finding that the doctrine of res judicata barred further consideration of the underfunding claims because the Supreme Court had ruled that the doctrine of res judicata applies in actions to enforce the Headlee Amendment to bar the

relitigation of similar issues by similar parties and because plaintiffs had already unsuccessfully challenged the adequacy of the funding in *Adair v Michigan*, 302 Mich App 305 (2013), rev'd in part 497 Mich 89 (2014) (*Adair II*).

The Court of Appeals *held*:

1. The doctrine of res judicata bars a second, subsequent action when the following three elements are met: (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. The doctrine bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. With regard to the first element, defendants correctly characterized the *Adair II* litigation as concluding in an involuntary dismissal under MCR 2.504(B)(2), which operated as an adjudication on the merits. A review of the order of dismissal showed that no language limited the scope of the merits decided, and the Supreme Court in *Adair II* expressly declined to remand the case for further proceedings, which reinforced the conclusion that the decision in *Adair II* was one on the merits. With regard to the second element, the parties in the *Adair II* litigation were identical to the parties in the present litigation with the exception that four of the parties in the *Adair II* litigation had not joined the present litigation. There was no question that the parties in the present litigation were the same as or in privity with the parties in *Adair II* for purposes of a declaratory judgment action brought to enforce the POUM provision of § 29. With regard to the third element, the determinative question was whether the matter in this case was or could have been resolved in *Adair II*. Employment of the transactional test—which provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts gives rise to the assertion of relief—revealed that plaintiffs in the present litigation were attempting to revisit and relitigate a dispositive issue raised and resolved adversely to plaintiffs in *Adair II*. One of the goals of the *Adair II* suit, in which plaintiffs asserted their first challenge under the POUM provision to a specific amount of funding appropriated to reimburse the districts for the costs associated with the record-keeping activities of the CEPI, necessarily was to establish a base level of funding that would guide the Legislature with regard to future compliance with the state's funding obligation under the POUM provision. *Adair II* set that base rate of funding at $34,000,000 as a consequence of plaintiffs' inability or unwilling-

ness to present appropriate proofs. The subsequent entry of involuntary dismissal served as a decision on the entire merits of the suit, including an adverse resolution of plaintiffs' claim that the $34,000,000 appropriation by the Legislature was inadequate to fully satisfy the state's funding obligation under the POUM provision. Therefore, because the issue of what constituted the appropriate base level of funding was necessarily raised and resolved in *Adair II*, and because plaintiffs sought to relitigate the same issue to obtain a more favorable outcome in the present litigation, the third element of the doctrine was satisfied. The doctrine of res judicata barred plaintiffs' underfunding claim, and the special master correctly determined that defendants were entitled to summary dismissal of the claim because the claim was not predicated on an alleged new violation of the POUM provision by the state. Summary disposition pursuant to MCR 2.116(C)(7) and (10) was granted in favor of defendants.

2. Plaintiffs' argument that application of the doctrine of res judicata in this case would violate the Headlee Amendment by writing out of the POUM provision the language establishing 1978 as the base year from which the state's funding responsibility must be measured failed for two reasons. First, the Supreme Court had made it clear that one of the purposes of a suit to enforce the POUM provision was to establish a base level of funding that would guide the Legislature with regard to future compliance with the state's funding obligation under the POUM provision. Second, the 1978 base year is the measure by which a court determines whether a newly enacted mandate triggers a corresponding funding obligation under the POUM provision; the 1978 base year has nothing to do with the calculation of the actual amount of the funding obligation. Application of res judicata in this case will not preclude a court in a future suit from using the 1978 base year to determine whether a newly enacted state mandate requires a local unit of government to engage in new activities or services or to increase the level of activities or services previously provided.

3. The rule of stare decisis required that the Court's decision in *Adair II* be honored with regard to plaintiffs' remaining claims that challenged the constitutionality of the funding scheme and the constitutionality of the definitions of "activity" under MCL 21.232(1) and "service" under MCL 21.234(1). Therefore, plaintiffs' request for a declaratory judgment with regard to those claims was declined.

Plaintiffs' complaint dismissed with prejudice.

CONSTITUTIONAL LAW — HEADLEE AMENDMENT — PROHIBITION OF UNFUNDED MANDATES — BASE YEAR.

The prohibition of unfunded mandates provision (POUM) of Const 1963, art 9, § 29 (part of the Headlee Amendment) provides that a new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the Legislature or any state agency of units of local government unless a state appropriation is made and disbursed to pay the unit of local government for any necessary increased costs; the provision establishes 1978 as the base year from which a court determines whether a newly enacted mandate triggers a corresponding funding obligation under the POUM provision; the 1978 base year has nothing to do with the calculation of the actual amount of the funding obligation.

Secrest Wardle (by *Dennis R. Pollard* and *Mark S. Roberts*) for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Timothy J. Haynes*, Assistant Attorney General, for defendants.

Before: SAAD, P.J., and MURRAY and GADOLA, JJ.

PER CURIAM. Plaintiffs[1] bring this original taxpayer action to enforce §§ 25 and 29 of the Headlee Amendment, Const 1963, art 9, §§ 25 to 34. Plaintiffs allege that the Legislature violated the Headlee Amendment by failing to appropriate sufficient funds to reimburse the school districts of this state for the necessary costs associated with the districts' compliance with the recordkeeping requirements of the Center for Educational Performance and Information (CEPI).[2] Accord-

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[1] The 930 plaintiffs in this case are 465 Michigan public school districts and a representative taxpayer from each district.

[2] CEPI is the state agency responsible for collecting, managing, and reporting education data in Michigan. It is a division of the State Budget Office.

ing to plaintiffs, the legislative appropriations for the 2012–2013, 2013–2014, and 2014–2015 school years are tens of millions of dollars less than is needed to satisfy the state's funding obligation under the Headlee Amendment. Plaintiffs also challenge the method by which the Legislature funded these appropriations. Plaintiffs characterize that funding scheme as an unconstitutional shell game. Finally, plaintiffs allege that the Legislature violated the Headlee Amendment by imposing a new or an increased level of activities on the school districts through amendments of certain provisions of the Revised School Code, MCL 380.1 *et seq.*, and the teacher tenure act, MCL 38.71 *et seq.*, without appropriating any funding to reimburse the school districts for the necessary costs associated with the new mandates. Defendants move for summary disposition with regard to plaintiffs' underfunding claim. Plaintiffs request a declaratory judgment in their favor with regard to their remaining claims. We grant summary disposition in favor of defendants with regard to plaintiffs' underfunding claim. The doctrine of res judicata bars our consideration of the merits of plaintiffs' underfunding claim. Plaintiffs' remaining claims were authoritatively rejected in *Adair v Michigan*, 302 Mich App 305; 839 NW2d 681 (2013), rev'd in part on other grounds 497 Mich 89 (2014), and thus, the doctrine of stare decisis bars reconsideration of the merits of those claims. Plaintiffs' complaint is dismissed in its entirety with prejudice.

I

This action focuses, in part, on the application of the second sentence of the Headlee Amendment, which is commonly referred to as the "prohibition on unfunded mandates" or POUM provision. As a result of prior

litigation brought in this Court by plaintiffs, our Supreme Court held that the state violated the POUM provision when it required plaintiff school districts to collect, maintain, and report to the CEPI certain types of data for use by the state without providing funds to reimburse the school districts for the necessary costs incurred by the districts in order to comply with the new mandates. *Adair v Michigan*, 486 Mich 468, 494; 785 NW2d 119 (2010) (*Adair I*). Thereafter, our Legislature appropriated $25,624,500 for the 2010–2011 school year "to be used solely for the purpose of paying necessary costs related to the state-mandated collection, maintenance, and reporting of data to this state." 2010 PA 217, § 152a. The Legislature increased the appropriation to $34,064,500 for the 2011–2012 school year. This latter appropriation included an allocation of $8,440,000 to reimburse the school districts for the costs of complying with a new CEPI reporting requirement.

Plaintiffs then commenced their second CEPI-related suit in this Court under the Headlee Amendment (*Adair II*). See *Adair v Michigan*, 497 Mich 89; 860 NW2d 93 (2014); *Adair*, 302 Mich App 305. They alleged that the Legislature failed to appropriate sufficient funding to cover the CEPI mandates for the 2010–2011 and 2011–2012 school years; that, to the extent that 2010 PA 217 otherwise reduced the overall discretionary state aid funds by reallocation of a portion of those discretionary funds to § 152a, the act violated Const 1963, art 9, §§ 25 and 29 by shifting the tax burden to local taxpayers; that the Legislature violated the POUM provision by mandating a new evaluation process for teachers and administrators without providing any funding to implement the mandate; and that the Legislature failed to appropriate sufficient funding to fully fund the new Teacher Stu-

dent Data Link portion of the CEPI system. This Court referred the matter to a special master.

The special master granted partial summary disposition in favor of defendants with regard to plaintiffs' challenge to the method by which the Legislature chose to fund the CEPI-related appropriations. He opined that he was required to do so because this Court had "definitively rejected" the arguments advanced by plaintiffs in *Durant v Michigan*, 251 Mich App 297; 650 NW2d 380 (2002), and *Durant v Michigan (On Remand)*, 238 Mich App 185; 605 NW2d 66 (1999). In subsequent proceedings, the special master granted partial summary disposition in favor of defendants on the ground that the newly mandated evaluation process involved the provision of a benefit for employees, and thus, pursuant to MCL 21.232(1), the evaluation process was not a state-mandated service or activity for purposes of the Headlee Amendment. Finally, during a trial on the merits of plaintiffs' remaining POUM claims, the special master granted defendants' motion for involuntary dismissal after plaintiffs' lead counsel indicated during his opening statement that plaintiffs would not attempt to prove a specific dollar amount of underfunding, but instead would limit proofs to expert testimony that would show that the Legislature's methodology to determine the requisite amount of funding was materially flawed.

This Court vacated the special master's grant of involuntary dismissal and remanded the matter to the master for the taking of proofs. This Court otherwise affirmed the rulings of the special master. *Adair*, 302 Mich App 305. Our Supreme Court reversed this Court in part and reinstated the special master's grant of involuntary dismissal. In so doing, however, the Supreme Court noted in its opinion that "[w]e do not

disturb the balance of the Court of Appeals' holdings not addressed in this opinion." *Adair*, 497 Mich at 111 n 54.

In the meantime, plaintiffs commenced the instant suit (*Adair III*). We referred plaintiffs' underfunding claim to a special master for the taking of proofs and the reporting of proposed factual findings for this Court's review. We reserved the remaining legal questions for our resolution at the conclusion of the proceedings before the special master.

Thereafter, proceedings commenced before the special master, and defendants moved for summary disposition on three grounds. First, defendants sought summary disposition pursuant to MCR 2.116(C)(7) on the ground that the doctrine of res judicata, the doctrine of collateral estoppel, or both doctrines barred plaintiffs from relitigating the adequacy of the roughly $34 million appropriation to fund the CEPI record-keeping requirements unsuccessfully challenged in *Adair II*. Second, defendants sought summary disposition pursuant to MCR 2.116(C)(8) on the ground that plaintiffs' revised first amended complaint failed to state a claim for a violation of the POUM provision consistent with the special pleading requirements of MCR 2.112(M) because plaintiffs failed to allege any new activity or service imposed by the state on the school districts since the school years at issue in *Adair II* or that the Legislature had decreased the level of funding for the same activities and services at issue in *Adair II*. Third and finally, defendants sought summary disposition pursuant to MCR 2.116(C)(10) on the ground that plaintiffs had not alleged and could not prove the existence of any new unfunded or underfunded mandate.

The special master issued his report on March 31, 2016, in which he recommended that defendants' mo-

tion for summary disposition be granted. The special master began his analysis with the acknowledgment that, in *Adair v Michigan*, 470 Mich 105, 120-126; 680 NW2d 386 (2004), our Supreme Court ruled that the doctrine of res judicata applies in actions to enforce the Headlee Amendment to bar the relitigation of similar issues by similar parties. He also acknowledged that the doctrine of res judicata bars a subsequent action when (1) the prior action was decided on the merits, (2) both actions involved the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. The special master then found that all three of these elements had been satisfied on the instant record and, therefore, that the doctrine of res judicata barred further consideration of the underfunding claims. He also found that the doctrine of collateral estoppel barred consideration of these claims.

The matter now returns for our determination of whether defendants are entitled to summary disposition with regard to plaintiffs' underfunding claim. We also must determine whether plaintiffs are entitled to the entry of a declaratory judgment in their favor with regard to their remaining claims.

II

A motion for summary disposition brought pursuant to MCR 2.116(C)(7) requires this Court to accept as true the well-pleaded allegations of plaintiffs and to construe those allegations in favor of plaintiffs unless the allegations are specifically contradicted by the affidavits or other appropriate documentation submitted by the movant. *Adair v Michigan*, 250 Mich App 691, 702-703; 651 NW2d 393 (2002), aff'd in part and rev'd in part on other grounds 470 Mich 105 (2004). "If

the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if the affidavits or other documentary evidence show that there is no genuine issue of fact, judgment must be rendered without delay." *Id*. at 703.

"A motion for summary disposition brought under MCR 2.116(C)(10) requires this Court to review the pleadings, affidavits, and other documentary evidence submitted, make all the reasonable inferences therefrom, and determine whether a genuine issue of material fact exists, giving the nonmoving party the benefit of the reasonable doubt." *Id*.

III

We agree with the special master that the doctrine of res judicata bars our further consideration of the merits of plaintiffs' underfunding claim.[3]

[3] We reject plaintiffs' assertion that the doctrine of res judicata should have no application in matters involving the enforcement of the Headlee Amendment. Plaintiffs are correct that the common law prevails except as abrogated by the Constitution, by the Legislature, or by our Supreme Court. *People v Stevenson*, 416 Mich 383, 389; 331 NW2d 143 (1982); *People v McKendrick*, 188 Mich App 128, 138; 468 NW2d 903 (1991). They are misguided, however, in their belief that an application of the doctrine of res judicata in this present case contravenes the constitutional scheme created within the Headlee Amendment. Our Supreme Court authoritatively rejected plaintiffs' position in *Adair*, 470 Mich 105. The Court definitively ruled that the ratifiers of the Headlee Amendment "would have thought, as with all litigation, there would be the traditional rules that would preclude relitigation of similar issues by similar parties" and that an application of the doctrine was essential to making the amendment "workable" and to preventing the amendment from becoming a "Frankensteinian monster." *Id*. at 120-121, 126-127. Therefore, we "must . . . consider res judicata and apply it to this unique Headlee situation." *Id*. at 121. We are "bound by the rule of stare decisis to follow the decisions of our Supreme Court." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008).

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair*, 470 Mich at 121. The doctrine bars a second, subsequent action when the following three elements are met: "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id*. The doctrine "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id*.

With regard to the first element, defendants correctly characterize the *Adair II* litigation as concluding in an involuntary dismissal under MCR 2.504(B)(2). *Adair*, 497 Mich at 99 & n 18, 110. An involuntary dismissal pursuant to MCR 2.504 operates as an adjudication on the merits. MCR 2.504(B)(3); *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 419; 733 NW2d 755 (2007). Therefore, in the absence of any language in the order of dismissal limiting the scope of the merits decided—and our review of the order discloses no such language of limitation—"the order operates as an adjudication of the entire merits of a plaintiff's claim." *Washington*, 478 Mich at 419. The fact that our Supreme Court expressly declined to remand the case for further proceedings reinforces our conclusion that the decision was one on the merits. *Adair*, 497 Mich at 110. The first element of the doctrine is satisfied.

With regard to the second element and Headlee Amendment actions, the *Adair* Court offered the following guidance:

> In litigation concerning the . . . POUM provision[] of the Headlee Amendment, Const 1963, art 9, § 29, where a

> taxpayer or a local unit of government is suing the state, the issue is whether the Legislature's act is unconstitutional as it applies not just to a single local unit of government, but to all local units affected by the legislation. In such cases, the interests of all similar local units of government and taxpayers will almost always be identical. If the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another, such as when declaratory relief is sought concerning an act of the Legislature establishing the proportion of state funding for local government units, the interests are identical. [*Adair*, 470 Mich at 122.]

In the present case, the special master found that the parties in the *Adair II* litigation were identical to the parties in the present litigation with the exception that four of the parties in the *Adair II* litigation had not joined the *Adair III* suit. Neither plaintiffs nor defendants challenge this finding. The special master also found that this element was satisfied. Again, neither side challenges this finding. There is no question that the parties in the present litigation are the same or in privity with the parties in *Adair II* for purposes of a declaratory judgment action brought to enforce the POUM provision of § 29. *Adair*, 470 Mich at 121-123. Hence, the second prong is satisfied.

With regard to the third element, the determinative question is whether the matter in this case was or could have been resolved in *Adair II*. *Adair*, 470 Mich at 121. "[T]his Court uses a transactional test to determine if the matter could have been resolved in the first case." *Washington*, 478 Mich at 420. "The transactional test provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." *Adair*, 470 Mich at 124 (quotation marks and citations omitted); see also *Washington*, 478 Mich at 420. " 'Whether a factual

grouping constitutes a "transaction" for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . .' " *Adair*, 470 Mich at 125, quoting 46 Am Jur 2d, Judgments, § 533, p 801 (emphasis omitted; alteration in original).

We find that the third element is satisfied. Plaintiffs' initial complaint in this case reasserted the same causes of action as advanced in the *Adair II* complaint. In *Adair II*, plaintiffs challenged the adequacy of the amount of the appropriations in the 2010–2011 and 2011–2012 school years to compensate the school districts for the necessary costs incurred through compliance with the CEPI requirements. *Adair*, 497 Mich at 97-98; *Adair*, 302 Mich App at 308. In the present case, plaintiffs challenge the adequacy of the appropriations for the 2012–2013, 2013–2014, and 2014–2015 school years. The goal of a POUM claim brought pursuant to § 29 of the Amendment is to provide the Legislature with "a judicially determined amount that it must appropriate in order to comply with Headlee," *Adair*, 497 Mich at 109, such that "the state will be aware of the financial adjustment necessary to allow for future compliance," *id*. (quotation marks and citation omitted). This goal is to be accomplished by requiring the plaintiff to establish the precise costs of the mandated service or activity and to identify the amount of the funding shortfall. *Id*. These prior rulings in *Adair I* and *Adair II* support the conclusion that one of the goals of the *Adair II* suit, in which plaintiffs asserted their first challenge under the POUM provision to a specific amount of funding appropriated to reimburse the districts for the costs associated with the recordkeeping activities of the CEPI, necessarily was to establish a base level of funding that would guide the Legislature

with regard to future compliance with the state's funding obligation under the POUM provision. *Adair II* set that base rate of funding at $34,000,000 as a consequence of plaintiffs' inability or unwillingness to present appropriate proofs and the subsequent entry of an involuntary dismissal. This is because the involuntary dismissal served as a decision on the entire merits of the suit, including an adverse resolution of plaintiffs' claim that the $34,000,000 appropriation by the Legislature was inadequate to fully satisfy the state's funding obligation under the POUM provision.

A review of plaintiffs' revised first amended complaint in this suit reveals that plaintiffs are once again attempting to litigate the base funding rate and to reset that base rate at a figure significantly greater than the current figure. In other words, plaintiffs are attempting to employ *Adair III* to revisit and relitigate a dispositive issue raised and resolved adversely to plaintiffs in *Adair II*. Because the issue of what constituted the appropriate base level of funding was necessarily raised and resolved in *Adair II*, and because plaintiffs now seek to relitigate the same issue in order to obtain a more favorable outcome, the third element of the doctrine is satisfied. *Adair*, 470 Mich at 121.

In light of the foregoing, the doctrine of res judicata bars further consideration of plaintiffs' claims of underfunding unless those claims are predicated on an alleged new violation of the POUM provision by the state, i.e., that the state imposed a new mandate through the CEPI that requires plaintiff school districts to engage in new activities or services or to increase the level of activities or services currently being provided. A review of plaintiffs' revised first amended complaint reveals no such allegations. Con-

sequently, the special master correctly opined that defendants are entitled to the summary dismissal of plaintiffs' underfunding claim. We grant summary disposition to defendants pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10).

In doing so, we reject plaintiffs' argument that an application of the doctrine of res judicata in this case would violate the Headlee Amendment by writing out of the POUM provision the language establishing 1978 as the base year "from which the State's funding responsibility must be measured." We do so for two reasons. First, our Supreme Court has made it clear that one of the purposes of a suit to enforce the POUM provision is to establish a base level of funding that would guide the Legislature with regard to future compliance with the state's funding obligation under the POUM provision. *Adair*, 497 Mich at 109; *Adair*, 470 Mich at 119-120. Second, the POUM provision "requires the state to fund any additional necessary costs of newly mandated activities or services and increases in the level of such activities or services from the 1978 base year." *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 595; 597 NW2d 113 (1999). The 1978 base year serves as the measure by which a court is to determine whether a newly enacted state mandate imposes on a local unit of government an obligation to engage in new activities or to provide new services or an increase in the amount of activities already engaged in or services provided by the local unit of government. In other words, the 1978 base year is the measure by which a court determines whether a newly enacted mandate triggers a corresponding funding obligation under the POUM provision. The 1978 base year has nothing to do with the calculation of the actual amount of the funding obligation. The state's funding obligation for newly mandated activities or

services necessarily will be based on the costs incurred in the first year the activities or services are provided. The state's funding obligation for a mandated increase in the activities engaged in or services provided will be based on calculating the difference between the premandate and postmandate costs incurred by the local unit of government in the first year the mandated activities or services are undertaken. An application of res judicata in the instant case will not preclude a court in a future suit from using the 1978 base year to determine whether a newly enacted state mandate requires a local unit of government to engage in new activities or services or to increase the level of activities or services previously provided. Because plaintiffs have not alleged in the current litigation that the state imposed a new mandate through the CEPI that requires plaintiff school districts to engage in new activities or services or to increase the level of activities or services currently being provided, the 1978 base year is irrelevant to any resolution of the issues raised in *Adair III*.

IV

Finally, we decline plaintiffs' request for a declaratory judgment in their favor with regard to their remaining claims. In *Adair II*, this Court rejected plaintiffs' challenge to the constitutionality of the funding scheme employed by the Legislature to reimburse the school districts for the necessary costs they incurred in order to comply with the recordkeeping mandates. *Adair*, 302 Mich App at 321-323. This Court also found that the amendments creating a teacher and administrator review process did not implicate the POUM provision because the amendments did not impose state-mandated activities within the meaning

of MCL 21.232(1) and the POUM provision. *Id*. at 317-321. Moreover, this Court determined that the definition of the term "activity" found in MCL 21.232(1) was constitutional. *Id*. at 320-321. This Court declined to address the constitutionality of the definition of the term "service" found in MCL 21.234(1), however, because the teacher evaluation and tenure processes are not programs for purposes of MCL 21.234(1), and hence, MCL 21.234(1) had no application in *Adair II*. *Id*. at 319 n 4. Nevertheless, this Court did acknowledge that this Court had previously found MCL 21.234(1) to be correct in its construction of the constitutional language. *Id*. at 320. We are bound under the rule of stare decisis to honor the precedential effect of this Court's decision in *Adair II* with regard to these rulings, as conceded by plaintiffs. MCR 7.215(C)(2); *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). Accordingly, we dismiss plaintiffs' remaining claims.

Plaintiffs' complaint is dismissed with prejudice.

SAAD, P.J., and MURRAY and GADOLA, JJ., concurred.

In re FOSTER ATTORNEY FEES

Docket No. 327707. Submitted September 14, 2016, at Lansing. Decided September 22, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 1059.

Attorney Mitchell T. Foster was appointed by the Iosco Circuit Court as appellate counsel for David G. Boudrie, Sr., who had pleaded guilty of unlawful imprisonment, MCL 750.349b. The Court of Appeals denied Boudrie's delayed application for leave to appeal his plea-based conviction and also denied his motion for leave to file a motion in the trial court to correct an invalid sentence. *People v Boudrie*, unpublished order of the Court of Appeals, entered March 5, 2016 (Docket No. 325681). The trial court authorized a payment of $642 for Foster's appellate services, and Foster filed a petition in the trial court for a reasonable fee, arguing that he had not been paid for the time he had spent preparing and filing in the Court of Appeals Boudrie's delayed application for leave to appeal and motion for leave to file a motion in the trial court to correct Boudrie's invalid sentence; Foster asserted that he was also not reimbursed for copy and postage fees incurred in connection with the filings in the Court of Appeals. The trial court, William F. Myles, J., denied Foster's petition, stating that because Iosco County was poor, it was the court's policy not to pay fees incurred by a court-appointed appellate attorney when the Court of Appeals denied for lack of merit in the grounds presented an application for leave to appeal a plea-based conviction. Foster appealed, and the Court of Appeals granted the Michigan Appellate Assigned Counsel System's motion to intervene.

The Court of Appeals *held*:

1. The Due Process and Equal Protection Clauses of the United States Constitution require that appellate counsel be appointed for those indigent defendants who seek access to first-tier review in the Court of Appeals. Under former MCL 775.16, an attorney appointed to represent an indigent defendant was entitled to reasonable compensation for his or her services. When determining reasonable compensation, a court could take into account local considerations, including the population of the county and the county's financial means; reasonable compensa-

tion could vary among the circuit courts. The trial court abused its discretion by denying Foster compensation for his appellate work on the basis that Boudrie's application for leave to appeal and motion were denied by the Court of Appeals; Foster was entitled to reasonable attorney fees and expense reimbursement for that work. The trial court's policy effectively made Foster's compensation contingent on the outcome of Boudrie's appeal in the Court of Appeals; that policy violated MRPC 1.5(d), which prohibits an attorney from entering into a contingency-fee arrangement in criminal matters. Further, the trial court misunderstood the order denying Boudrie's delayed application for leave to appeal; the language "denied for lack of merit in the grounds presented" in the Court of Appeals order may not have been equivalent to a final decision on the merits but instead may have signaled that the Court found the matters asserted unworthy of the expenditure of further judicial resources.

2. Reassignment to a different trial judge on remand for the calculation of reasonable compensation was necessary to preserve the appearance of justice because of the trial judge's previously expressed views.

Reversed and remanded.

ATTORNEY AND CLIENT — COURT-APPOINTED COUNSEL — REASONABLE COMPENSATION — RESULT OF APPEAL NOT A FACTOR.

An attorney appointed to represent an indigent defendant who is appealing his or her plea-based conviction is entitled to reasonable compensation for those legal services and reimbursement for associated costs regardless of whether the defendant is granted the relief sought.

Mitch Foster Law (by Mitchell T. Foster) *in propria persona*.

State Appellate Defender (by *Dawn Van Hoek*) and *Bradley R. Hall*, Michigan Appellate Assigned Counsel System Administrator, for the Michigan Appellate Assigned Counsel System.

Before: JANSEN, P.J., and K. F. KELLY and O'BRIEN, JJ.

PER CURIAM. Appellant, Mitchell T. Foster, appeals as of right the order of the trial court denying his petition

for appellate attorney fees in addition to those sums that the trial court had already approved for Foster's appellate representation of defendant, David George Boudrie, Sr. We reverse and remand for further proceedings consistent with this opinion.

Following defendant's plea-based conviction for unlawful imprisonment, MCL 750.349b, Foster was appointed by the trial court to be defendant's appellate attorney. Foster visited with defendant, reviewed the record, and filed a delayed application for leave to appeal with this Court. The delayed application presented three issues: whether the scoring of Offense Variable (OV) 3 was incorrect, whether trial counsel was ineffective for failing to object to the scoring of OV 3 at sentencing, and whether defendant's sentencing guidelines were unconstitutionally increased based on impermissible judicial fact-finding. Additionally, Foster filed a motion in this Court for leave to file a motion in the trial court to correct an invalid sentence. This Court denied leave to appeal in an order, which stated:

> The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.
>
> The motion for leave to file a motion to correct an invalid sentence in the Trial Court is DENIED. [*People v Boudrie*, unpublished order of the Court of Appeals, entered March 5, 2015 (Docket No. 325681).]

Foster was paid $642 for his services. He filed a petition for a reasonable fee in the trial court, arguing that he was not paid for the time he spent preparing the delayed application for leave to appeal or the motion filed in this Court. Additionally, the trial court did not reimburse Foster for copy and postage fees incurred in connection with Foster's filings in this Court. During the hearing on Foster's petition, the

trial court explained that because this Court denied defendant's application for leave to appeal on the basis of "no merit and grounds," and because the trial court presided in a "poor county," the court could not afford to pay for appellate attorney fees when attorneys "file stuff that doesn't have a basis of merit to it." Foster asked the trial court if it was policy that anytime this Court denies an appeal "for lack of merit on a guilty plea case," the trial court would not pay fees for the work incurred by a court-appointed appellate attorney, to which the trial court replied, "That's correct." Foster then filed this appeal.

Foster argues that the trial court abused its discretion when it denied Foster's request for additional fees and expenses for preparing and filing the delayed application for leave to appeal and the motion for leave to file a motion to correct an invalid sentence because this Court denied the delayed application for leave to appeal for lack of merit in the grounds presented. We agree.

A trial court's determination regarding the reasonableness of compensation for services and expenses of court-appointed attorneys is reviewed for an abuse of discretion. *In re Mullkoff Attorney Fees*, 176 Mich App 82, 85; 438 NW2d 878 (1989). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Lyon*, 310 Mich App 515, 517; 872 NW2d 245 (2015).

"[T]he Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert v Michigan*, 545 US 605, 610; 125 S Ct 2582; 162 L Ed 2d 552 (2005). "At common law," the burden of providing a defense to indigent defendants "was borne by members

of the bar as part of the obligations assumed upon admission to practice law." *In re Recorder's Court Bar Ass'n*, 443 Mich 110, 121; 503 NW2d 885 (1993). However, in *Recorder's Court Bar Ass'n*, our Supreme Court, while noting that the validity and accuracy of this common-law rule was not without challenge, recognized that MCL 775.16 provides a statutory right to reasonable compensation for those attorneys appointed to represent indigent defendants. *Id*. at 122-123. Our Supreme Court held that while "what constitutes reasonable compensation may necessarily vary among circuits," "the Legislature clearly intended an individualized determination of reasonable compensation . . . ." *Id*. at 129-130. On this basis, our Supreme Court determined that the Wayne Circuit Court's "fixed-fee system" failed "to provide assigned counsel reasonable compensation within the meaning of" the statute. *Id*. at 131.[1]

We conclude that the trial court's policy of not paying counsel for time spent in preparing a delayed application for leave to appeal or for preparing motions filed with this Court when this Court ultimately denies leave to appeal "for lack of merit in the grounds presented" or denies relief on the motions constitutes an abuse of discretion. This policy clearly provides that

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[1] We note that MCL 775.16 was recently amended and no longer explicitly provides that an attorney appointed to represent an indigent defendant is entitled to reasonable compensation. See MCL 775.16, as amended by 2013 PA 94, effective July 1, 2013. However, no party on appeal contends that Foster is not entitled to reasonable compensation. Instead, Foster contends that the trial court improperly determined his compensation. Furthermore, the Michigan Supreme Court recently referred to the reasonable-compensation requirement in an order entered after MCL 775.16 was amended, which indicates that the requirement still exists. See *In re Ujlaky Attorney Fees*, 498 Mich 890 (2015). Regardless, because the issue is not before this Court, we decline to address it.

a court-appointed appellate attorney's fee would be contingent on the outcome of the matter for which the service was rendered. Our Supreme Court in *Recorder's Court Bar Ass'n* recognized that the reasonable-compensation determination will necessarily take into account local considerations, including the population of the county and the county's financial means, and the meaning of "reasonable compensation" may vary among circuit courts. *Recorder's Court Bar Ass'n*, 443 Mich at 129. However, the Court did not state that the trial court may award compensation contingent on the outcome at the appellate level. Indeed, attorneys are not allowed to enter into contingency-fee arrangements in criminal matters under the Michigan Rules of Professional Conduct. MRPC 1.5(d). Therefore, no attorney in the state of Michigan could agree to be a court-appointed attorney in the Iosco Circuit Court under that court's current policy because to do so would require entering into a contingency-fee arrangement in violation of the attorney's professional responsibilities. Accordingly, the trial court's policy was unreasonable and constituted an abuse of discretion.

Additionally, the trial court misunderstood the language from this Court's order denying defendant's delayed application for leave to appeal. The United States Supreme Court, in holding that Michigan is required to provide appointed counsel for defendants convicted by plea who are seeking access to first-tier appellate review, stated that when this Court "denies leave using the stock phrase 'for lack of merit in the grounds presented,' its disposition may not be equivalent to a 'final decision' on the merits, *i.e.*, the disposition may simply signal that the court found the matters asserted unworthy of the expenditure of further judicial resources." *Halbert*, 545 US at 618. This Court's decision denying defendant's application for leave to appeal was

not necessarily a final decision on the merits, but may simply have been a statement that the matters asserted were not worthy of further expenditure of judicial resources. In fact, because one of the issues raised by Foster in the delayed application for leave to appeal concerned the constitutionality of Michigan's sentencing guidelines, the Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), confirmed that at least one issue raised by Foster had a great deal of merit. After filing a pro se application for leave to appeal to the Michigan Supreme Court upon this Court's denial of defendant's delayed application, defendant received some level of favorable relief from our Supreme Court in its order remanding defendant's case to the trial court for a determination whether it would have imposed a materially different sentence under *Lockridge*. See *People v Boudrie*, 499 Mich 851 (2016). Therefore, notwithstanding the impermissible and unreasonable nature of the trial court's decision in denying appointed counsel fees and expenses when this Court determined the arguments were without merit, at least one of the arguments made by Foster in this particular case was determined to have some level of merit by our Supreme Court.

For the reasons discussed in this opinion, Foster was entitled to reasonable attorney fees and expense reimbursement for preparing defendant's delayed application for leave to appeal and for preparing defendant's motion for leave to file a motion to correct an invalid sentence. The trial court's policy of not paying for work performed on behalf of a defendant when this Court denies an application for lack of merit in the grounds presented is unreasonable and an abuse of discretion.[2]

[2] In light of our resolution of the issue, we decline to address the constitutional arguments presented by intervening appellant, the Michigan Appellate Assigned Counsel System, in its brief on appeal.

Accordingly, remand is necessary for the trial court to determine the compensation owed to Foster by conducting an individualized determination of reasonable compensation that is not contingent on the outcome of the appeal in this Court.

We further conclude that remand to a different trial judge is warranted given the trial judge's statement that it was his personal policy to deny attorney fees anytime this Court denies leave for lack of merit in a guilty-plea case. In determining whether to remand the case to a different trial judge, this Court considers

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (citations and quotation marks omitted).]

See also *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004) ("We may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.").

During the hearing on Foster's motion for attorney fees, Foster asked the trial court whether its decision represented an Iosco Circuit Court policy or simply represented the trial judge's policy. The judge responded, "That's my policy. I don't know if there is an official one in the circuit. I'm the only Circuit Judge here right now, so . . . ." The judge further explained,

"[W]e've got a poor county here and we can't be -- afford to pay attorneys to file stuff that doesn't have a basis of merit to it." The judge's comments make clear that the refusal to grant fees and expenses when this Court denies leave to appeal for lack of merit in the grounds presented constituted his personal policy. Therefore, we conclude that the trial judge would reasonably be expected to have substantial difficulty putting out of his mind his previously expressed views regarding the proper resolution of the compensation issues. We further conclude that reassignment is advisable to preserve the appearance of justice in this case. Although the judge was able to consider the financial means of the county in rendering his decision, the judge improperly based his decision on his personal policy that Foster was not entitled to compensation for the work he performed on the delayed application and motion because this Court denied leave to appeal. In addition, we do not believe that reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness considering the trial judge's personal stance on this issue. Accordingly, we remand the case to a different trial judge to determine the reasonable compensation owed to Foster. See *Hill*, 221 Mich App at 398.

Reversed and remanded for further proceedings consistent with this opinion. On remand, the case is to be reassigned to a different trial judge. We do not retain jurisdiction.

JANSEN, P.J., and K. F. KELLY and O'BRIEN, JJ., concurred.

PEOPLE v GUTHRIE

Docket No. 327385. Submitted September 13, 2016, at Detroit. Decided September 22, 2016, at 9:05 a.m.

John P. Guthrie III was arraigned in the 33d District Court on two counts of second-degree criminal sexual conduct (person under 13 years of age), MCL 750.520c(1)(a). After a preliminary examination, the prosecution requested entry of an order of *nolle prosequi*, which was granted. Because a *nolle prosequi* had entered, defendant moved in the district court for the destruction of his fingerprint images and arrest card under MCL 28.243(8). MCL 28.243(8) requires the destruction of fingerprint images and arrest records when a defendant's case is disposed of by an order of *nolle prosequi*. MCL 28.243(12), however, contains an exception to the requirement of destruction. Before MCL 28.243(12) was amended in 2012, the exception provided that destruction was not required when a defendant had been arraigned in circuit court for a charge of criminal sexual conduct. Defendant argued that this earlier version of the applicable statute indicated that the exception to the destruction requirement only applied to defendants who had been arraigned in circuit court. Defendant contended that because he was arraigned in district court, the court was required to order the Michigan State Police (MSP) to destroy his fingerprint images and arrest card. The prosecution argued that the 2012 amendment of MCL 28.243 had eliminated the language regarding arraignment in circuit court and that the exception now applied to defendants arraigned in district court on charges of criminal sexual conduct. The prosecution also asserted that defendant's motion to destroy his arrest record and fingerprint images was improper. The prosecution contended that the proper method for defendant to seek destruction of the items would have been for defendant to file an action in the circuit court for mandamus against the MSP, seeking compliance with the statute's mandate to destroy the items. The court, Jennifer Coleman Hesson, J., agreed with the prosecution that the amended statute prohibited the destruction of defendant's fingerprint images and arrest card because he had been charged

with criminal sexual conduct, and the court denied defendant's motion. Defendant appealed the district court's denial in the Wayne Circuit Court, claiming that the district court erred by concluding that it did not have discretion to order the destruction of his fingerprint images and arrest card. The circuit court, Richard M. Skutt, J., agreed with defendant, reasoning that the elimination of the phrase that limited application of the exclusion to defendants who had been arraigned in circuit court was merely a legislative decision to clear up the language in the statute and that nothing in the amended statute prohibited it from ordering the destruction of defendant's fingerprint images and arrest record. The circuit court ordered destruction of defendant's fingerprint images and arrest card. The prosecution appealed.

The Court of Appeals *held*:

1. A defendant is not required to file an action for mandamus when he or she seeks the destruction of fingerprint images and his or her arrest card. The Court of Appeals has recognized a defendant's ability to file a motion in a criminal case for the destruction of these items. Further, the State Court Administrative Office (SCAO) publishes forms for the purpose of moving for the destruction of fingerprint images and arrest records, and the forms support the conclusion that a motion may be made in a criminal case. The court rules similarly support this conclusion. A mandamus action filed against the MSP in circuit court is not required.

2. A statute must be interpreted according to its plain meaning. If a statute's language is unambiguous, the statute must be applied as written. When the Legislature amends a statutory provision, it is presumed to have intended to change the meaning of that provision or, on occasion, to clarify the meaning of a provision rather than change it. In this case, the amendment of MCL 28.243(12) removed the limiting language concerning circuit court arraignments from the MCL 28.243(12) exception. MCL 28.243(12) now contains no language regarding where a defendant was arraigned. This reflects the Legislature's intent that a defendant arraigned in either district or circuit court for criminal sexual conduct is not entitled to the destruction of his or her fingerprint images and arrest record under MCL 28.243(8). Therefore, the circuit court erred by ordering the destruction of defendant's fingerprint images and arrest card.

Reversed and remanded.

1. CRIMINAL LAW — DESTRUCTION OF BIOMETRIC DATA AND ARREST RECORDS — AVAILABILITY.

Under MCL 28.243(12), a defendant is not entitled to the destruction of his or her biometric data and arrest card when the defendant was arraigned for a charge of criminal sexual conduct; this rule applies no matter whether the defendant was arraigned in district or circuit court or whether the defendant was found not guilty, had his or her case dismissed, or an order of *nolle prosequi* entered after arraignment.

2. CRIMINAL LAW — DESTRUCTION OF BIOMETRIC DATA AND ARREST RECORDS — WRIT OF MANDAMUS.

A defendant may move for destruction of his or her fingerprint images and arrest card in his or her criminal case following an order of *nolle prosequi*; a writ of mandamus against the Michigan State Police seeking compliance with the statute's mandate to destroy the defendant's biometric data and arrest card is not required (MCL 28.243).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Timothy A. Baughman*, Special Assistant Prosecuting Attorney, for the people.

Law Offices of Raymond A. Correll PC (by *Raymond A. Correll*) for defendant.

Before: BORRELLO, P.J., and MARKEY and RIORDAN, JJ.

RIORDAN, J. The prosecution appeals by leave granted[1] the circuit court order reversing the district court order that denied defendant's motion for destruction of his arrest record and biometric data.[2] We reverse and remand for further proceedings consistent with this opinion.

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[1] *People v Guthrie*, unpublished order of the Court of Appeals, entered October 27, 2015 (Docket No. 327385).

[2] Under the current version of MCL 28.241a, "biometric data" includes fingerprint and palm print images. MCL 28.241a(b).

I. FACTUAL BACKGROUND

On October 28, 2014, defendant was charged with two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13 years of age). The following day, he was arraigned in district court. In December 2014, after a preliminary examination was held, the prosecution requested entry of an order of *nolle prosequi*, which the district court granted.[3]

In January 2015, defendant filed a motion in the district court requesting destruction of his fingerprints and the return of his arrest card, arguing that MCL 28.243(8) required destruction of his fingerprints and arrest record because an order of *nolle prosequi* had been entered. Although he acknowledged that MCL 28.243(12) contains an exception to the destruction requirement for crimes involving criminal sexual conduct (CSC), defendant noted that language in a former version of the statute stated that the exception only applied to defendants who were "arraigned in circuit court or the family division of circuit court."[4] Thus, because he was never arraigned in circuit court, defendant argued that he was entitled to destruction of his arrest card and fingerprint images.

In response, the prosecution argued that defendant's motion should be denied in light of a 2012 amendment of MCL 28.243(12), which deleted the phrase "in circuit

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[3] "*Nolle prosequi*" is defined as "[a] legal notice that a lawsuit or prosecution has been abandoned" or "[a] docket entry showing that the plaintiff or the prosecution has abandoned the action." *Black's Law Dictionary* (10th ed). In Michigan, *nolle prosequi* usually constitutes "a dismissal without prejudice which does not preclude initiation of a subsequent prosecution." *People v Reagan*, 395 Mich 306, 317; 235 NW2d 581 (1975); *People v McCartney*, 72 Mich App 580, 585; 250 NW2d 135 (1976). See also MCL 767.29 (setting forth requirements for entering a *nolle prosequi* upon an indictment in Michigan).

[4] See MCL 28.243(12), as amended by 2004 PA 222.

court or the family division of circuit court."[5] Because the current version of MCL 28.243(12) only states that the destruction requirement does "not apply to a person who was arraigned for any of the following [crimes]" and defendant was arraigned in district court on October 29, 2014, the prosecution contended that defendant was not entitled to the destruction of his records. In his reply, defendant urged the district court to read MCL 28.243 in its entirety in order to properly determine the Legislature's intent, arguing that the prosecution's position was inconsistent with other provisions of the statute.

Following a hearing, the district court denied defendant's motion for destruction of his arrest record and fingerprints, reasoning that it did not have discretion to grant the motion as a result of the 2012 amendment of the statute.

In February 2015, defendant appealed the district court's order in the Wayne Circuit Court. In his brief on appeal, defendant contended that the district court abused its discretion when it ruled that it was without discretion to order destruction of his arrest card and biometric data. He asserted, *inter alia*, that even though MCL 28.243(12) states that the provisions in MCL 28.243(8) requiring destruction do not apply to defendants who were arraigned for certain crimes, the statute does not state that a court is without discretion to order destruction of those documents in the interest of justice. Defendant argued that while law enforcement may not be required by statute to destroy biometric data and arrest cards once a defendant has been arraigned in district court, the statute does nothing to limit or prohibit a court from so ordering. In response, the prosecution again emphasized that MCL

[5] See 2012 PA 374.

28.243(12) states that the requirement to destroy arrest records and biometric data is inapplicable to certain enumerated offenses. It argued that if the Department of State Police fails to carry out its legal duty, a defendant may file an action for mandamus in circuit court. The prosecution reasoned that defendant improperly filed a motion for the destruction of his biometric data and arrest record in the district court. Nevertheless, the prosecution concluded that defendant was not entitled to destruction of his arrest record and biometric data.

During the hearing on defendant's appeal, the circuit court ruled that it did, in fact, have jurisdiction to rule on the destruction of defendant's arrest card and biometric data and that a mandamus action was not required. Ultimately, the circuit court granted defendant's motion, hypothesizing that the Legislature's deletion of the phrase "arraignment in circuit court" was most likely the result of "just some stocker trying to clear up language." Likewise, relying heavily on its examination of committee reports and bill analyses related to the 2012 amendment of the statute, the court speculated that the Legislature only intended to change the word "fingerprinting" to "biometric data" and to require the collection of biometric data at the point of arrest rather than at the point of conviction. Therefore, the court ruled that defendant was entitled to the destruction he requested.

II. STANDARD OF REVIEW

This appeal raises issues of first impression concerning the proper application of MCL 28.243(12). "Statutory interpretation presents a question of law, which this Court reviews de novo." *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009).

III. ANALYSIS

A. MANDAMUS

The prosecution first argues that defendant's appeal in the circuit court of the district court's decision regarding the destruction of his arrest card and biometric data was improper. It contends that defendant was required to file a mandamus action against the Michigan State Police seeking destruction of that documentation. We disagree.

While this Court has considered at least one appeal from a trial court's entry of a writ of mandamus concerning the return or destruction of fingerprints and arrest cards, see *McElroy v Mich State Police Crim Justice Info Ctr*, 274 Mich App 32, 33-35, 38-39; 731 NW2d 138 (2007), it also has considered appeals from court orders granting or denying a defendant's motion for the return or destruction of this documentation. See, e.g., *In re Klocek*, 291 Mich App 9, 11; 805 NW2d 213 (2010); *People v Benjamin*, 283 Mich App 526, 527; 769 NW2d 748 (2009) (holding that the defendants who were granted deferral status and probation were not entitled to destruction of their fingerprints and arrest cards); *People v Cooper (After Remand)*, 220 Mich App 368, 370-372; 559 NW2d 90 (1996) (interpreting a previous version of MCL 28.243); *People v Pigula*, 202 Mich App 87, 88-91; 507 NW2d 810 (1993). It is clear from these cases that the courts of this state routinely recognize a defendant's ability to file a motion in a criminal case for the return or destruction of his or her biometric data and arrest card pursuant to MCL 28.243.[6]

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[6] This conclusion is consistent with the fact that the State Court Administrative Office (SCAO) has approved court forms that specifically pertain to these motions. SCAO Form MC 235 clearly reflects the fact

Moreover, MCR 3.936 expressly states that, under certain circumstances, if a juvenile defendant's arrest

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that such a motion may be filed in criminal cases. It includes boxes indicating that the motion may be filed in district or circuit court. SCAO, *Form MC 235: Motion for Destruction of Fingerprints and Arrest Card* (March 2009). See also *McElroy*, 274 Mich App at 34-35 (referring to the defendant's filing of Form MC 235 when he moved for return of his fingerprints and arrest-related documents in his criminal case, which gave rise to the writ of mandamus at issue in that appeal). The form states:

> This form is for use when the arresting agency or the Michigan State Police has failed to destroy the fingerprints and arrest card as required by law or when the Michigan State Police has not destroyed the fingerprints and arrest card because the defendant has had a prior conviction as stated in MCL 28.243(12)(h). This form is not for use in conjunction with setting aside an adjudication pursuant to MCL 712A.18e or setting aside a conviction pursuant to MCL 780.621. [SCAO, *Form MC 235*.]

Similarly, Form MC 392, used for orders concerning the destruction of fingerprints and arrest cards, includes boxes indicating that such an order may be entered in district or circuit court and includes specific sections in which a court may list the name of the defendant or juvenile who has filed a motion requesting that his or her fingerprints and arrest card be destroyed. SCAO, *Form MC 392: Order Regarding Destruction of Fingerprints and Arrest Card* (March 2010). The order form provides two alternative dispositions:

> In accordance with MCL 28.243, the arresting agency and/or Michigan State Police shall
>
> ☐ not destroy or return the fingerprints and arrest card of the defendant/juvenile.
>
> ☐ immediately destroy the fingerprints and arrest card of the defendant/juvenile and provide certification of that fact to the defendant/juvenile. [SCAO, *Form MC 392*.]

Additionally, the certificate of mailing section indicates that the order shall be served, "as appropriate," on "the arresting agency and the Michigan State Police[.]" *Id*.

Finally, Form MC 263, used for motions and orders of *nolle prosequi*, states:

card and biometric data are not destroyed in accordance with MCL 28.243(7) and (8), "the court, *on motion filed pursuant to MCL 28.243(8)*, shall issue an order directing the Department of State Police, or other official holding the information, to destroy the fingerprints and arrest card . . . ." MCR 3.936(D) (emphasis added). See also *In re Klocek*, 291 Mich App at 11. While MCR 3.936 applies to juvenile proceedings, it clearly recognizes that a motion for the destruction of biometric data or an arrest card may be filed under MCL 28.243(8), and it demonstrates the authority of a court to require destruction of arrest cards and biometric data in cases other than actions for mandamus relief. Likewise, MCL 28.243(12)(h)—by stating that MCL 28.243(8) does not apply to an individual "who has a prior conviction, other than a misdemeanor traffic offense"—specifically contemplates the authority of "a court of record, except the probate court," to "order[] the destruction or return of the biometric data and arrest card" in those cases. In *Pigula*, 202 Mich App at 91, we also stated, in the context of interpreting a former version of MCL 28.243, that "[t]he circuit courts continue to have jurisdiction to enforce" the provision of the statute stating that the return of fingerprints and arrest cards shall not apply in specified cases.

Finally, we have held that "[t]he general rule is that a writ of mandamus is not to be issued where the plaintiff can appeal the error." *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544

TO THE DEFENDANT: Your fingerprints and arrest card will be destroyed by the Michigan State Police if you have been found not guilty. *They may also be destroyed after motion and order for destruction of fingerprints (forms MC 235 and MC 392).* [SCAO, *Form MC 263: Motion/Order of Nolle Prosequi* (March 2016) (emphasis added).]

(1993). In this case, after the district court denied defendant's motion for destruction of his arrest card and fingerprints, defendant had the right to appeal the district court's decision in the circuit court. Defendant subsequently exercised this right, at which time the prosecution raised its mandamus argument for the first time.

For these reasons, we reject the prosecution's claim that defendant was required to file an action for mandamus rather than a motion in the district court seeking the destruction of his fingerprints and arrest card.

B. DESTRUCTION OF ARREST CARD AND BIOMETRIC DATA

The prosecution next argues that the circuit court erroneously granted defendant's request for destruction of his arrest card and biometric data, contrary to MCL 28.243(12), because it lacked authority to order destruction given that defendant was, in fact, arraigned in district court. We agree.

> The primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. We begin this task by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. Unless they are otherwise defined in the statute or are terms of art or technical words, we assign the words of a statute their plain and ordinary meaning. . . . Only if the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent. Although we must, as far as possible, give effect to every word, phrase, and clause in the statute, [w]e may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. [*People v Haynes*, 281 Mich App 27, 29; 760

> NW2d 283 (2008) (quotation marks and citations omitted; alteration in original).]

We will presume that a change in a statutory phrase reflects the Legislature's intention to change the meaning of that provision. *Pigula*, 202 Mich App at 90; see also *People v Williams*, 288 Mich App 67, 85; 792 NW2d 384 (2010) ("[A] change by amendment in the phraseology of a statute is presumed to indicate a legislative purpose to change the meaning.") (quotation marks and citation omitted; alteration in original), aff'd 491 Mich 164 (2012). On the other hand, we have, on occasion, acknowledged that despite this presumption, a "change[] in statutory language may reflect an attempt to clarify the meaning of a provision rather than change it." *Ettinger v Lansing*, 215 Mich App 451, 455; 546 NW2d 652 (1996); see also *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 82; 858 NW2d 751 (2014).

Before it was amended in 2012, MCL 28.243(12) provided, in relevant part:

> The provisions of subsection (8) that require the destruction of the fingerprints and the arrest card do not apply to a person *who was arraigned in circuit court or the family division of circuit court* for any of the following:
>
> (a) The commission or attempted commission of a crime with or against a child under 16 years of age.
>
> * * *
>
> (c) Criminal sexual conduct in any degree. [MCL 28.243(12), as amended by 2004 PA 222 (emphasis added).]

The 2012 amendment deleted the words "in circuit court or the family division of circuit court" so that,

under the current version of the statute, MCL 28.243(8) does not apply "to a person *who was arraigned* for any of the following . . . ." MCL 28.243(12), as amended by 2012 PA 374 (emphasis added). As stated, the first step in statutory interpretation is to review the language of the statute. *Haynes*, 281 Mich App at 29. In its current form, the statute does not specify the court in which a defendant must be arraigned in order for MCL 28.243(12) to apply.[7] However, because a change in a statutory phrase gives rise to a presumption that the Legislature intended to change the meaning of the phrase, *Pigula*, 202 Mich App at 90, and there is no indication in this case that the amendment was only intended to clarify the meaning of the statute, we must conclude that the Legislature's intent in deleting the phrase "in circuit court or the family division of circuit court" was to render an arraignment in either district court or circuit court sufficient for MCL 28.243(12) to apply.

The trial court speculated that the deletion of the phrase was simply "a cleanup of language" given its

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[7] We recognize that the arraignments held in district court and circuit court are distinct, in that district court arraignments are on the warrant or complaint, while circuit court arraignments are on the information and occur after the defendant has been bound over to the circuit court for trial. See MCR 6.006(A); MCR 6.104; MCR 6.113(B); *People v Nix*, 301 Mich App 195, 207-208; 836 NW2d 224 (2013). However, we find no basis in the language of MCL 28.243(12) for concluding that the Legislature intended the differences between district court and circuit court arraignments to affect or limit the scope of MCL 28.243(12) after it removed "in circuit court or the family division of circuit court" from that subsection. Further, it is noteworthy that both types of arraignments occur following a finding of probable cause, see MCR 6.102(A) and (B); MCR 6.104(A) and (D); MCR 6.110(E); MCR 6.111(A) and (B); MCR 6.113(A), and the Michigan Court Rules provide a procedure for a "circuit court arraignment" to be conducted by a district court judge under both the former and current versions of MCR 6.111(A).

review of sources other than the text of the statute and its personal knowledge of, and experience with, the legislative process. However, this bald conjecture, which is not grounded in the statute's unambiguous language, is insufficient to overcome the presumption that the Legislature intended to change the application of the provision. See *Haynes*, 281 Mich App at 29. As part of its analysis, the lower court failed to consider a basic tenet of statutory interpretation—when language is unambiguous, no further judicial construction is required or permitted. See *id*. Instead, the circuit court simply chose to ignore the applicable plain language of the statute.

This conclusion is consistent with our interpretation of an earlier version of MCL 28.243 after the Legislature deleted language from the statute. In *Pigula*, 202 Mich App at 88, the defendant was charged with first-degree and second-degree criminal sexual conduct. When the charges were dismissed, the defendant moved for return of his fingerprints, arrest card, and photographs. *Id*. In support of his motion, the defendant cited a phrase in a previous version of MCL 28.243 that allowed a court to order the return of the records even if the defendant had been charged with criminal sexual conduct. *Id*. at 89. We noted that this phrase had been deleted in an amendment of the statute. *Id*. at 90. As a result, we held that "there [was] no right to the return of arrest records with regard to a dismissed CSC charge," reasoning that a change in statutory language reflects a change in meaning. *Id*. In this case, consistent with our reasoning in *Pigula*, we conclude that deletion of the phrase "in circuit court or the family division of circuit court" reflects the Legislature's intent to change the statute's scope.

Therefore, we hold that an arraignment in either district court or circuit court is sufficient for MCL 28.243(12) to apply. Because defendant was arraigned in district court on October 29, 2014, before the order of *nolle prosequi* was entered in December 2014, MCL 28.243(12) applies in this case, and defendant is not entitled to destruction of his arrest card or biometric data. Likewise, given the clear and unambiguous language of the statute, we reject defendant's claims that the trial court had discretion to order the destruction or return of defendant's biometric data and arrest card in the interest of justice. See *Pigula*, 202 Mich App at 90-91 (providing an analysis of provisions in the former version of MCL 28.243 that are substantively identical, in all relevant respects, to the current version of MCL 28.243(12)(c) and (h)). Nothing in the plain language of the statute supports the circuit court's conclusion or defendant's contention regarding the scope of the trial court's discretion in this matter.

IV. CONCLUSION

Defendant was not required to request a writ of mandamus compelling the return or destruction of his arrest card and biometric data. However, MCL 28.243(12) does not entitle defendant to the destruction of his biometric data and arrest card.

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

BORRELLO, P.J., and MARKEY, J., concurred with RIORDAN, J.

THE GROSSE POINTE LAW FIRM, PC v JAGUAR LAND ROVER NORTH AMERICA, LLC

Docket No. 326312. Submitted August 10, 2016, at Detroit. Decided September 22, 2016, at 9:10 a.m. Leave to appeal denied 500 Mich 1017.

The Grosse Pointe Law Firm, PC, brought an action in the Macomb Circuit Court against Jaguar Land Rover North America, LLC, and others, claiming, among other things, breach of warranty and violation of the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., for issues related to a vehicle purchased December 30, 2005, repaired several times throughout plaintiff's ownership, and ultimately traded in on November 28, 2012. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the claims were barred by MCL 440.2725, which provides a four-year limitations period for claims involving breach of contract for the sale of goods. Plaintiff contended that promises to repair or replace referred to future performance of the warrantor, not the vehicle, so that the claim accrued when the warrantor failed to repair the vehicle rather than on tender of delivery. The court, John C. Foster, J., concluded that the claims were time-barred and granted defendants' motion for summary disposition, but the court acknowledged that other jurisdictions recognized a separate repair-and-replace limited warranty that accrued at the time the repair was attempted, dismissing the argument for a later accrual date only because there was no precedential caselaw on the subject in Michigan. Plaintiff applied for delayed leave to appeal in the Court of Appeals, which was granted.

The Court of Appeals *held*:

A promise to repair or replace says nothing about the quality of the goods themselves but rather identifies a specific remedy available to the buyer if a defect arises. Therefore, promises to repair defective goods are contractual promises under Article 2 of the Michigan Uniform Commercial Code (UCC), MCL 440.2101 through MCL 440.2725, but they are not warranties under the UCC. Otherwise, the period of limitations would begin to run before a breach even occurred. A promise to repair or replace defective goods is breached when the seller either fails or refuses to repair or replace the defect, and the period of limitations begins

to run at that time. Therefore, the trial court erred when it concluded that plaintiff's claim accrued on tender of delivery. The trial court also erred by dismissing plaintiff's MMWA claim. The promise to repair or replace is a written warranty under 15 USC 2301(6)(B) of the MMWA. The MMWA does not provide a period of limitations for filing a breach of written warranty claim, so courts apply the most closely analogous statute of limitations under state law, which, in this case, was Article 2 of the UCC. Therefore, MCL 440.2725 governed plaintiff's MMWA claim, and the trial court erred by concluding that plaintiff's MMWA claim accrued on tender of delivery.

Reversed and remanded.

BECKERING, P.J., concurring, agreed with the result reached by the majority, but wrote separately to discuss how the MMWA provided a different path to the same result, with logical and persuasive support for the majority's decision. Specifically, in claims brought under the MMWA, a repair-or-replace warranty was not a promise regarding the quality, character, description, sample, or model of the goods because it did not "warrant" the quality of the vehicle or its performance, and the goods could not "conform" to the promise to repair. Instead, it related to an undertaking by the supplier of the product to refund, repair, replace, or take other remedial action if and when a defect arose during the warranty period, making it a written warranty under 15 USC 2301(6)(B). MCL 440.2725 governed the limitations period, but because the warranty did not meet the criteria of MCL 440.2313, non-UCC law governed the warranty's accrual date. Accordingly, the claim of breach of the repair-or-replace warranty accrued when the duty to perform was not fulfilled, and the consumer had four years after the breach to bring a cause of action.

1. CONTRACTS — UNIFORM COMMERCIAL CODE — ARTICLE 2 — PROMISES TO REPAIR OR REPLACE.

Promises to repair or replace defective goods are contractual promises under Article 2 of the Michigan Uniform Commercial Code, MCL 440.2101 through MCL 440.2725, but they are not warranties.

2. CONSUMER PROTECTION — MAGNUSON-MOSS WARRANTY ACT — WRITTEN WARRANTIES — PROMISES TO REPAIR OR REPLACE.

Promises to repair or replace are "written warranties" under 15 USC 2301(6)(B) of the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq*.

3. CONSUMER PROTECTION — MAGNUSON-MOSS WARRANTY ACT — STATUTES OF LIMITATIONS.

Under MCL 440.2725, the period of limitations for an action under the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq.*, is four years.

4. CONTRACTS — BREACH OF PROMISE TO REPAIR OR REPLACE — STATUTES OF LIMITATIONS.

A promise to repair or replace defective goods is breached when the seller either fails or refuses to repair or replace the defective good, and the period of limitations begins to run at that time.

O'Reilly Rancilio, PC (by *Lawrence M. Scott*), and *Alan H. Broad* for plaintiff.

The Erskine Law Group, PC (by *Scott M. Erskine* and *Melissa Trpcevski*), for defendants.

Before: BECKERING, P.J., and CAVANAGH and GADOLA, JJ.

GADOLA, J. This case requires us to examine the distinction between warranties and remedies under Michigan's Uniform Commercial Code (UCC), MCL 440.1101 *et seq*. Plaintiff, The Grosse Pointe Law Firm, PC, appeals by leave granted[1] orders granting the motions for summary disposition filed by defendants Jaguar Land Rover North America, LLC (JLRNA), Rover Motors of Farmington Hills LLC (Rover Motors), and Jaguar/Land Rover of Macomb, LLC (Land Rover of Macomb). We reverse and remand for further proceedings.

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[1] *The Grosse Pointe Law Firm, PC v Jaguar Land Rover North America*, unpublished order of the Court of Appeals, entered September 17, 2015 (Docket No. 326312). This Court's order granting plaintiff leave to appeal limited the appeal to "the issue of whether the circuit court erred by dismissing plaintiff's claim for breach of a warranty to repair based on the running of the statute of limitations." *Id*.

I. BACKGROUND FACTS

Plaintiff purchased a vehicle from Rover Motors on December 30, 2005. The vehicle was manufactured by JLRNA. At the time of purchase, JLRNA issued a document titled "Vehicle Warranties," which stated the following:

> Land Rover North America, Inc., warrants that during the warranty period, if a Land Rover vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for service; any component covered by this warranty found to be defective in materials or workmanship will be repaired, or replaced, without charge.
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> The warranty period for the vehicle begins on the date of the first retail sale, or on the date of entry into demonstrator service. The basic warranty period is for four (4) years or until the vehicle has been driven 50,000 miles, whichever occurs first.

Plaintiff brought the vehicle to Rover Motors and Land Rover of Macomb for repairs several times. In 2011 and 2012, plaintiff attempted to negotiate for JLRNA to repurchase the vehicle, but the parties failed to reach an agreement regarding the price. On November 28, 2012, plaintiff traded in the vehicle and filed the instant lawsuit.

In its lawsuit, plaintiff raised, among others, claims for breach of warranty and violation of the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*. Defendants moved for summary disposition under MCR 2.116(C)(7),[2] arguing that plaintiff's breach of warranty

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[2] JLRNA filed the motion for summary disposition under MCR 2.116(C)(7). Rover Motors and Land Rover of Macomb concurred in the motion.

claims were time-barred by MCL 440.2725, which provides a four-year limitations period for claims involving breach of any contract for the sale of goods. MCL 440.2725(2) states that a breach of warranty claim accrues "when tender of delivery is made, except . . . where a warranty explicitly extends to future performance of the goods . . . ." MCL 440.2725(2). Plaintiff responded that "[p]romises to repair or replace refer to the future performance of the warrantor manufacturer, not to the future performance of the vehicle," so a claim for breach of a repair-or-replace warranty accrues when the warrantor fails to repair a defect, rather than on tender of delivery. The trial court granted defendants' motion under MCR 2.116(C)(7), concluding that plaintiff's claims were time-barred under MCL 440.2725. In doing so, the court acknowledged that other jurisdictions "recognize[] a separate repair and replace limited warranty that accrues at the time the repair is attempted," but reasoned that without precedential caselaw on the subject in Michigan, plaintiff's claims accrued on tender of delivery.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *King v Reed*, 278 Mich App 504, 513; 751 NW2d 525 (2008). MCR 2.116(C)(7) "permits summary disposition where the claim is barred by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). When reviewing such a motion, we "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 the parties submit any affida-

vits, depositions, admissions, or other documentary evidence, we "consider them to determine whether there is a genuine issue of material fact." *Id*. at 429. Only if no facts are in dispute and reasonable minds could not differ regarding the legal effect of those facts should the trial court grant a motion for summary disposition under MCR 2.116(C)(7). *Id*.

We also review questions of statutory interpretation de novo. *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). When construing statutory provisions, courts must interpret the words of the statute in light of their ordinary meaning and read them in context. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). Likewise, courts must "give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

III. DISCUSSION

Article 2 of the UCC, MCL 440.2101 through MCL 440.2725, governs the relationship between parties involved in contracts for the sale of goods. MCL 440.2102; *Neibarger v Universal Coops, Inc*, 439 Mich 512, 519-520; 486 NW2d 612 (1992). MCL 440.2725 provides the limitations period for claims involving obligations arising under Article 2 and states, in pertinent part, the following:

> (1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.

> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Therefore, a cause of action for breach of a sales contract under Article 2 accrues when the breach occurs, unless the cause of action is for breach of warranty, in which case the claim accrues either on tender of delivery or, if the warranty explicitly extends to future performance of the goods, when the breach is, or should have been, discovered.

The trial court concluded that the repair-or-replace provision at issue in this case constituted a warranty for purposes of MCL 440.2725(2), but determined that the warranty did not "explicitly extend[] to future performance of the goods," so plaintiff's cause of action accrued on tender of delivery. For a warranty to extend to future performance, it must expressly define the future period to which it applies. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002). Further, it must explicitly provide that the goods warranted will be free from defects for the specified period. See *Executone Business Sys Corp v IPC Communications, Inc*, 177 Mich App 660, 667-669; 442 NW2d 755 (1989) (holding that a warranty extended to future performance when it "explicitly provided freedom 'from defects for a period of one year from the date of shipment' ").

The repair-or-replace provision in this case does not expressly state that plaintiff's vehicle will be free from defects, but rather states that the manufacturer will repair or replace any defects that arise during the

specified period. Accordingly, we agree with the trial court that the provision does not "explicitly extend[] to future performance of the goods." However, the question remains whether a repair-or-replace provision, standing alone, is a "warranty" for purposes of MCL 440.2725(2).

In *Centennial Ins Co v Gen Electric Co*, 74 Mich App 169, 170-171; 253 NW2d 696 (1977),[3] this Court seemingly treated a repair-or-replace provision in a contract for the sale of goods as a warranty within the scope of Article 2, but not as a warranty extending to future performance for purposes of MCL 440.2725(2). In *Centennial*, the buyer brought a breach of warranty claim against the seller more than four years after receiving the goods at issue. *Id*. at 170-171. The buyer argued that the limitations period for bringing its claim had not expired because the warranty contained a one-year repair-or-replace provision, which fell within the exception of MCL 440.2725(2) for warranties "explicitly extend[ing] to future performance of the goods." *Id*. at 171. The contract provision at issue in *Centennial* stated the following:

> "The Company warrants to the Purchaser that the equipment to be delivered hereunder will be free from defects in material, workmanship and title and will be of the kind and quality designated or described in the contract. . . . If it appears within one year from the date of shipment by the Company that the equipment delivered hereunder does not meet the warranties specified above and the Purchaser notifies the Company promptly, the Company shall thereupon correct any defect, including nonconformance with the specifications, at its option, either by repairing any defective part or parts or by making

[3] We note that *Centennial* is not binding on this Court. See MCR 7.215(J)(1) (providing that cases decided by this Court before November 1, 1990, do not have precedential value).

> available at the Company's plant, a repaired or replacement part." [*Id*. at 171 n 1 (emphasis omitted).][4]

Rejecting the buyer's claim, this Court held that the one-year repair-or-replace provision did not constitute "a warranty for future performance, but rather, *a specification of the remedy to which* [*the*] *buyer is entitled* should breach be discovered within the first year." *Id*. at 171. Accordingly, the Court held that the buyer's claim was time-barred by MCL 440.2725. *Id*. at 172.

The *Centennial* Court properly identified a distinction between a warranty extending to future performance, which promises that goods will be free from defects for a specified period of time, and a promise to repair or replace, which provides a remedy if any defects arise. However, the Court did not specifically address whether a repair-or-replace promise, standing alone, constitutes a warranty for purposes of MCL 440.2725.[5]

Defendants argue that a promise to repair or replace is a warranty for purposes of MCL 440.2725(2) because it falls within the definition of "express warranty" provided by MCL 440.2313. MCL 440.2313(1) states that express warranties by the seller are created in the following ways:

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[4] The *Executone* Court distinguished *Centennial* by noting that the provision in *Centennial* did not "explicitly warrant that the goods would be free from defects for a specified period of time," while the warranty provision in *Executone* "explicitly provided freedom 'from defects for a period of one year from the date of shipment' . . . ." *Executone*, 177 Mich App at 668.

[5] Indeed, the seller in *Centennial* arguably did create an express warranty by making a promise that the goods would be free from defects, albeit not for a specified period of time, in addition to a promise to repair or replace defective parts. See MCL 440.2313(1)(a). No such language appears in the contract provision at issue in this case.

> (a) An affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
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> (b) A description of the goods which is made part of the bargain creates an express warranty that the goods shall conform to the description.
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> (c) A sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Defendants argue that the repair-or-replace provision in this case falls within the definition of "express warranty" under MCL 440.2313(1)(a) because it contains a promise to repair or replace made by JLRNA to plaintiff that relates to the vehicle and formed part of the basis of the sale. However, MCL 440.2313(1)(a) goes on to state that an applicable affirmation of fact or promise "creates an express warranty that the *goods shall conform to the affirmation or promise*." (Emphasis added.)[6] Goods cannot "conform" to a promise to repair or replace because such a promise says nothing about the character or quality of the goods, but rather identifies a remedy if the buyer determines that the goods are defective. Put another way, an unadorned promise to repair or replace a defective part is not a promise concerning the quality or performance of the goods to which the goods can "conform." A promise to repair or replace instead provides nothing more than a remedy for a product that breaks. Accordingly, we cannot agree that the repair-or-replace provision in this case is an express warranty under MCL 440.2313(1)(a).

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[6] Again, when interpreting statutes, we must give effect to every phrase, clause, and word in the statute, we must read the statutory language in context, and we must construe the statute as a whole. *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009).

In addition to express warranties under MCL 440.2313, which parties may include as a term of a contract of sale, Article 2 also defines a wide range of implied warranties that arise by operation of law. See *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 638; 774 NW2d 332 (2009).[7] Although the parties do not suggest that the repair-or-replace provision at issue in this case is an implied warranty under Article 2, what all the warranties defined under Article 2, express or implied, have in common is that they relate to the character or quality of the goods, rather than to the remedies that are available should a buyer discover that the goods are defective.[8] In contrast, a promise to repair or replace

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[7] The implied warranties under Article 2 are as follows: the implied warranty of title and against infringement, which provides that "title conveyed shall be good, and its transfer rightful" and that "the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge," MCL 440.2312; the implied warranty of merchantability, which provides that goods must (a) "pass without objection in the trade under the contract description," (b) "in the case of fungible goods, are of fair quality within the description," (c) "are fit for the ordinary purpose for which the goods are used," (d) "run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved," (e) "are adequately contained, packaged, and labeled as the agreement may require," and (f) "conform to the promises or affirmations of fact made on the container or label if any," MCL 440.2314; and the implied warranty of fitness for a particular purpose, which provides that "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose," MCL 440.2315.

[8] See Garvin, *Uncertainty and Error in the Law of Sales: The Article Two Statute of Limitations*, 83 B U L Rev 345, 379 (2003) ("All [express and implied warranties] go to the quality of the goods at tender. None goes to the remedies, which come about only if a warranty is breached."); DeWitt, *Action Accrual Date for Written Warranties to Repair: Date of Delivery or Date of Failure to Repair?*, 17 U Mich J L Reform 713, 722

says nothing about the quality of the goods themselves, but rather identifies a specific *remedy* available to the buyer should a defect arise.

Accordingly, we adopt the approach that promises to repair or replace defective goods are contractual promises under Article 2, but are not warranties.[9] To conclude otherwise would require us to reach "the perverse conclusion that the statute of limitations began

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n 35 (1984) ("A repair provision relates not to the goods and their quality, but to the manufacturer and its obligation to the purchaser.").

[9] Defendants cite *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105; 394 NW2d 17 (1986), *Rust-Pruf Corp v Ford Motor Co*, 172 Mich App 58; 431 NW2d 245 (1988), *Severn v Sperry Corp*, 212 Mich App 406; 538 NW2d 50 (1995), and *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309; 696 NW2d 49 (2005), for the proposition that "Michigan case law is clear that warranties substantially similar to [the repair-or-replace provision at issue in this case] are express limited warranties under MCL 440.2313." We first note that, contrary to defendants' assertions, *Kelynack* and *Rust-Pruf* are not binding on this Court. MCR 7.215(J)(1). Although these cases involve repair-or-replace provisions included in contracts for the sale of goods, none of the cases addresses the issue we are faced with today, which is whether such remedial promises, standing alone, constitute express warranties under MCL 440.2313 or fall within the breach of warranty accrual provision of MCL 440.2725(2). Further, like the approach we adopt today, these cases explain that repair-or-replace promises relate to the *remedies* available to a buyer who discovers a defect in purchased goods, and do not suggest that such promises relate to the quality of the goods themselves, which is necessary to create an express warranty under MCL 440.2313(1)(a). See *Kelynack*, 152 Mich App at 115 (characterizing a repair-or-replace clause as "an exclusive remedy provision contained in a warranty"); *Rust-Pruf*, 172 Mich App at 61-62 (holding that a party could not sustain a products-liability action against a vehicle manufacturer when the rights that could be enforced by the buyer for breach of an express warranty were set forth in the sales contract); *Severn*, 212 Mich App at 409 (stating that a purchased good was covered by a "two-year written warranty under which defendant's obligations were limited to repairing defects or . . . replacing any parts that in defendant's judgment were defective"); *Computer Network*, 265 Mich App at 314 (noting that a promise to repair or replace in a "limited express warranty" constitutes a remedy to which the parties agreed).

to run before the breach occurred." *Baker v DEC Int'l*, 458 Mich 247, 249 n 4; 580 NW2d 894 (1998) (citation and quotation marks omitted).[10] That conclusion would also render repair-or-replace promises extending beyond four years meaningless because any claim for breach of the promise would be time-barred four years after the tender of delivery, and it would further give sellers an incentive to stall repairs until the limitations period expired. Because remedial promises are not warranties, a claim for breach of a remedial promise "accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." MCL 440.2725(2). It seems unremarkable to state that a promise to repair or replace defective goods is breached when the seller either fails or refuses to repair or replace the defect, and that the statute of limitations begins to run at that time. Therefore, the trial court erred by concluding that plaintiff's claim accrued on tender of delivery.

For the same reasons, the trial court erred by dismissing plaintiff's MMWA claim. Although plaintiff's claim for breach of the promise to repair or replace is not truly a "breach of warranty" claim under Article 2 for purposes of MCL 440.2725(2), the promise

[10] Defendants argue that our approach requires us to ignore the Supreme Court's holding in *Baker*, 458 Mich 247. We disagree. In *Baker*, the plaintiffs brought an implied-warranty claim under the UCC more than four years after their purchased equipment was delivered but arguably less than four years after the equipment was installed. *Id*. at 250. The issue in *Baker* was whether tender of delivery occurred—such that the period of limitations began to run on plaintiffs' breach of warranty claim—at the time of delivery or installation. *Id*. Our Supreme Court held that "where the seller is obligated to install goods under a contract, tender of delivery does not occur until installation is completed." *Id*. at 249. Accordingly, *Baker* does not address the issue we are faced with today, and its holding does not dictate a contrary result.

is a "written warranty" for purposes of the MMWA. See 15 USC 2301(6)(B). The MMWA specifically defines written warranties to include "any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking." 15 USC 2301(6)(B).

The MMWA does not provide a limitations period for filing a breach of written warranty claim. See *Mydlach v DaimlerChrysler Corp*, 226 Ill 2d 307, 316; 314 Ill Dec 760; 875 NE2d 1047 (2007) ("Although the [MMWA] provides a private right of action for breach of a written warranty, the Act does not contain a limitations provision for such an action."). When a federal statute fails to specify a limitations period, "courts apply the most closely analogous statute of limitations under state law." *DelCostello v Int'l Brotherhood of Teamsters*, 462 US 151, 158; 103 S Ct 2281; 76 L Ed 2d 476 (1983). The most analogous statute of limitations is found in Article 2 of the UCC, as codified by various state statutes. See *Snyder v Boston Whaler, Inc*, 892 F Supp 955, 960 (WD Mich, 1994). Therefore, MCL 440.2725 also applies to plaintiff's MMWA claim, and the trial court erred by concluding that plaintiff's MMWA claim accrued on tender of delivery. Accordingly, we reverse the trial court's order granting defendants summary disposition on plaintiff's warranty claims and remand this matter to the trial court for further proceedings.[11]

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[11] We decline to address plaintiff's equitable-estoppel claim because it was not part of the issue for which we granted leave to appeal. Therefore, the issue is not properly before this Court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs. MCR 7.219(A).

CAVANAGH, J., concurred with GADOLA, J.

BECKERING, P.J. (*concurring*). I concur in the result reached by my colleagues and write separately to discuss how the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., provides a different path to the same result, while also providing logical and persuasive support for the majority's decision.

Congress enacted the MMWA in 1974 to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 USC 2302(a). The MMWA does not require a consumer product to be warranted, 15 USC 2302(b)(2), but when a warranty is provided, it is subject to the MMWA's regulatory scheme, 15 USC 2302(a); 16 CFR 700.1 *et seq*. If a product fails, the warrantor may elect repair, replacement, or refund as a remedy. 15 USC 2301(10). If the warrantor elects to repair the product, but it cannot be repaired after a reasonable number of attempts, the "warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be)." 15 USC 2304(a)(4). Subject to provisions inapplicable to the case at bar,[1] the MMWA provides for a private right of action for consumers in state or federal court when suppliers, warrantors, or service contractors violate its provisions. 15 USC 2310(d)(1).

[1] See 15 USC 2310(a)(3) and (e), addressing alternative dispute resolution and class actions, respectively.

As the majority points out, the MMWA has no statute of limitations. Where there is no federal statute of limitations expressly applicable to a suit, "courts apply the most closely analogous statute of limitations under state law." *DelCostello v Int'l Brotherhood of Teamsters*, 462 US 151, 158; 103 S Ct 2281; 76 L Ed 2d 476 (1983). As the majority further explains, the most analogous statute of limitations is set forth in § 2-725 of the Uniform Commercial Code (UCC), codified in Michigan as MCL 440.2725.[2] See *Snyder v Boston Whaler, Inc*, 892 F Supp 955, 960 (WD Mich, 1994).[3] Thus, the four-year period of limitations found in MCL 440.2725 also applies to plaintiff's MMWA claim. The question at issue is when the period of limitations begins to run.

Whereas the UCC refers to "express warranties" (which may be oral or written) and "implied warranties," MCL 440.2313 to MCL 440.2315, the MMWA refers to "written warranties" (full or limited) and "implied warranties," 15 USC 2301(6) and (7); 15 USC 2303. Broader than the UCC's definition of "express warranty," the MMWA's definition of "written warranty" encompasses:

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[2] MCL 440.2725 provides in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
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> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

[3] "Although lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
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> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product. [15 USC 2301(6).]

For the reasons set forth by my colleagues, the warranty to repair or replace defective components at issue in the instant case does not meet the criteria of an "express warranty" under the UCC. However, it does meet the criteria of a "written warranty" under the quoted provision of the MMWA, 15 USC 2301(6)(B).

Some courts have elected to treat a written warranty under the MMWA the same as an express (or implied) warranty under the UCC for purposes of determining an accrual date if the written warranty does not fall within the recognized exception to the general rule that a breach accrues on the date of delivery. For example, one federal district court held that a repair-or-replace warranty does not extend the accrual date unless the warranty "(1) involves specific contractual obligations that can be deemed to accrue after delivery, or (2) explicitly extends particular obligations beyond the four year period of warranty." *Jackson v Eddy's LI RV Ctr, Inc*, 845 F Supp 2d 523, 532 (ED NY, 2012). An example of the first condition would be a warranty that explicitly states that it

accrues once the delivered goods are "in place," while an example of the second would be an express agreement to replace or repair a product beyond the statutory warranty period.[4] See *id*. When neither condition is present, the court concluded, future performance of repair-or-replace obligations "cannot extend accrual of the statute of limitations beyond the date of delivery." *Id*.

This approach has been criticized on the ground that a promise to repair or replace could be unenforceable if breach of the promise occurred near the end of the four-year limitations period. See *Mydlach v DaimlerChrysler Corp*, 226 Ill 2d 307, 324-325; 314 Ill Dec 760; 875 NE2d 1047 (2007).[5] Further, if a cause of action for breach of a repair-or-replace promise is timely only if brought no later than four years after tender of delivery, manufacturers or sellers could "use the marketing advantage of longer repair warranty, yet escape the accompanying obligations of that warranty by pleading the statute of limitations in defense." *Id*. at 325. The latter possibility would be contrary to the purpose of the MMWA, which is "to improve the adequacy of information available to consumers" and "prevent deception." 15 USC 2302(a).

Without differentiating between warranty and remedy as the majority does today, other courts have acknowledged the distinction between an express warranty under the UCC and a written warranty under the MMWA, and they have referred to non-UCC law to

[4] E.g., a 6-year/60,000-mile warranty on a vehicle's powertrain. See, e.g., *Cosman v Ford Motor Co*, 285 Ill App 3d 250, 257; 220 Ill Dec 790; 674 NE2d 61 (1996).

[5] This Court is not bound by cases from other jurisdictions; it may, however, find the analyses contained in those cases to be helpful and persuasive. See *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

determine when a cause of action accrues for breach of a written promise to repair and replace falling under the MMWA's definition of written warranty. MCL 440.1103(2) ("Unless displaced by the particular provisions of [Michigan's UCC], the principles of law and equity . . . supplement its provisions."). They have concluded that breach of such promise occurs when the promised repair or replacement is not made. Restatement Contracts, 2d, § 235, p 211 ("When performance of a duty under a contract is due any non-performance is a breach."); see also *Woody v Tamer*, 158 Mich App 764, 771-773; 405 NW2d 213 (1987) (discussing the Second Restatement of Contracts). Thus, as the Illinois Supreme Court reasoned in *Mydlach*:

> Performance under a vehicle manufacturer's promise to repair or replace defective parts is due not at tender of delivery, but only when, and if, a covered defect arises and repairs are required. In that event, if the promised repairs are refused or unsuccessful, the repair warranty is breached and the cause of action accrues, triggering the four-year limitations period. [*Mydlach*, 226 Ill 2d at 323.]

The advantages to this interpretation, the Illinois Supreme Court noted, are that it ensures enforceability of a warranty even when a breach occurs late in the warranty period and supports the MMWA's purpose to prevent deception. See *id*. at 324-325. I find the analysis in *Mydlach* to be on point and persuasive.

In claims brought under the MMWA, a repair-or-replace warranty is a promise not regarding the quality, character, description, sample, or model of the goods—as it does not "warrant" the quality of the vehicle or its performance, and the goods cannot "conform" to the promise to repair[6]—but instead, it relates to an undertaking by the supplier of a product "to

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[6] See *Cosman*, 285 Ill App 3d at 259.

refund, repair, replace, or take other remedial action with respect to such product," 15 USC 2301(6)(B), if and when a defect arises during the warranty period.[7] MCL 440.2725 governs the limitations period, *DelCostello*, 462 US at 158, but, because such warranty does not meet the criteria of MCL 440.2313, non-UCC law governs the warranty's accrual date, MCL 440.1103(2). Accordingly, a claim for breach of the repair-or-replace warranty accrues when the duty to perform is not fulfilled, Restatement Contracts, 2d, § 235, p 211, and the consumer has four years after the breach to bring a cause of action, MCL 440.2725(1).[8]

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[7] As stated in *Cosman*, "A promise to repair parts . . . for six years is a promise that the manufacturer will behave in a certain way, not a warranty that the vehicle will behave in a certain way." *Cosman*, 285 Ill App 3d at 257. "A promise to repair is simply not a promise of performance. On the contrary, in the arms length [sic] atmosphere of the market place, a promise to repair can more honestly be read as an admission that the thing sold might break, rather than a legally enforceable prediction that it will never need tending to." *Id*. at 260. Thus, the promise is "not breached until the seller fails to repair." *Id*. at 261. Finding that a repair-or-replace warranty qualifies as a written warranty under the MMWA that is breached when the seller fails to repair

> does the least violence to two legislative acts—the Uniform Commercial Code and the Magnuson-Moss Act—drafted without an eye on the other. It preserves a four year statute of limitations for promises that are part of a contract for the sale of goods, while recognizing that the Magnuson-Moss remedy for breach of a promise to repair cannot ripen until the promise is broken and has nothing to do with the inherent quality of the goods or their future performance. [*Id*.]

[8] Contrary to this Court's perception in *Centennial Ins Co v Gen Electric Co*, 74 Mich App 169, 172; 253 NW2d 696 (1977), this approach does not extend a supplier's liability indefinitely. As explained in *Mydlach*:

> Because the promise to repair or replace defective parts is only good during the warranty period, the latest a breach of warranty can occur is at the very end of that period. Accordingly, the statute of limitations will expire, at the latest, four years after the

The similarities between the MMWA path and the approach taken by my colleagues are clear: in both, repair-or-replace promises are not "express warranties" as defined by the UCC, non-UCC law dictates that claim accrual for a breach of a repair-or-replace promise occurs when the promised repair or replacement is not made, and, once the promise is breached, the UCC's four-year statute of limitations governs the limitations period. However, whereas the majority relies on Michigan caselaw to differentiate between "warranty" and "remedy," the MMWA includes repair-or-replace promises in its definition of "written warranties." The significance of this difference in nomenclature is that even when repair-and-replace promises are not distinguished from warranties under the UCC, persuasive authority still exists to hold that plaintiff's claim under the MMWA survived.

> warranty period has run. If breach of a repair warranty occurs earlier in the warranty period, the limitations period for that breach will expire sooner, but in no event will the warrantor's exposure extend beyond the warranty period, plus four years. [*Mydlach*, 226 Ill 2d at 325-326.]

Regardless, as noted by the majority, *Centennial* is not binding on this Court. MCR 7.215(J)(1).

PEOPLE v JONES

Docket No. 332018. Submitted September 7, 2016, at Grand Rapids. Decided September 29, 2016, at 9:00 a.m.

Melissa L. Jones pleaded guilty in the St. Joseph Circuit Court of first-degree child abuse, MCL 750.136b(2). To establish the factual basis of the offense, defendant admitted that she had knowingly or intentionally caused serious physical harm to a child because she had used amphetamines and methamphetamines while she was pregnant, the last time five days before giving birth, and the infant tested positive for those drugs at birth, which resulted in health problems. The court, Paul E. Stutesman, J., accepted defendant's plea on the basis of that statement. The Court of Appeals granted defendant's delayed application for leave to appeal.

The Court of Appeals *held*:

1. MCL 750.136b(2) provides that a person is guilty of first-degree child abuse if the person knowingly or intentionally causes serious physical or serious mental harm to a child. For purposes of the statute, MCL 750.136b(1)(a) defines the term "child" as a person who is less than 18 years of age and is not emancipated by operation of law as provided in MCL 722.4. Under MCL 750.136b(1)(d), the term "person" refers to the person who committed the abuse rather than the child victim. Consistent with the definitions of "person" in the Michigan Penal Code, MCL 750.1 *et seq*., and the Code of Criminal Procedure, MCL 760.1 *et seq*., the Legislature did not include fetuses within the definition of "child" or "person" in the MCL 750.136b child abuse statute. Therefore, under the statutory language, a fetus is not a child for purposes of the child abuse statute. When the Legislature has created protection for fetuses, it has done so by clearly and specifically including fetuses in the statutory language. The Legislature's specific use of the terms fetus, embryo, or unborn quick child in some statutes without using such terminology in the definition of "child" in the child abuse statute indicates that the Legislature did not intend a viable fetus to be a child for purposes of the child abuse statute. The factual basis underlying defendant's guilty plea was insufficient to support her conviction

of first-degree child abuse because the infant was not a child for purposes of that statute when defendant transmitted the illegal drugs from herself to the fetus in utero. Accordingly, the trial court plainly erred by accepting defendant's guilty plea, that error affected defendant's substantial rights, and the conviction had to be vacated because defendant was actually innocent.

2. Defendant's claim of ineffective assistance of counsel was moot because it would be impossible to fashion a remedy for the ineffective assistance of counsel when defendant's conviction was vacated on the basis of the other issue.

Defendant's conviction vacated.

CRIMINAL LAW — STATUTES — CHILD ABUSE — DEFINITION OF CHILD — NOT A FETUS.

Under MCL 750.136b(2), a person is guilty of first-degree child abuse if the person knowingly or intentionally causes serious physical or serious mental harm to a child; for purposes of the statute, MCL 750.136b(1)(a) defines the term "child" as a person who is less than 18 years of age and who is not emancipated by operation of law as provided in MCL 722.4; a fetus is not a child for purposes of the child abuse statute.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for defendant.

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM. Defendant, Melissa Lee Jones, pleaded guilty of first-degree child abuse, MCL 750.136b(2), and the trial court sentenced her to 3 to 10 years' imprisonment with credit for 208 days served. Defendant now appeals her conviction by delayed leave granted. We agree with defendant's argument that the first-degree child abuse statute does not apply to her conduct at issue, and we therefore vacate her conviction and sentence.

This case arises out of defendant's delivery of a baby who tested positive for methamphetamine at birth. After defendant gave birth, the hospital staff became

concerned about the baby because he weighed less than four pounds, despite being delivered at full term. The baby was weak, had trouble feeding, and required an IV to receive nutrition. Defendant did not participate in any prenatal care. A Child Protective Services (CPS) worker arrived at the hospital after being informed of the baby's condition and that the baby had tested positive for methamphetamine. After speaking with the CPS worker, defendant removed her own IVs and left the hospital with her boyfriend against the advice of hospital staff and against the recommendation of CPS. When police arrived at the hospital regarding the abandoned newborn, defendant had not returned to the hospital for her baby. A court order subsequently placed the child under protection and prohibited defendant from having contact with the baby.

Defendant was charged with child abuse arising out of her prenatal conduct. During the plea hearing, the factual basis for her guilty plea was established as follows:

> *The Court*: I need you to tell me what you did that makes you guilty of the offence. It says that in January 29th, 2015 you were in the city of Sturgis, county of St. Joseph, state of Michigan, is that true?
>
> [*Defendant*]: Yes
>
> *The Court*: At that time, you did knowingly or intentionally cause serious physical harm to a child. Tell me what happened?
>
> [*Defendant*]: I was using in my pregnancy and my baby tested positive.
>
> *The Court*: When was your baby born?
>
> [*Defendant*]: The 28th at . . .
>
> *The Court*: And . . .

[*Defendant*]: . . . 11:54, I think.

The Court: January 28th?

[*Defendant*]: Yes.

The Court: In Sturgis?

[*Defendant*]: Yes.

The Court: And they ran tests, is that correct?

[*Defendant*]: Uh-huh.

The Court: Yes?

[*Defendant*]: Yes.

The Court: And it tested positive for amphetamines and methamphetamines?

[*Defendant*]: Yes.

The Court: And then they tested you?

[*Defendant*]: Yes.

The Court: And you were also positive for methamphetamines and amphetamines?

[*Defendant*]: Yes.

The Court: When had you last used before you delivered your child?

[*Defendant*]: I don't—like five days before I was . . .

The Court: Five?

[*Defendant*]: Yeah.

The Court: Or less—was it less or was it five?

[*Defendant*]: I—I'm just guessing around five.

The Court: Okay. But you do admit that you consumed it knowing . . .

[*Defendant*]: Yes.

The Court: Okay. Are counsel satisfied that a factual basis has been established?

[*Prosecutor*]: Yes, Your Honor.

[*Defense Counsel*]: I am satisfied.

On appeal, defendant first argues that the first-degree child abuse statute was improperly applied to her because a fetus is not included within the statutory definition of "child," and she therefore could not have caused harm to a "child" as required by the statute simply by using methamphetamine during her pregnancy. We agree.

Defendant did not preserve this issue by challenging in the trial court the applicability of the first-degree child abuse statute to her conduct. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Issues of statutory interpretation are reviewed de novo. *People v Wambar*, 300 Mich App 121, 124; 831 NW2d 891 (2013). "Whether conduct falls within the statutory scope of a criminal statute is a question of law that is reviewed de novo on appeal." *People v Rutledge*, 250 Mich App 1, 4; 645 NW2d 333 (2002). However, unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). On plain-error review, the burden is on the defendant to establish (1) "error"; (2) that was "plain," meaning "clear or obvious"; and (3) that the plain error caused prejudice, meaning "that the error affected the outcome of the lower court proceedings." *Id*. at 763. "[O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse," but "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks and citation omitted; alteration in original).

In eliciting a factual basis from defendant during the plea colloquy, the trial court clearly focused on

defendant's prenatal methamphetamine use and the fact that the baby tested positive for methamphetamines and amphetamines to support the first-degree child abuse conviction. No other facts of alleged harm to the baby were introduced, and no facts were introduced of conduct toward the baby after birth. Thus, the factual basis to support defendant's guilty plea rested solely on defendant's prenatal conduct. Therefore, the question before us is one of first impression, namely, whether a mother's prenatal drug use can support a conviction for first-degree child abuse when the statute requires the victim to be a "child" and does not specifically include fetuses within the statutory definition of "child."

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). "The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute." *People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009). If the statutory language is unambiguous, then the statute is applied as written. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003) (quotation marks and citation omitted). "If the statute defines a term, that definition controls." *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010). "Further, the language must be applied as written, and nothing should be read into a statute that is not within the manifest intent of the Legislature as indicated by the act itself." *People v Lange*, 251 Mich App 247, 253-254;

650 NW2d 691 (2002) (citations omitted). "It is well settled that criminal statutes are to be strictly construed, absent a legislative statement to the contrary." *People v Boscaglia*, 419 Mich 556, 563; 357 NW2d 648 (1984).

MCL 750.136b(2) states that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." Under this statute, a " '[c]hild' means a *person* who is less than 18 years of age and is not emancipated by operation of law as provided in section 4 of 1968 PA 293, MCL 722.4." MCL 750.136b(1)(a) (emphasis added). The definition of "person" that appears in MCL 750.136b serves to define the person committing the abuse rather than the child victim. See MCL 750.136b(1)(d) (" '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 does not refer to fetuses or to conduct that harms a fetus in relation to the proscribed conduct. Furthermore, neither the definition of "child" nor the definition of "person" found in the statute specifically includes fetuses.

The fact that the Legislature did not include fetuses within either definition in the child abuse statute is in accordance with other statutory definitions of "person," which consistently omit any reference to fetuses. For example, the definition section of the Michigan Penal Code, MCL 750.1 *et seq*., merely includes the following definition for the term "person": "The words 'person', 'accused', and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary asso-

ciations." MCL 750.10. Similarly, the Code of Criminal Procedure, MCL 760.1 *et seq.*, states, " 'Person', 'accused', or a similar word means an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association." MCL 761.1(a).

There does not appear to be any caselaw specifically addressing whether a mother's drug use during pregnancy may form the basis of a first-degree child abuse prosecution on the theory that the drug use harmed the fetus. However, this Court previously considered, in *People v Guthrie*, 97 Mich App 226, 229; 293 NW2d 775 (1980), the question "whether an unborn but admittedly viable fetus is a 'person' as that word is used in the [negligent homicide] statute."[1] In *Guthrie*, this Court discussed the so-called common-law "born alive" rule: "The killing of an unborn child was not a homicide at common law for the reason that the fetus was not considered a 'person' or 'a reasonable creature in being' before its birth. It was necessary that the child be 'born alive' and exist independently of its mother's body before it could be considered a 'person'." *Id*. at 229. Thus, at common law, to be "born alive" a fetus must have been "totally expelled from the mother and show[n] a clear sign of independent vitality, such as respiration, although respiration was not strictly required." *Id*. at 230 (quotation marks and citation

[1] The negligent-homicide statute, MCL 750.324, was repealed by 2008 PA 463, enacting § 2, effective October 31, 2010. When *Guthrie* was decided, the statute provided in relevant part, " '*Any person who*, by the operation of any vehicle . . . at an immoderate rate of speed or in a careless, reckless or negligent manner, but not willfully or wantonly, *shall cause the death of another*, shall be guilty of a misdemeanor . . . .' " *Guthrie*, 97 Mich App at 228-229, quoting MCL 750.324. The *Guthrie* Court analyzed whether the term "person" included a "fetus" because it noted that the use of the word "another" in the statute "refers back to the word 'person . . . .' " *Id*. at 229.

omitted). Alternatively, "[i]n the United States the 'born alive' requirement has come to mean that the fetus be fully brought forth and establish an 'independent circulation' before it can be considered a human being." *Id*.

This Court held in *Guthrie* that a fetus did not come within the meaning of the word "person" for purposes of the negligent-homicide statute and affirmed the dismissal of the negligent-homicide charge against the defendant. *Id*. at 233, 237-238. In reaching this conclusion, this Court compared the negligent-homicide statute with two other Michigan statutes that specifically criminalize certain acts of harming unborn fetuses, the assaultive-abortion statute, MCL 750.322,[2] and the manslaughter-by-abortion statute, MCL 750.323,[3] reasoning:

> When the Legislature enacted the negligent homicide statute in 1921 and reenacted it in 1931, the "born alive" rule was a well understood and accepted rule of law. At that time and in subsequent years, the Legislature had the opportunity to include unborn fetuses in the statute, but did not do so. The Legislature has, however, enacted the assaultive abortion and manslaughter abortion statutes cited earlier in this opinion. Both statutes specifically refer to fetal deaths. *The fact that the Legislature would refer to a fetus in two statutes but not in the negligent*

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[2] MCL 750.322 states, "The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." See also *Guthrie*, 97 Mich App at 231 n 2, quoting MCL 750.322.

[3] MCL 750.323 states in relevant part, "Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter." See also *Guthrie*, 97 Mich App at 231 n 3, quoting MCL 750.323.

> *homicide statute is strongly persuasive that the Legislature did not intend that a viable fetus is a "person" within the meaning of that term in the statute*. [*Id*. at 233 (emphasis added).]

This Court expressed reservations with the born-alive rule but nonetheless recognized that the task of defining criminal conduct belongs to the Legislature:

> Although we find that the "born alive" rule is archaic and should be abolished in prosecutions brought under the negligent homicide statute, the abolition of the rule is a matter for action by the Legislature. For this Court to interpret the statute to include unborn viable fetuses as persons would usurp the Legislature's traditional power of defining what acts shall be criminal and would be contrary to the decisions from other jurisdictions cited herein. Respectfully, we urge the Legislature to make the necessary amendments to the statute. [*Id*. at 237-238.]

The Legislature later addressed this concern, although not by expanding the definition of "person" or by abolishing the "born alive" requirement. MCL 750.90e[4] provides:

> If a person operates a motor vehicle in a careless or reckless manner, but not willfully or wantonly, that is the proximate cause of an accident involving a pregnant individual and the accident results in a miscarriage or stillbirth by that individual or death to the *embryo or fetus*, the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both. [Emphasis added.]

The Legislature has added further protection for fetuses by criminalizing other assaultive acts that result in harm to an embryo or fetus. For example, MCL 750.90a provides:

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[4] Enacted by 1998 PA 238, effective January 1, 1999.

> If a person intentionally commits conduct proscribed under sections 81 to 89 [which involve various types of assault offenses] against a pregnant individual, the person is guilty of a felony punishable by imprisonment for life or any term of years if all of the following apply:
>
> (a) The person intended to cause a miscarriage or stillbirth by that individual or death or great bodily harm to the *embryo or fetus*, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person's conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the *embryo or fetus*.
>
> (b) The person's conduct resulted in a miscarriage or stillbirth by that individual or death to the *embryo or fetus*. [Emphasis added.]

See also MCL 750.90b (using the language "embryo or fetus" to criminalize conduct against a pregnant individual that harms the fetus). Additionally, the Infant Protection Act, MCL 750.90g,[5] defines a "live infant" as a "person." MCL 750.90g(2)[6] states in relevant part:

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[5] The Infant Protection Act was amended by 1999 PA 107, effective March 10, 2000, to add MCL 750.90g.

[6] In *WomanCare of Southfield, PC v Granholm*, 143 F Supp 2d 849, 855 (ED Mich, 2001), the United States District Court for the Eastern District of Michigan held that MCL 750.90g is unconstitutional because the statute "fails to contain an adequate exception to protect the mental and/or physical health of the pregnant woman." However, *WomanCare* concerned the constitutionality of the Infant Protection Act, codified at MCL 750.90g, as a regulation of abortion. See *WomanCare*, 143 F Supp 2d at 852, 854-855. The court did not specifically address the question of whether a fetus is a person. See *id*. While the United States District Court for the Eastern District of Michigan enjoined the state of Michigan "from enforcing any provision of [MCL 750.90g]," *id*. at 855, the definitions in MCL 750.90g(2)(a) and (b) nevertheless illustrate the Legislature's clear intent that some degree of existence outside the mother is required to meet the statutory definition of a "person." Furthermore, "[l]ower federal court decisions are not binding on this Court, but may be considered on the basis of their persuasive analysis." *People v Fomby*, 300 Mich App 46, 50 n 1; 831 NW2d 887 (2013).

The legislature finds all of the following:

(a) That the constitution and laws of this nation and this state hold that a *live infant completely expelled from his or her mother's body* is recognized as a *person* with constitutional and legal rights and protection.

(b) That a *live infant partially outside his or her mother* is neither a fetus nor potential life, but *is a person*.

* * *

(6) As used in this section:

(a) "Live infant" means a human fetus *at any point after any part of the fetus is known to exist outside of the mother's body* and has 1 or more of the following:

(*i*) A detectable heartbeat.

(*ii*) Evidence of spontaneous movement.

(*iii*) Evidence of breathing. [Emphasis added.]

In *People v Hardy*, 188 Mich App 305; 469 NW2d 50 (1991), this Court addressed a factual scenario similar to the instant case, in which the defendant mother's criminal charges arose out of her use of drugs while she was pregnant. In *Hardy*, the defendant's baby tested positive for cocaine metabolites the day after his birth, and the defendant "admitted to police that she smoked crack—a derivative of crystallized cocaine—less than thirteen hours before giving birth." *Id*. at 307. The defendant was charged with second-degree child abuse,[7] on the basis of "allegations that defendant ingested cocaine while she was pregnant, causing serious physical harm to her minor child," and delivery of less than 50 grams of a mixture containing cocaine,[8] on the theory that "once ingested the cocaine was transmitted from defendant's system through the um-

[7] MCL 750.136b(3).

[8] MCL 333.7401(2)(a)(*iv*).

bilical cord during the period after the baby had passed through the birth canal until the umbilical cord was severed after birth." *Id*. The circuit court had granted the defendant's motion to quash regarding second-degree child abuse, "reason[ing] that there was insufficient evidence that defendant's ingestion of cocaine, while pregnant, caused serious physical harm to her child," but the circuit court had denied the defendant's motion to quash the charge for delivery of cocaine. *Id*. at 308.

This Court reversed in *Hardy*, stating, "We are not persuaded that a pregnant woman's use of cocaine, which might result in the postpartum transfer of cocaine metabolites through the umbilical cord to her infant, is the type of conduct that the Legislature intended to be prosecuted under the *delivery*-of-cocaine statute . . . ." *Id*. at 308, 310. In her concurrence, Judge MAUREEN P. REILLY noted that "[t]he term 'deliver' is defined in MCL 333.7105(1) as the actual, constructive, or attempted transfer of a controlled substance from *one person to another*" and addressed the definition of "person." *Id*. at 311 (REILLY, J., concurring). Judge REILLY reasoned:

> Nonetheless, we have no historical or scientific basis to determine that the Legislature intended to protect an unborn fetus against the pregnant mother's *use* of narcotics, which is not proscribed by the controlled substances act, when it enacted laws regulating the *possession* or *distribution* of controlled substances. The defendant may properly have been charged with possession of cocaine when she admitted to smoking crack. However, the *use* of controlled substances by a pregnant woman, without more, does not support the additional charge of *delivery to another* while the fetus is still in utero. [*Id*. at 312-313.]

In this case, it is clear from the statutory language that a fetus is not a "child" for purposes of the first-

degree child abuse statute. See *Borchard-Ruhland*, 460 Mich at 284. Neither the definition of "child" in the child abuse statute nor the general definition of "person" in the Michigan Penal Code refers to fetuses. MCL 750.136b(1)(a); MCL 750.10. And the Legislature has consistently refrained from expanding the definition of person to include fetuses. See, e.g., *Guthrie*, 97 Mich App at 233; MCL 750.136b(1)(a); MCL 750.136(1)(d); MCL 750.10; MCL 761.1(a). Rather, when the Legislature has created protection for fetuses, it has done so by clearly and specifically including embryo, fetus, unborn quick child, or other similar term in the statutory language instead of by including fetuses within the statutory definition of a "person." See, e.g., MCL 750.90a; MCL 750.90b; MCL 750.90e; MCL 750.322; MCL 750.323.

For example, when addressing the concern we expressed in *Guthrie* about the lack of protection for harmed fetuses in the negligent-homicide statute, the Legislature did not respond by modifying the definition of person but by creating a statute specifically protecting fetuses. See MCL 750.90e. "When the Legislature acts in a certain subject area, it is presumed that the Legislature is aware of existing judicial interpretations of words and phrases within that subject area." *Lange*, 251 Mich App at 255. The course of action chosen by the Legislature with respect to MCL 750.90e suggests that it did not disagree with our holding in *Guthrie* that the statutory definition of "person" did not include fetuses, even though the Legislature was nonetheless willing to criminalize the conduct at issue when it resulted in harm to a fetus. See *Lange*, 251 Mich App at 255 ("The Legislature's silence when using terms previously interpreted by the courts suggests agreement with the courts' construction."). Additionally, in the Infant Protection Act, the Legislature made clear

that the definition of "person" includes "a live infant partially outside his or her mother" and that a live infant partially outside the mother "is neither a fetus nor a potential life." MCL 750.90g(2)(b).

As this Court reasoned in *Guthrie*, the Legislature's specific use of the terms fetus, embryo, or unborn quick child in some statutes without including such terminology in the definition of "child" in the child abuse statute "is strongly persuasive that the Legislature did not intend that a viable fetus is a ["child"] within the meaning of that term in the statute." *Guthrie*, 97 Mich App at 233. Moreover, just as this Court determined in *Hardy* that the Legislature did not intend for the crime of delivering cocaine to include a mother's prenatal drug use, here it does not appear, based on the statutory definition of "child" and its lack of a reference to fetuses, that the Legislature intended for the first-degree child abuse statute to be used as a vehicle for prosecuting a mother who abuses drugs while pregnant. See *Hardy*, 188 Mich App at 308, 310; *id*. at 311-313 (REILLY, J., concurring). To expand the definition of "child" in MCL 750.136b(1)(a) to include fetuses would erroneously read a term into the statute that "is not within the manifest intent of the Legislature as indicated by the act itself." See *Lange*, 251 Mich App at 254.

Therefore, because a fetus is not a child for purposes of the first-degree child abuse statute, defendant cannot be guilty of first-degree child abuse based solely on the fact that she used methamphetamine while she was pregnant; the trial court erred by accepting her guilty plea. See MCR 6.302(D)(1); *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006) (indicating that the factual basis for a plea is inadequate if the finder of fact cannot properly convict the defendant on the facts elicited at the plea hearing).

Accordingly, defendant has established plain error affecting her substantial rights. Defendant has shown error because the statute under which she was convicted did not apply to her conduct. See *Carines*, 460 Mich at 763. This error was plain because, as discussed, the statutory language of MCL 750.136b(2) makes clear that the statute applies to acts that harm a "child" but not to acts that harm a fetus; the statute does not make a mother's prenatal drug use a criminal offense. See *Carines*, 460 Mich at 763. The error prejudiced defendant because she would not have been convicted of first-degree child abuse but for the erroneous application of the statute to her conduct. See *id*. Finally, relief is justified in this case because the error resulted in the conviction of an individual who was "actually innocent" of the conduct proscribed by MCL 750.136b(2) and allowing the conviction to stand would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." See *Carines*, 460 Mich at 763 (quotation marks and citation omitted).

Defendant also argues that she received ineffective assistance of counsel because defense counsel failed to object to the applicability of MCL 750.136b(2). However, this issue is now moot. "An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). "Normally, the remedy for ineffective assistance of counsel is a new trial." *People v Gridiron (On Rehearing)*, 190 Mich App 366, 370; 475 NW2d 879, amended 439 Mich 880 (1991). However, having determined that defendant's conviction must be vacated because the statute of conviction did not apply to the conduct for which she was convicted, there is no further remedy that is available based on a claim of ineffective assistance of counsel.

Thus, defendant's ineffective assistance of counsel claim is moot and need not be addressed. See *Cathey*, 261 Mich App at 510; *People v Sours*, 315 Mich App 346, 352; 890 NW2d 401 (2016) ("This Court generally does not decide moot issues.").

We hold that a fetus is not a "child" for purposes of MCL 750.136b. Therefore, defendant's prenatal methamphetamine use did not support her conviction of first-degree child abuse.

We vacate defendant's conviction and sentence. We do not retain jurisdiction.

HOEKSTRA and BECKERING, JJ., concurred.

MURRAY, P.J. (*concurring*). I concur in the majority opinion's statutory analysis, which in the end properly concludes that the Legislature did not include a fetus in the definition of "child" for purposes of the first-degree child abuse statute. MCL 750.136b(2). I write separately to briefly address several arguments put forth by defendant. First, although in her brief defendant discusses *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and several federal and state decisions issued subsequent to *Roe*, as the majority opinion makes clear, this case is not about the Fourteenth Amendment of the United States Constitution. Instead, it is *only* about how to interpret a word used in a Michigan statute and how to apply the definition provided by the Legislature. As a result, whether *Roe* and its progeny were correctly decided (a matter which we have no control over anyway) is not an issue before this Court,[1] and consequently there is no reason to

[1] But see *Planned Parenthood of Southeast Penn v Casey*, 505 US 833, 944; 112 S Ct 2791; 120 L Ed 2d 674 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

opine on that issue. Second, we do not opine on whether a fetus *should be* included in the statutory definition of "child," as that decision is solely within the province of the legislative branch. *People v Williams*, 288 Mich App 67, 74; 792 NW2d 384 (2010). Instead, this case, like most cases we deal with on a daily basis, requires us to apply statutory words and phrases and to determine their meaning as intended by the Legislature. Since the majority opinion has adequately done so, I fully concur in that opinion.

MAKOWSKI v GOVERNOR

Docket No. 327396. Submitted July 7, 2016, at Detroit. Decided August 18, 2016. Approved for publication October 4, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 988.

Matthew Makowski filed an action in the Ingham Circuit Court against the Governor and Secretary of State, seeking a declaratory judgment and injunctive relief to reverse Governor Jennifer Granholm's decision to revoke her commutation of plaintiff's nonparolable life sentence. The court, Richard D. Ball, J., concluded that it lacked jurisdiction to review a governor's exercise of discretion over commutation decisions. Plaintiff appealed, and the Court of Appeals, O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ., affirmed, holding that the Governor's exercise of the commutation power presented a nonjusticiable political question. 299 Mich App 166 (2012). The Supreme Court granted plaintiff's application for leave to appeal, 494 Mich 876 (2013), and held that the Governor had validly commuted plaintiff's sentence and lacked the authority to revoke the commutation once made, ordering the Department of Corrections to reinstate plaintiff's sentence to "a parolable life sentence" and remanding plaintiff to the parole board's jurisdiction, 495 Mich 465, 490 (2014). Plaintiff moved for clarification or rehearing of the Supreme Court's decision, and the Supreme Court, in lieu of granting the motion, entered an order that amended the last sentence of the opinion to direct the Department of Corrections "to reinstate plaintiff's sentence to a minimum term of years—equivalent to the amount of time served as of the date of the Michigan Parole and Commutation Board's decision to recommend that plaintiff's sentence be commuted—to a maximum of life, and remand plaintiff to the jurisdiction of the parole board." 497 Mich 862, 863 (2014). Plaintiff moved to have the trial court retain jurisdiction, but before a decision was rendered on the motion, the board denied plaintiff parole. Plaintiff argued that all the prisoners with mandatory life sentences granted a commutation during the Granholm administration were punctually processed for release and that the import of the Supreme Court's decision was that he should be treated exactly as those prisoners. The case was transferred to the Court of Claims while plaintiff's motion was

still pending, and the Court of Claims, AMY RONAYNE KRAUSE, J., issued an opinion and order denying plaintiff's request that it retain jurisdiction, concluding that plaintiff had identified a historical practice but not a legal entitlement to parole and that the language used in plaintiff's commutation simply made plaintiff eligible for parole but not entitled to it. Plaintiff appealed in the Court of Appeals but also applied to the Supreme Court for permission to bypass the Court of Appeals, which the Supreme Court denied. 498 Mich 876 (2015).

The Court of Appeals *held*:

1. Article 5, § 14 of the Michigan Constitution grants the governor the power to grant reprieves, commutations, and pardons after convictions upon such conditions and limitations as he or she may direct, subject to procedures and regulations prescribed by law. The power to commute a sentence does not alter the source or authority of the original sentence; only trial courts have the authority to issue a judgment of sentence. The governor's power to commute is the power to alter or amend an existing sentence to one that is less severe. In this case, the Governor exercised her authority to commute plaintiff's sentence by altering it from a sentence of life in prison without the possibility of parole to one with a minimum term equal to the time served as of a certain date and a maximum term of life in prison. Although the Governor modified plaintiff's sentence to a less severe sentence, the sentence remained that of the circuit court. Further, as amended, plaintiff's sentence was an indeterminate sentence whose minimum term he had already served; accordingly, the board had jurisdiction to consider plaintiff for parole. The Court of Claims correctly determined that the board had jurisdiction over plaintiff as a prisoner who completed the minimum sentence of his amended indeterminate sentence.

2. The board's decision to deny parole even after the Governor's decision to commute plaintiff's sentence did not contravene the Governor's exclusive authority to commute sentences. It was evident that the Governor did not amend plaintiff's sentence to one for time served and did not explicitly order him to be paroled. Because the Governor did not specifically provide for plaintiff's release, but instead exercised her authority to alter his sentence to make him eligible for parole, the board's exercise of its discretion and adherence to the normal procedures for paroling a prisoner did not unconstitutionally interfere with the Governor's authority to commute a sentence. The Governor's decision to set the minimum sentence to the date of the board's recommendation did not amount to an order removing the decision from the board's

discretion. There was nothing in the language of the commutation that required the board to parole plaintiff. Likewise, although the board's members might have understood that a vote to recommend commutation amounted to a vote for parole, the recommendation was not, in fact, an order of parole; therefore, the board was not—in effect—reconsidering a grant of parole under MCL 791.236(2) by refusing to parole him after his commutation. The Court of Claims did not err when it concluded that the board had the discretion to deny plaintiff parole.

3. A prisoner has no constitutional or inherent right to have his or her sentence commuted or commuted in a particular way, and a convicted felon's expectation of clemency premised on a state agency's prior practices does not give rise to a constitutionally protected right to clemency. Instead, any constitutional right must be grounded in state law. In this case, as the Court of Claims correctly recognized, plaintiff had not identified any state law that entitled him to the grant of immediate parole after the Governor amended his sentence. Because he had not established a constitutional or statutory right to be treated exactly the same as every other prisoner whose sentence was commuted using the same language, plaintiff did not establish grounds for the continued assertion of jurisdiction by the Court of Claims.

Affirmed.

1. CONSTITUTIONAL LAW — GUBERNATORIAL POWERS — COMMUTATION DECISIONS.

Article 5, § 14 of the Michigan Constitution grants the governor the power to grant reprieves, commutations, and pardons after convictions upon such conditions and limitations as he or she may direct, subject to procedures and regulations prescribed by law; the governor's power to commute a sentence does not alter the source or authority of the original sentence because only trial courts have the authority to issue a judgment of sentence; the governor's power to commute is the power to alter or amend an existing sentence to one that is less severe.

2. CONSTITUTIONAL LAW — GUBERNATORIAL POWERS — COMMUTATION DECISIONS — DENIAL OF PAROLE AFTER COMMUTATION DECISION.

A decision of the Michigan Parole and Commutation Board to deny parole even after the governor's decision to commute a prisoner's sentence does not contravene the governor's exclusive authority to commute sentences when the language of the commutation does not specifically require that the board parole the prisoner; the governor's decision to set a minimum sentence to the date of

the board's recommendation does not amount to an order removing the decision of whether to parole the prisoner from the board's discretion.

3. CONSTITUTIONAL LAW — EXPECTATION OF COMMUTATION — PRIOR PRACTICES OF STATE AGENCY.

A prisoner has no constitutional or inherent right to have his or her sentence commuted or commuted in a particular way; a convicted felon's expectation of clemency premised on a state agency's prior practices does not give rise to a constitutionally protected right to clemency; instead, any constitutional right must be grounded in state law.

Michigan Clinical Law Program (by *Paul D. Reingold* and *Kimberly Thomas*) and *Charles L. Levin* for Matthew Makowski.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *A. Peter Govorchin*, Assistant Attorney General, for the Governor and Secretary of State.

Before: RIORDAN, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM. In this dispute over the denial of parole after having his sentence commuted, plaintiff, Matthew Makowski, appeals the opinion and order of the Court of Claims denying his request that it retain jurisdiction after our Supreme Court's decision remanding Makowski to the parole board's jurisdiction, see *Makowski v Governor*, 495 Mich 465; 852 NW2d 61 (2014), as amended on reh 497 Mich 862 (2014), and the parole board's decision to deny him parole. On appeal, Makowski argues—on various grounds—that the board had no authority to deny him parole and that the Court of Claims should have retained jurisdiction to ensure that the board paroled him as it was required to do. We conclude that the commutation reduced the

severity of Makowski's sentence by making him immediately eligible for parole, but the commutation did not mandate parole. Because the board had jurisdiction over Makowski and had the discretion to consider whether he was an appropriate candidate for parole, the Court of Claims correctly determined that there were no grounds for retaining jurisdiction to supervise the board's decision-making process. Consequently, we affirm.

I. BASIC FACTS

The circuit court sentenced Makowski to serve life in prison without the possibility of parole after a jury found him guilty of first-degree murder in 1988. *Id*. at 468. In 2010, the board considered Makowski's application for commutation of his sentence and sent the application to the Governor with a favorable recommendation. *Id*. at 468-469. The Governor signed the commutation. It was then signed by the Secretary of State, who affixed the Great Seal. *Id*. at 469. After the family of the victim expressed opposition, the Governor revoked the commutation. *Id*. at 469-470.

Makowski sued the Governor and Secretary of State in 2011. He argued that the Governor lacked the authority to revoke his commutation once it was signed, sealed, and delivered. *Id*. at 470. The case eventually went to our Supreme Court, and the Court determined that the Governor had validly commuted Makowski's sentence and lacked the authority to revoke the commutation once made. *Id*. at 485-490. Accordingly, it ordered the Department of Corrections to reinstate Makowski's sentence to "a parolable life sentence" and remanded him to the parole board's jurisdiction. *Id*. at 490.

After our Supreme Court remanded the case, the board issued a decision in October 2014 expressing "no interest" in taking further action to parole Makowski. Makowski moved for clarification or rehearing of the Supreme Court's decision; he complained that the Department of Corrections used the final sentence of the Court's decision to treat him as a person with a parolable life sentence instead of someone with a sentence commuted to a minimum term of years. He contended that the board already agreed to parole him when it sent the commutation recommendation to the Governor, and he urged the Supreme Court to modify its opinion to restore him to exactly the status he would have had but for the Governor's wrongful attempt to revoke the commutation.

In lieu of granting the motion, the Supreme Court entered an order amending the last sentence of its opinion to read:

> Accordingly, we reverse the judgment of the Court of Appeals. Consistent with the undisputed language of plaintiff's commutation, we further order the Department of Corrections to reinstate plaintiff's sentence to a minimum term of years—equivalent to the amount of time served as of the date of the Michigan Parole and Commutation Board's decision to recommend that plaintiff's sentence be commuted—to a maximum of life, and remand plaintiff to the jurisdiction of the parole board. [*Makowski*, 497 Mich at 863, amending on reh 495 Mich at 490.]

Makowski then moved to have the trial court retain jurisdiction over the case because further remedial action might be needed. He explained that he had not been processed for parole even though all other prisoners granted a commutation were promptly released. Thereafter, the board again denied Makowski parole; it explained that Makowski minimized his

responsibility for the crime and needed additional insight into his offense to ensure that he did not pose a risk to the community. Makowski asserted that all the prisoners with mandatory life sentences granted a commutation during the Granholm administration were punctually processed for release and that the import of the Supreme Court's decision was that he too should be treated exactly as those prisoners. He argued that the Supreme Court did not remand the matter to the board to consider anew whether he should be released, but rather did so to process him for release.

In October 2014, while the motion to retain jurisdiction was still pending, the case was transferred to the Court of Claims. The Court of Claims heard the motion and issued an opinion and order explaining that it considered the gravamen of Makowski's argument to be that the board violated a legal duty arising out of historical precedent and procedural implications rather than a statutory mandate. The court directed the parties to address whether the court properly understood the gravamen of the issue and, if it did, why the proper remedy was not to file a new action for habeas corpus or mandamus. The court further ordered the parties to provide it with any legal authority pertaining to whether the board must parole a prisoner after the board recommends, and the governor grants, a commutation.

At a second hearing, Makowski maintained that the court should place him in the same position he would have been in had Governor Granholm not attempted to revoke his commutation. He characterized his commutation as effectively granting him parole, leaving the board with the ministerial duty to carry out the commutation. The Governor and Secretary of State argued

that the commutation merely rendered Makowski eligible for parole.

In April 2015, the Court of Claims issued its opinion and order. It stated that Makowski had identified a "historical practice, but not an actual, obvious legal entitlement to an outright grant of parole." The court concluded that the law did not provide that a commutation entitled him to parole. It then examined the language used in the commutation and determined that it simply made Makowski eligible for parole, but not entitled to it. The court opined that if Makowski felt that the board had not properly exercised its discretion, his recourse was to file a new cause of action. The court did order that the board could not consider or use any documentation conveyed by Governor Granholm or her agents in connection with her attempted revocation when considering Makowski for parole, but otherwise denied Makowski's requests for relief.

Makowski then appealed in this Court and applied to the Supreme Court for permission to bypass this Court. The Supreme Court denied the bypass request. *Makowski v Governor*, 498 Mich 876 (2015).

II. RIGHT TO IMMEDIATE PAROLE

A. STANDARDS OF REVIEW

Makowski argues that the Court of Claims erred in various ways when it refused to grant his requested relief. This Court reviews de novo questions of constitutional law. *People v Ackley*, 497 Mich 381, 388; 870 NW2d 858 (2015). This Court also reviews de novo whether the trial court properly selected, interpreted, and applied the relevant statutes. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

B. ANALYSIS

Makowski argues that the board had no authority to deny him parole once the Governor commuted his sentence. Specifically, he maintains that the Governor's commutation entitled him to parole and that the board's refusal to parole him contravened the Governor's exclusive authority to commute sentences.

Michigan's Constitution grants the governor the power "to grant reprieves, commutations and pardons after convictions . . . upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law." Const 1963, art 5, § 14. The power to commute a sentence does not alter the source or authority of the original sentence; only trial courts have the authority to issue a judgment of sentence. MCL 769.1(1). The governor's power to commute, rather, is the power to alter or amend an existing sentence to one that is less severe. See *Kent Co Prosecutor v Kent Co Sheriff*, 425 Mich 718, 725; 391 NW2d 341 (1986) (opinion by BOYLE, J.). Makowski, therefore, mischaracterizes his amended sentence when he refers to it as a "Governor-imposed sentence." In this case, the Governor exercised her authority to commute Makowski's sentence by altering it from a sentence of life in prison without the possibility of parole to one with a minimum term equal to the time served as of a certain date and a maximum term of life in prison.[1] Although the Governor modified his sentence to a less severe sentence, Makowski's sentence remained the sentence of the circuit court. Further, as amended, Makowski's sentence was an indeterminate

[1] The original commutation was destroyed. However, the parties do not dispute that Makowski's commutation used identical language to the other commutations issued at the time. See *Makowski*, 495 Mich at 478 n 5.

sentence whose minimum term he had already served; accordingly, the board had jurisdiction to consider him for parole. MCL 791.234(1) and (2).

The board's decision to deny parole even after the Governor's decision to commute Makowski's sentence also did not contravene the Governor's exclusive authority to commute the sentence. In this case, it is evident that the Governor did not amend Makowski's sentence to one for time served and did not explicitly order him to be paroled. The undisputed language of similar commutations does not order "release" or "parole," but instead indicates that the prisoner is eligible for parole. Because the Governor did not specifically provide for Makowski's release, but instead exercised her authority to alter his sentence to make him eligible for parole, the board's exercise of its discretion and adherence to the normal procedures for paroling a prisoner did not unconstitutionally interfere with the Governor's authority to commute a sentence. Had the Governor wanted to commute Makowski's sentence to include immediate parole, she could have done so in express terms.

We are also unpersuaded by Makowski's arguments concerning the Governor's decision to set the minimum sentence to the date of the board's recommendation; as Makowski notes, this date makes it possible for the board to rely on its prior proceedings leading to the recommendation for commutation as the grounds for paroling a prisoner whose sentence has been commuted, but it does not follow that setting that date amounts to an order removing the decision from the board's discretion. There is simply nothing within the language of the commutation that requires the board to parole Makowski. Likewise, although the board's members might have understood that a vote to recom-

mend commutation amounts to a vote for parole, the recommendation is not, in fact, an order of parole. Consequently, the board was not—in effect—reconsidering a grant of parole under MCL 791.236(2) by refusing to parole him after his commutation.

The fact that the board had routinely paroled prisoners who had been given similar commutations without further hearings also did not deprive the board of its discretion to deny parole. A prisoner has no constitutional or inherent right to have his or her sentence commuted or commuted in a particular way. See *Conn Bd of Pardons v Dumschat*, 452 US 458, 465; 101 S Ct 2460; 69 L Ed 2d 158 (1981). And a convicted felon's expectation of clemency premised on a state agency's prior practices does not give rise to a constitutionally protected right to clemency:

> A constitutional entitlement cannot "be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past." No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution. [*Id*. (citations omitted).]

Instead, any constitutional right must be grounded in state law: "The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Id*. As the Court of Claims correctly recognized, Makowski has not identified any state law that entitled him to the grant of immediate parole after the Governor amended his sentence. Because he has not established a constitutional or statutory right to be treated exactly the same as every other prisoner whose sentence was commuted using the same language, he

has not established grounds for the continued assertion of jurisdiction by the Court of Claims.[2]

The Court of Claims correctly determined that the board had jurisdiction over Makowski as a prisoner who completed the minimum sentence of his amended indeterminate sentence. MCL 791.234(1) and (2). It also did not err when it concluded that the board had the discretion to deny him parole.[3]

Affirmed.

RIORDAN, P.J., and SAAD and M. J. KELLY, JJ., concurred.

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[2] Because he only qualified for parole, Makowski's due-process rights included only those rights normally attending consideration of parole. The commutation left Makowski a mere "potential parolee who remains in prison" with "no liberty to protect." *In re Parole of Haeger*, 294 Mich App 549, 575; 813 NW2d 313 (2011). "The mere hope that the benefit of parole will be obtained is too general and uncertain and, therefore, is not protected by due process." *Id*. (quotation marks and citation omitted). Therefore, we reject his claim that the Court of Claims erred by failing to further consider whether the board violated his right to due process.

[3] The question before our Supreme Court primarily involved whether the Governor could revoke a commutation. For that reason, whether the board had discretion to deny parole on further review was not properly before the parties until after the Supreme Court's remand. Given the procedural posture, we conclude that the Governor and Secretary of State timely and properly asserted the board's discretion as a defense to the continued exercise of jurisdiction.

PEOPLE v MAHDI

Docket No. 327767. Submitted October 4, 2016, at Detroit. Decided October 11, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 991.

Defendant, Gary T. Mahdi, was convicted following a jury trial in the Oakland Circuit Court of two counts of possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(*iv*), and one count of possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*). Defendant had become the subject of police observation after an informant entered an apartment at 45 Lantern Lane, purchased drugs inside, and turned the drugs over to police. Before executing a search warrant for 45 Lantern Lane, a detective observed defendant rummage in the trunk of a Buick and then enter 44 Cherry Hill, another apartment in the complex. Detectives subsequently spotted a small bag of marijuana in or near the center console of the Buick. Two detectives and an officer then knocked on the door at 44 Cherry Hill. Defendant answered and was arrested for possession of marijuana. The detectives informed defendant's mother that her son was under investigation for drug trafficking and asked for her permission to search the apartment for drugs, which she granted. The detectives did not find contraband at 44 Cherry Hill, but they did confiscate a wallet, a set of keys, and a cell phone. The set of keys contained a key for the Buick, and a detective used the key to unlock the vehicle and retrieve the marijuana that had been spotted inside of it. A subsequent search of 45 Lantern Lane revealed a Sam's Club bag that contained marijuana, heroin, cocaine, two receipts that contained defendant's name and address, and an AutoZone rewards card with a bar code that matched the numbers of a rewards card attached to the set of keys confiscated at 44 Cherry Hill and the numbers of a receipt found in defendant's wallet. A detective also answered several text messages on defendant's phone; the detective used street slang when responding to the messages in an attempt to obtain additional incriminating evidence against defendant. Before trial, defendant moved to suppress the wallet, keys, and cell phone, arguing that the items found at 44 Cherry Hill were not related to the possession or sale of drugs, were not connected to the Lantern Lane address, and

were outside the scope of the search that defendant's mother permitted. The Oakland Circuit Court, Michael D. Warren, Jr., J., denied the motion as untimely and further determined that denial was appropriate on the merits, concluding that the consent exception to the warrant requirement applied. The evidence was admitted at trial, and defendant was convicted. Defendant appealed.

The Court of Appeals *held*:

1. The United States Constitution, US Const, Am IV, and the Michigan Constitution, Const 1963, art 1, § 11, protect against unreasonable searches and seizures. Whether a search or seizure is lawful depends on whether it is reasonable. Searches conducted without both a warrant and probable cause to believe evidence of wrongdoing might be located at the place searched are unreasonable per se. When evidence has been seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial unless an exception to the warrant requirement applies. In this case, it was uncontested that the officers did not have a warrant to search 44 Cherry Hill. Therefore, the search was unreasonable per se, and an exception to the warrant requirement was necessary in order for the search to be reasonable.

2. For an individual to assert standing to challenge a search, the individual must have had a legitimate expectation of privacy in the place or location searched that society recognizes as reasonable. A court determines the issue of standing by examining the totality of the circumstances surrounding the search, and the defendant bears the burden of establishing that he or she has standing. In this case, the totality of the circumstances established that defendant had a legitimate expectation of privacy in his mother's apartment that society recognizes as reasonable: police officers recovered several items from the Buick indicating that defendant resided at 44 Cherry Hill, including tax paperwork, a collections notice, Friend of the Court paperwork, and a land sale registration; defendant answered the door at 44 Cherry Hill, indicating that he had control over the apartment and the ability to regulate its access; and officers found defendant's personal belongings in 44 Cherry Hill. Accordingly, defendant had standing to challenge the search of 44 Cherry Hill and the seizure of the wallet, keys, and cell phone.

3. Consent is an exception to the warrant requirement. Consent must be given by the person whose property is searched or by a third party possessing common authority over the property. Consent to search may be limited in scope, and the standard

for measuring the scope of consent under the Fourth Amendment is that of objective reasonableness—what a typical reasonable person would have understood by the exchange between the officer and the person giving consent. The scope of a search is generally defined by its expressed object. In this case, defendant's mother had authority to give consent to search the apartment; however, the items seized—the wallet, keys, and cell phone—were not within the scope of that consent. The officers had explained to defendant's mother that they wished to search the apartment for evidence of drugs. Therefore, a reasonable person would have believed that the scope of the mother's subsequently given consent pertained to illegal drugs hidden in the apartment; such consent did not constitute consent to seize any item.

4. The plain-view exception to the warrant requirement allows a police officer to seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminatory. An item is obviously incriminatory, meaning its incriminating nature is immediately apparent, if, without further search, the officers have probable cause to believe that the items are seizable. In this case, the incriminating nature of the wallet, keys, and cell phone was not immediately apparent; instead, further investigation was necessary to establish a connection between the items and the suspected criminal activity. Therefore, the plain-view exception to the warrant requirement did not apply.

5. The prosecution's argument that officers were only required to have reasonable suspicion that criminal activity was occurring in order to conduct the search of the apartment and seize the wallet, keys, and cell phone on the basis of the United States Supreme Court's decision in *United States v Knights*, 534 US 112 (2001) (holding that the government's intrusion on a probationer's significantly diminished privacy interests is reasonable when an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity), failed. The case at bar was distinguishable from *Knights* because the prosecution did not submit evidence regarding the conditions of defendant's probation in the trial court. Without the probation conditions, there was insufficient evidence in the record to conclude that the officers had reasonable suspicion that a probationer subject to a search condition was engaged in criminal activity. The probation/parole orientation guide that the prosecution provided on appeal was not signed by defendant, and even assuming that defendant agreed to the conditions provided in the guide, those conditions differed substantially from the search

condition in *Knights*. Additionally, even assuming that the probation conditions in the guide applied to defendant and that the officers had reasonable suspicion to conduct a search of 44 Cherry Hill with regard to defendant's suspected drug activity, the seizure of the items found in 44 Cherry Hill did not fall under the probation exception outlined in *Knights*. Although the *Knights* Court clarified that an officer may search the home of a probationer subject to a search condition if the officer had reasonable suspicion that the probationer was engaged in criminal activity, the Court was silent with regard to the justification for the seizure of the items taken from the respondent's home. The holding in *Knights* could not be expanded to permit the seizure of any item found in a probationer's home if there was reasonable suspicion of criminal activity permitting search of the home. Additionally, even if the officers were only required to have reasonable suspicion that the items were used for illegal drug activities in order to seize the items, the officers had nothing more than a hunch that the cell phone, wallet, and keys were connected with drug activity based on their experiences with similar items in the past, and the officers lacked any particularized suspicion with regard to the specific items seized. Accordingly, even assuming that the reasoning from *Knights* applied in this case, *Knights* did not justify the seizure of the cell phone, keys, and wallet.

6. The inevitable-discovery doctrine is recognized in Michigan and may justify the admission of otherwise tainted evidence that ultimately would have been obtained in a constitutionally accepted manner. Several factors are used in determining whether the inevitable-discovery rule applies, including whether the legal means were truly independent, whether the use of the legal means and the discovery by the legal means were truly inevitable, and whether application of the inevitable-discovery doctrine could incentivize police misconduct or significantly weaken the protection provided under the Fourth Amendment. In this case, there was no indication that the officers would have inevitably discovered the wallet, keys, and cell phone through legal means. Even assuming that the officers had probable cause to obtain a warrant for the keys, wallet, and cell phone, the officers were not in the process of obtaining a warrant when they seized the items. Additionally, application of the inevitable-discovery doctrine in this context would incentivize police misconduct and significantly weaken Fourth Amendment protections because it would permit police officers to evade the warrant requirement and would permit the seizure of an item whenever there is probable cause. Therefore, the inevitable-discovery doctrine did not apply to the

seizure of the cell phone, wallet, and set of keys, and those items should have been excluded from trial.

7. The exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search. The text messages obtained from the cell phone fell under the exclusionary rule as products of the illegal seizure of the cell phone because the messages were obtained through exploitation of the illegal seizure when the officer searched the phone and engaged in conversations in an attempt to procure further incriminating evidence against defendant.

8. The prosecution could not establish that there was no reasonable probability that the evidence contributed to defendant's conviction. The testimony regarding the keys and the contents of defendant's wallet was admitted to show a connection between defendant and the locations in which the drugs were found, and the testimony regarding the cell phone was admitted to show a connection between defendant and drug sales. Without the testimony regarding these items, the only evidence presented at trial connecting defendant with the drugs found in the Sam's Club bag included the two receipts bearing defendant's name as well as testimony that a detective saw defendant entering and exiting 45 Lantern Lane on several occasions. Although this evidence was incriminating, it did not establish, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of might have contributed to the conviction. The admission of the evidence was not harmless beyond a reasonable doubt, and defendant was entitled to a new trial.

Reversed and remanded for a new trial.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Thomas R. Grden*, Appellate Division Chief, *Jessica R. Cooper*, Prosecuting Attorney, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christine A. Pagac*) for defendant.

Before: SAAD, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM. Defendant appeals as of right his jury trial convictions of two counts of possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(*iv*), and one count of possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of 76 months to 40 years' imprisonment for the intent-to-deliver-a-controlled-substance convictions and 76 months to 15 years' imprisonment for the intent-to-deliver-marijuana conviction. We reverse and remand for a new trial.

I. FACTS AND PROCEDURAL HISTORY

On October 2, 2014, at approximately 10:00 a.m., the Oakland County Sheriff's Office executed a warrant at 45 Lantern Lane, an apartment in the North Hill Farms apartment complex in Pontiac, Michigan. Detective Daniel Main presented the affidavit for issuance of a search warrant before the warrant was issued. He explained at trial that on two occasions an informant entered 45 Lantern Lane, purchased drugs inside, left the apartment, and turned over the drugs to police. Detective Main testified that defendant was the subject of the investigation and was observed entering and exiting the 45 Lantern Lane location on multiple occasions. However, the affidavit did not name a particular individual. A search warrant for 45 Lantern Lane was issued on the basis of the affidavit.

Before executing the warrant, Detective Main conducted surveillance of the area. He observed defendant standing behind a Buick Regal in the parking lot of the apartment complex. Defendant moved around items in the trunk of the vehicle, closed the trunk, and walked into 44 Cherry Hill, another apartment in the complex,

carrying a small bag in his hand. Detective Main did not see defendant inside the vehicle. It was later determined that the vehicle was not registered to defendant.

Following this surveillance, five officers executed the search warrant at 45 Lantern Lane. The two people in the house were secured. Detectives Main and Jason Teelander then walked to the Buick in the parking lot and looked inside. They spotted a small bag of marijuana in or near the center console. The two detectives, along with a uniformed officer, went to 44 Cherry Hill and knocked on the door. Defendant answered and stepped outside the apartment. He was arrested for possession of marijuana and placed in the back of a police car. The detectives then spoke to defendant's mother, Emma Howard. She told them that 44 Cherry Hill was her apartment. Detective Main explained that the officers were investigating her son for drug trafficking and wanted "to make sure that he didn't have any drugs hidden in her house that she didn't know about." He asked her "if she [would] mind if we looked around and made sure there was nothing there." Howard gave them permission to conduct the search.

The detectives did not find contraband or drugs in the apartment at 44 Cherry Hill. Detective Teelander searched the bathroom. He saw men's clothing piled on the toilet seat and a cell phone next to the clothing. There were shoes on the floor, and a travel bag was opened. Detective Teelander seized the cell phone. The officers also confiscated a wallet and a set of keys from the couch in the living room. The wallet contained a receipt for AutoZone, various cards and receipts with defendant's name on them, and $971 in cash. The keychain included keys that could unlock 44 Cherry Hill, 45 Lantern Lane, and the Buick in the parking

lot. The keychain also contained an AutoZone rewards card. Detective Main used a key on the keychain to unlock the Buick and retrieve the marijuana inside. He also found paperwork with defendant's name and the address at 44 Cherry Hill as well as a phone box that matched the phone taken from Howard's apartment. In the trunk, Detective Main found men's clothing and a PlayStation 4.

The detectives returned to 45 Lantern Lane to continue searching the apartment. While searching the kitchen, Detective Main found a couple of boxes of sandwich baggies, a pair of latex gloves, and a pair of scissors. He testified at trial that the items were significant because sandwich baggies are often used to package smaller amounts of drugs for sale, latex gloves prevent a person from absorbing drugs into his or her skin during packaging, and scissors could be used to cut off portions of the baggies. In the kitchen garbage can, Detective Main located sandwich baggies with the corners missing, a syringe, and a receipt stub without a name. He explained at trial that one way of packaging drugs is to place the drug into one corner of a baggie, knot the remaining portion just above the drug, and separate the main part of the baggie from the portion holding the drug. In the living room, Detective Main found scales and a tin with eight individual bags of marijuana containing approximately 1 gram each. There were also "rolling papers" inside the residence.

In the dining area, Detective Main found a reusable Sam's Club bag on one of the chairs. Inside were CDs, PlayStation games, and a PlayStation 3. The bag also contained two bags of marijuana, a digital scale, and a nylon case with individually packaged bags of heroin and one bag of cocaine. The two bags of marijuana were approximately 6 grams and nearly 11 grams in weight.

The bags of heroin ranged in weight. The powdered cocaine found in the nylon container weighed approximately 1.6 grams. There was also a small amount of crack cocaine in the bottom of the Sam's Club bag. Detective Main testified that the heroin and cocaine were worth about $800 to $900. He also testified that digital scales are often used in drug trafficking to weigh drugs for both sale and purchase.

There were two receipts in the Sam's Club bag. A September 7, 2014 receipt for the Comfort Suites in Auburn Hills listed defendant's name and the address at 44 Cherry Hill. The other receipt, dated August 22, 2014, was for the McGuire's Motor Inn on Telegraph Road and listed defendant's name and the address at "41 Cherry Hill." The bag also contained an AutoZone rewards card with 16 numbers under the bar code, which matched the numbers on the rewards card attached to the keychain found at 44 Cherry Hill. The AutoZone receipt found in the wallet listed four numbers that were the same as the last four numbers on the AutoZone rewards card.

While Detective Main was writing his police report, he kept the cell phone from Howard's apartment. The phone rang several times and received some text messages. Some of the texts mentioned "G" or "Gary," and there were numerous photographs of defendant in the phone. Detective Main responded to some of the text messages. He recounted several text message exchanges at trial. At 6:02 p.m., an incoming message stated, "[H]ave those 4 15 milligram oxycodones, trade you for a 25, they go for 9 to 12 dollars, you said you would today, pretty please." At 6:21 p.m., another message stated, "[N]eed 20, have cash, call me. ASAP." Detective Main asked, "[B]oy or girl?" The response was "girl, how long and will you do the pill deal for me,

it's for that long haired beauty you like." Detective Main responded that he was "waiting on some more." Detective Main testified that boy is "street slang" for heroin, and girl is "street slang" for cocaine.

At 6:29 p.m., an incoming message stated, "[W]hat up, this Ton, I need some of that hookup." Detective Main asked, "[B]oy?" The incoming text answered, "[N]o, that hard." Detective Main responded, "[M]y bad, I'm waiting on some." The next text message stated, "[H]it me up as soon as you get it cause I'm missing out on a lot right now." Detective Main explained that "hard" is a street term for crack cocaine, and "soft" refers to powder cocaine. At 9:30 p.m., there was an incoming message stating, "[Y]ou around?" Detective Main responded via text message, "[Y]ou need something," and the answer was "100." Detective Main testified that this likely meant $100 worth of heroin. At 9:40 p.m., there was an incoming message asking "G" if he was at "the farms." When Detective Main responded, "[Y]eah, what's up," the person stated, "I need a 4 piece." Detective Main asked, "[B]oy or girl[?]" The answer was "girl." He explained at trial that "[t]he farms is what people in Pontiac call North Hill Farms," and "4 piece" means $40 worth of drugs.

Detective Main read into the record at trial relevant text messages from dates before the search and arrest. An incoming message from September 29, 2014, stated, "Liz want [sic] to know can you take her 2 GMS," which is an abbreviation for grams. The outgoing response was "regs," to which there was a reply of "no." The next outgoing message stated, "[T]hat's all I got is regs." Detective Main explained at trial that "regs" is a common street term for marijuana, particularly "lower level cheap marijuana." Detective Main testified that there were text messages on the cell

phone from September 26, 2014, regarding setting up a meeting at McGuire's Motor Inn. Some additional text messages referred to being in North Hill Farms.

Before trial, defense counsel moved to suppress the wallet, keys, and cell phone found at 44 Cherry Hill. Defense counsel argued that the items found at that location were not related to the possession or sale of drugs, were not connected to the Lantern Lane address, and were outside the scope of the search defendant's mother permitted. The prosecution asserted that defendant's motion was untimely, the items seized from 44 Cherry Hill were taken legally through a consent search, and the items were in plain view and known to be possibly incriminating by officers familiar with drug trafficking. At the motion hearing, the trial court denied defendant's motion as untimely and determined that denial was appropriate on the merits as well. The trial court concluded that the consent exception to the warrant requirement applied in this circumstance. Evidence stemming from the search of the wallet, keys, and cell phone was admitted into evidence at trial. Defendant was convicted and sentenced as stated, and this appeal followed.

II. FOURTH AMENDMENT SEARCH AND SEIZURE

The main issue presented in this case is whether the seizure of the cell phone, wallet, and keys from 44 Cherry Hill, as well as the subsequent search of the cell phone, violated defendant's Fourth Amendment protection against unreasonable searches and seizures. Defendant contends that the seizure of the cell phone, wallet, and keys was unreasonable because there was no warrant permitting the police to seize the items and because no exception to the warrant requirement permitted the police officers to seize the items. We agree.

"We review de novo a trial court's ultimate decision on a motion to suppress on the basis of an alleged constitutional violation." *People v Gingrich*, 307 Mich App 656, 661; 862 NW2d 432 (2014). We review for clear error any findings of fact made during the suppression hearing. *Id*. "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. (citation and quotation marks omitted). We review de novo the issue whether the Fourth Amendment was violated and the issue whether an exclusionary rule applies. *People v Corr*, 287 Mich App 499, 506; 788 NW2d 860 (2010).[1]

The United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Fourth Amendment of the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The corresponding provision of the Michigan Constitution provides, in part, "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures." Const 1963, art 1, § 11. Whether a search or a seizure is lawful depends on whether it is reasonable. *People v Nguyen*, 305 Mich App 740, 751; 854 NW2d 223 (2014). Therefore, "a search for purposes of the Fourth Amendment occurs when the government intrudes on an

[1] We note that although the trial court concluded that the motion to suppress was untimely, the court nevertheless held a hearing on the motion and reached a conclusion on the underlying issue.

individual's reasonable, or justifiable, expectation of privacy." *People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011) (citation and quotation marks omitted).

"In general, searches conducted without both a warrant and probable cause to believe evidence of wrongdoing might be located at the place searched are unreasonable per se." *Lavigne v Forshee*, 307 Mich App 530, 537; 861 NW2d 635 (2014). "And, generally, when evidence has been seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial." *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009) (citation and quotation marks omitted). However, there are several exceptions to the warrant requirement. See *Lavigne*, 307 Mich App at 537-538.

With regard to the search of the contents of a cell phone, the United States Supreme Court recently held that a warrant is generally required before searching the information contained in a cell phone. *Riley v California*, 573 US ___, ___; 134 S Ct 2473, 2493; 189 L Ed 2d 430 (2014). However, the Court clarified that "even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone." *Id*. at ___; 134 S Ct at 2494. Therefore, the search of the contents of a cell phone generally requires a warrant unless a case-specific exception applies.

A. STANDING

We first address the issue whether defendant had standing to contest the search of 44 Cherry Hill and the seizure of the wallet, cell phone, and keys. The right to be free from unreasonable searches and sei-

zures is personal, and the right cannot be invoked by a third party. *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008). "For an individual to assert standing to challenge a search, the individual must have had a legitimate expectation of privacy in the place or location searched, which expectation society recognizes as reasonable." *Id*. A court determines the issue of standing by examining the totality of the circumstances, and a defendant bears the burden of establishing that he has standing. *Id*.

> Factors relevant to the determination of standing include ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case. [*Id*. (citation and quotation marks omitted).]

The totality of the circumstances in this case establishes that defendant had a legitimate expectation of privacy in his mother's apartment that society recognizes as reasonable. The police officers recovered from the Buick several items indicating that defendant resided at 44 Cherry Hill with his mother, including tax paperwork listing defendant's name and the address of 44 Cherry Hill. The detectives also recovered a collections notice for defendant at 44 Cherry Hill and Friend of the Court paperwork for defendant, which also listed 44 Cherry Hill as his address. Finally, the officers found a land sale registration form signed by defendant listing 44 Cherry Hill as his address. Defendant answered the door when the police officers arrived at 44 Cherry Hill, indicating that he had control over the apartment and the ability to regulate its access. Additionally, the officers found defendant's personal

belongings in 44 Cherry Hill after arresting defendant. The totality of the circumstances of this case, therefore, indicates that defendant had a legitimate expectation of privacy with regard to 44 Cherry Hill that was objectively reasonable because he resided at the residence with his mother and had the ability to control the area searched and items seized. Accordingly, defendant had standing to challenge the search of 44 Cherry Hill and the seizure of the wallet, keys, and cell phone.

B. CONSENT

We next turn to the issue whether the police violated defendant's Fourth Amendment right against unreasonable searches and seizures when the officers searched 44 Cherry Hill and seized the wallet, keys, and cell phone. It is uncontested that the officers did not have a warrant to search 44 Cherry Hill. Therefore, the search was unreasonable per se, and an exception to the warrant requirement was necessary in order for the search to be reasonable. The trial court determined that the search and seizure was valid under the consent exception to the warrant requirement. Consent is an exception to the warrant requirement. *Lavigne*, 307 Mich App at 538. The consent exception permits a search and seizure if the consent is unequivocal, specific, and freely and intelligently given. *Id*. "Whether consent to search is freely and voluntarily given presents a question of fact that must be determined on the basis of the totality of the circumstances[.]" *Id*. The consent must be given by the person whose property is searched or from a third party possessing common authority over the property. *Brown*, 279 Mich App at 131. "The trial court's decision regarding the validity of the consent to search is reviewed by this Court under a standard of clear error."

People v Frohriep, 247 Mich App 692, 702; 637 NW2d 562 (2001) (citations and quotation marks omitted). Consent to search may be limited in scope, and consent may be revoked. *Id*. at 703. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Id*. (citation and quotation marks omitted). Further, "[t]he scope of a search is generally defined by its expressed object." *People v Dagwan*, 269 Mich App 338, 343; 711 NW2d 386 (2005) (citation and quotation marks omitted).

The parties do not contest that defendant's mother had the authority to give consent to search her apartment. Instead, the parties dispute whether the items seized were within the scope of the consent. At trial, Detective Main testified as follows:

> I told Ms. Howard why we were there. Uh, I told her that we were investigating her son for, for drug trafficking. I told her that I wanted to make sure that he didn't have any drugs hidden in her house that she didn't know about and I asked her if she mind [sic] if we looked around and made sure there was nothing there.

Detective Teelander testified that "Detective Main, uh, told him why we were there—or told her why we were there—and explained the situation and asked if, uh, if we mind-, if she would consent to letting us search her apartment for any illegal drugs or anything." Howard consented to the search, and the officers proceeded to search the apartment and seize the wallet, keys, and cell phone. The testimony establishes that a reasonable person would have believed that the scope of the search pertained to illegal drugs hidden in the apartment. Howard's consent to search her apartment for

the limited purpose of uncovering illegal drugs did not constitute consent to seize *any* item. The seizure of the wallet, keys, and cell phone, therefore, fell outside the scope of Howard's consent.

C. PLAIN VIEW

Furthermore, the officers were not entitled to seize the wallet, keys, and cell phone under the plain-view exception to the warrant requirement because the incriminating character of the items seized was not immediately apparent. "The plain view exception to the warrant requirement allows a police officer to seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminatory." *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). An item is obviously incriminatory, meaning its incriminating nature is immediately apparent, if "without further search the officers have 'probable cause to believe' the items are seizable." See *People v Champion*, 452 Mich 92, 102; 549 NW2d 849 (1996) (citation omitted). The rationale behind the plain-view doctrine is police convenience, as "[i]t would be unreasonably inconvenient to require the police, once they have made a valid intrusion and have discovered probable evidence in plain view, to leave, obtain a warrant, and return to resume a process already in progress." *Id*.

The prosecution's argument that the items were properly seized under the plain-view exception is without merit because the incriminating nature of the wallet, keys, and cell phone was not immediately apparent. Instead, further investigation was necessary to establish a connection between the items and the suspected criminal activity. With regard to the set of keys, the officers were required to conduct further

investigation to determine that the keychain contained keys for the Buick, 44 Cherry Hill, and 45 Lantern Lane. The officers also performed an additional search to conclude that the rewards card on the keychain contained a 16-digit bar code matching the bar code of a rewards card found in the Sam's Club bag. With regard to the wallet, the officers conducted additional investigation to determine that the wallet contained a large amount of cash and an AutoZone receipt with four numbers matching the last four numbers found on a rewards card located in the Sam's Club bag. With regard to the cell phone, Detective Main conducted further investigation of the phone by searching through text messages, and even responding to text messages, to locate evidence connecting defendant with drug sales. Therefore, the incriminating nature of these items was not immediately apparent, and the plain-view exception to the warrant requirement did not apply in this context.

D. PROBATIONER STATUS

On appeal, the prosecution relies, in large part, on the United States Supreme Court's decision in *United States v Knights*, 534 US 112; 122 S Ct 587; 151 L Ed 2d 497 (2001), for the proposition that the officers were only required to have reasonable suspicion that criminal activity was occurring to conduct the search of the apartment and seize the wallet, keys, and cell phone. In *Knights*, the respondent was sentenced to probation for a drug offense and signed a probation order including the condition that the respondent "would '[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement

officer.' " *Id*. at 114 (alterations in original). The probation order also included a provision acknowledging receipt of a copy of the probation order and indicating that the respondent read and understood the terms and conditions of probation as well as agreed to abide by them. *Id*. After the respondent was placed on probation, police officers began to suspect that the respondent was involved in setting a power transformer and telecommunications vault on fire. *Id*. at 114-115. The fire occurred after the company owning the power transformer filed a theft-of-service complaint against the respondent and shut off his electric service. *Id*. A detective set up surveillance of the respondent's apartment and saw the respondent's suspected accomplice carrying items that the detective believed were pipe bombs. *Id*. at 115. The detective looked into the accomplice's truck and saw several explosive materials and other items, including padlocks matching the description of those removed from the transformer vault. *Id*. The detective then conducted a search of the respondent's apartment, which revealed additional incriminating items. *Id*.

The United States Supreme Court concluded that the search was reasonable under the totality of the circumstances and that the probation search condition was a "salient circumstance." *Id*. at 118. The Court discussed the fact that probationers do not have the absolute liberty that ordinary citizens have and noted that the condition in the probation order significantly diminished the respondent's reasonable expectation with regard to his privacy. *Id*. at 119-120. The Court further noted that probationers are more likely to violate the law than ordinary citizens and that probationers have more incentive to conceal and dispose of incriminating evidence. *Id*. at 120. Therefore, the Court held that "the balance of these considerations

requires no more than reasonable suspicion to conduct a search of this probationer's house." *Id*. at 121.[2] The Court reasoned that "[t]he degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." *Id*. Under the circumstances of the case, the balance of governmental and private interests warranted a reasonable suspicion standard. *Id*. The Court concluded, "When an officer has reasonable suspicion that a probationer *subject to a search condition* is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable." *Id*. (emphasis added).[3]

This case is distinguishable from *Knights*, however, because the prosecution did not submit evidence regarding the conditions of defendant's probation in the trial court. Defendant's presentence investigation report (PSIR) indicates that he was on probation at the time the instant offense was committed. In response to defendant's motion to suppress, the prosecution did not contend that the search was reasonable under the probation exception to the warrant requirement, in-

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[2] "In determining reasonableness, the court must consider whether the facts known to the officer at the time . . . would warrant an officer of reasonable precaution to suspect criminal activity." *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). Further, "[t]he reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances." *Id*. (citation and quotation marks omitted).

[3] See also *Knights*, 534 US at 122 (Souter, J., concurring) ("We now hold that law-enforcement searches of probationers *who have been informed of a search condition* are permissible upon individualized suspicion of criminal behavior committed during the probationary period . . . .") (emphasis added).

stead relying on the consent and plain-view exceptions to the warrant requirement. Consequently, the signed conditions of defendant's probation do not appear in the lower court record. In *Knights*, the United States Supreme Court indicated that the probation search condition was a *salient* circumstance within the totality of the circumstances in determining whether the search of the respondent's residence was reasonable. *Knights*, 534 US at 118. In this case, we cannot examine defendant's probation conditions because the probation conditions are not contained in the record.[4] Without the probation conditions, there is insufficient evidence in the record to conclude that the officers had reasonable suspicion that a probationer *subject to a search condition* was engaged in criminal activity. See *id*. at 121.[5]

The prosecution attaches to its brief on appeal a "probation/parole orientation guide," which is not signed by defendant. The document that the prosecu-

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[4] The PSIR contains recommended probation conditions in relation to defendant's previous conviction, but it is unclear whether the trial court adopted those recommendations. Further, there is no search condition listed in the recommended probation conditions.

[5] The prosecution relies on this Court's opinion in *People v Glenn-Powers*, 296 Mich App 494; 823 NW2d 127 (2012), in support of the conclusion that the officers were permitted to search Howard's residence and seize the cell phone, keys, and wallet if the officers had reasonable suspicion that defendant was engaging in criminal activity. However, the statements regarding *Knights* in *Glenn-Powers* constituted nonbinding obiter dicta. "Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, therefore, 'lack the force of an adjudication.' " *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) (citation omitted). The issue in *Glenn-Powers* was whether the defendant, a probationer, was lawfully arrested under a warrant for violation of his probation when the warrant was not sworn under oath. *Glenn-Powers*, 296 Mich App at 496. *Glenn-Powers* did not involve a search and seizure, and, therefore, this Court's discussion regarding the rule from *Knights* constituted mere obiter dicta. See *Peltola*, 489 Mich at 190 n 32.

tion provides on appeal states, in relevant part, "If applicable, explained Nighthawk or enhanced supervision programs, advising the offender that the agent, possibly with law enforcement, may make unannounced home visits during evening and weekend hours to ensure compliance with the probation/parole order."[6] Even assuming that defendant agreed to this condition, the condition differs substantially from the condition in *Knights*. First, the condition does not explain when it is applicable, and it is unclear whether this provision applied to the circumstances of defendant's probation. Second, the condition merely states that an agent and law enforcement officers may make unannounced home visits; it does not include language indicating that defendant would submit his property or residence to a search without a search warrant or reasonable cause, which was the provision at issue in *Knights*. See *Knights*, 534 US at 114. Accordingly, we conclude that, even assuming that defendant agreed to the probation provision, the provision is distinguishable from the provision at issue in *Knights*.

Finally, even assuming that the probation conditions that the prosecution attaches to its brief on appeal

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[6] In addition to this provision, the prosecution points to another provision in the probation/parole orientation guide, which states:

> Advised offender that prohibited drug and alcohol use will be taken seriously and will involve immediate corrective action which could include, in addition to verbal warning and counseling, meetings with pro-social supports and/or assessments for treatment programs. Offenders who fail to respond positively to these corrective actions could incur increased interventions which may include jail detention, residence searches and/or increased supervision.

It is clear that this provision does not apply to this situation, however, because there was no indication that defendant used any drugs, and there was no immediate corrective action, which was required before increased interventions occurred.

applied to defendant and that the officers had reasonable suspicion to conduct a search of 44 Cherry Hill with regard to defendant's suspected drug activity, we conclude that the seizure of the items found in 44 Cherry Hill did not fall under the probation exception outlined in *Knights*. Although the *Knights* Court clarified that an officer may search the home of a probationer subject to a search condition if the officer has reasonable suspicion that the probationer is engaged in criminal activity, the Court was silent with regard to the justification for the seizure of the items taken from the respondent's home. *Knights*, 534 US at 121. We decline to expand the holding in *Knights* to permit the seizure of *any* item found in a probationer's home if there is reasonable suspicion of criminal activity permitting a search of the home. In *Knights*, the incriminating nature of the items seized, which included "a detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, and a brass padlock stamped [with the name of the company that was the victim of arson]," was immediately apparent in light of the circumstances in that case and therefore would have been subject to seizure under the plain-view exception to the warrant requirement when the officers searched the home. *Id*. at 115.

In this case, as discussed earlier, the items seized from 44 Cherry Hill were not obviously incriminating and therefore did not fall under the plain-view exception to the warrant requirement. Even if the officers were only required to have reasonable suspicion that the items were used for illegal drug activities in order to seize the items, the officers had nothing more than a hunch that the cell phone, wallet, and keys were connected with drug activity based on their experi-

ences with similar items in the past, and the officers lacked any particularized suspicion with regard to the specific items seized. See *Champion*, 452 Mich at 98 ("Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause."). Accordingly, even assuming that the reasoning from *Knights* applied in this case, *Knights* does not justify the seizure of the cell phone, keys, and wallet from 44 Cherry Hill.

E. INEVITABLE DISCOVERY

We also agree with defendant that the cell phone, keys, and wallet do not fall under the scope of the inevitable-discovery doctrine. "The inevitable discovery doctrine is recognized in Michigan and may justify the admission of otherwise tainted evidence that ultimately would have been obtained in a constitutionally accepted manner." *People v Brzezinski*, 243 Mich App 431, 436; 622 NW2d 528 (2000). 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. *Id*. at 435. This Court has cited several factors in determining whether the inevitable-discovery rule applies, including (1) whether the legal means were truly independent, (2) whether the use of the legal means and the discovery by the legal means were truly inevitable, and (3) whether application of the inevitable-discovery doctrine could incentivize police misconduct or significantly weaken the protection provided under the Fourth Amendment. *Id*. at 436 (citation omitted).

There is no indication that the officers would have inevitably discovered the wallet, keys, and cell phone through legal means. Even assuming that the officers had probable cause to obtain a warrant for the keys, wallet, and cell phone, the officers were not in the process of obtaining a warrant when they seized the items. See *People v Hyde*, 285 Mich App 428, 445; 775 NW2d 833 (2009) (reasoning that the evidence at issue in the case should have been excluded because, even though there was probable cause to obtain a warrant and the evidence would have been obtained through a warrant, the police were not in the process of obtaining the warrant at the time of the seizure). Additionally, application of the inevitable-discovery doctrine in this context would incentivize police misconduct and significantly weaken Fourth Amendment protections because it would permit police officers to evade the warrant requirement and would permit the seizure of an item whenever there is probable cause. See *id*. ("To allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement."). Therefore, the inevitable-discovery doctrine does not apply to the seizure of the cell phone, wallet, and set of keys. Accordingly, the cell phone, the wallet and its contents, and the keychain should have been excluded from trial.

F. FRUIT OF THE POISONOUS TREE

We next conclude that the text messages obtained from the cell phone fell under the exclusionary rule as products of the illegal seizure of the cell phone. "[T]he exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so-called

'fruit of the poisonous tree' doctrine." *People v Stevens (After Remand)*, 460 Mich 626, 634; 597 NW2d 53 (1999). In *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963), the United States Supreme Court clarified:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [Citation omitted.]

The text messages on the cell phone were clearly obtained through exploitation of the illegal seizure of the cell phone. After the officers seized the cell phone, Detective Main searched the phone and even engaged in several conversations via text message to obtain additional incriminating evidence against defendant. The process through which the text messages were obtained, therefore, was not sufficiently distinguishable to be purged of the primary taint of the illegal seizure of the cell phone, and the text message evidence constituted a fruit of the original illegal actions of the police.

G. HARMLESS ERROR

We further conclude that defendant is entitled to a new trial because the prosecution failed to establish that the admission of the evidence regarding the items seized in violation of the Fourth Amendment was harmless beyond a reasonable doubt. With regard to the preserved, nonstructural constitutional error at issue in this case, in order to show that the error was

harmless and that reversal is not required, the prosecution must "prove, and the court [must] determine, beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction." *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994) (citation and quotation marks omitted).

The prosecution cannot establish that there is no reasonable probability that the evidence contributed to defendant's conviction. The keychain contained a key for 45 Lantern Lane and a key to the Buick. The testimony regarding the keychain was admitted to show a connection between defendant and the Buick, in which marijuana was found, and a connection between defendant and 45 Lantern Lane, in which drugs and drug paraphernalia were found. Also attached to the keychain was an AutoZone rewards card, which showed a connection between defendant and the Sam's Club bag because the 16 numbers on the bar code for the rewards card attached to the keychain matched the 16-number bar code on the rewards card found in the Sam's Club bag. With regard to the wallet, the police found a receipt for AutoZone, various cards with defendant's name on them, and $971 in cash. Detective Main testified at trial that the amount of money found in the wallet was indicative of drug sales. Testimony regarding the AutoZone receipt was used at trial to connect defendant with the Sam's Club bag because four numbers on the receipt matched four numbers found on the rewards card in the Sam's Club bag.

Finally, with regard to the cell phone, Detective Main read into evidence text message conversations from the cell phone and explained how the text messages referred to drug sales. The text messages referred to "G" or "Gary" and contained pictures of

defendant, which connected defendant to the cell phone and the drug sales discussed in the text messages. The text messages were highly incriminating because they not only tied defendant to the drugs found at 45 Lantern Lane, but also indicated that defendant was engaged in drug sales. Indeed, Detective Main testified at trial that, after examining the text messages and the other evidence in the case, it was more likely that the drugs were possessed with the intent to deliver.

For the reasons discussed, the evidence from the cell phone, wallet, and keychain was highly prejudicial to the defense. The items served to connect defendant with the drugs found at 45 Lantern Lane and in the Buick as well as to establish that defendant was engaged in drug dealing. Without the testimony regarding these items, the only evidence presented at trial connecting defendant with the drugs found in the Sam's Club bag included the two motel receipts bearing defendant's name and Detective Main's testimony that he saw defendant entering and exiting 45 Lantern Lane on several occasions. Although this evidence was incriminating, it does not establish, beyond a reasonable doubt, that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. Rather, the cell phone, keys, and wallet were vital to the prosecution's case against defendant, and, accordingly, there is a reasonable probability that this evidence contributed to his conviction. For this reason, we cannot conclude that the error in admitting the evidence was harmless beyond a reasonable doubt.

We note that defendant raises several additional arguments in his brief on appeal regarding (1) whether the text messages from the cell phone constituted inadmissible hearsay under MRE 801 and MRE 802,

(2) whether Detective Main's testimony that the drugs were possessed with the intent to deliver denied defendant his right to due process by improperly invading the province of the jury, and (3) whether defendant's upward departure sentence was unreasonable. However, in light of our conclusion regarding defendant's Fourth Amendment arguments, we need not reach the merits of these additional issues.

III. CONCLUSION

We conclude that, although the officers received valid consent to search 44 Cherry Hill, the officers did not have a warrant permitting the seizure of the cell phone, wallet, and keys, and the seizure of these items fell outside the scope of the consent. In addition, no exceptions to the warrant requirement applied in this circumstance, and the evidence does not fall under the scope of the inevitable-discovery doctrine. Therefore, the cell phone, wallet, and set of keys should have been excluded from trial. Finally, the admission of the evidence was not harmless beyond a reasonable doubt. Accordingly, defendant is entitled to a new trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

SAAD, P.J., and JANSEN and M. J. KELLY, JJ., concurred.

PEOPLE v TURN

Docket No. 327910. Submitted October 5, 2016, at Detroit. Decided October 11, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 962.

Dakota L. Turn pleaded guilty in the Lapeer Circuit Court to a charge of assault with intent to commit murder, MCL 750.83, and was sentenced as a third-offense habitual offender, MCL 769.11, to 18½ to 35 years of imprisonment. The court, Nick O. Holowka, J., ordered defendant to pay restitution to the victim of the assault and to the victim's insurer. Included in the restitution ordered was restitution to the victim for loss of the accumulated sick, personal, and vacation time the victim used while recuperating from his injuries. Defendant moved for resentencing and challenged the restitution order. Defendant contended that he should not be ordered to pay the victim for his lost leave time because that type of loss is not listed in the Crime Victim's Rights Act, MCL 780.751 *et seq*., or the general restitution statute, MCL 769.1a. The court held a restitution hearing and ordered defendant to pay the victim's insurer for the victim's actual medical expenses and the victim for the loss of his jacket. After additional briefing on the issue of the victim's lost leave time, the court ordered defendant to pay the victim for the accumulated leave time the victim had to use before he was able to return to work. Defendant appealed by leave granted.

The Court of Appeals *held*:

Under Const 1963, art 1, § 24, MCL 780.766, and MCL 769.1a, a crime victim is entitled to full restitution for direct or threatened physical, financial, or emotional harm resulting from a defendant's criminal conduct giving rise to a conviction. In this case, the victim suffered physical and financial injury. Part of the victim's financial injury occurred when he was required to use his accumulated sick, personal, and vacation time while he was recuperating from his injuries and under a doctor's order to refrain from working. Having used 112 hours of his accumulated leave time, the victim was without that leave time to use in the future and was without that leave time for which he was entitled to receive monetary compensation from his employer if the victim ceased working for that employer. Although restitution for the

loss of accumulated leave time is not listed in the Crime Victim's Rights Act or the general restitution statute, its absence from the types of restitution listed in both statutes is not dispositive because the lists appearing in those statutes are nonexhaustive. The victim lost the future use of the leave time he had accumulated, and he lost the opportunity to be paid for that accumulated leave time should he terminate his employment. The trial court properly ordered defendant to pay the victim for the economic value of the victim's lost leave time.

Affirmed.

CRIMINAL LAW — RESTITUTION — LOST INCOME — ACCUMULATED LEAVE TIME.

A crime victim is entitled to restitution for accumulated sick, personal, and vacation time when the victim had to use that time during his or her absence from work while recuperating from injuries suffered as a result of a defendant's criminal conduct; even though the victim was paid by his or her employer for the time used during the victim's recuperation, the accumulated leave time used qualifies as loss of income because the leave time is lost for future use or, when applicable, for monetary compensation from an employer when the victim's employment is terminated (Const 1963, art 1, § 24; MCL 769.1a; MCL 780.766).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Emil H. Joseph, III*, Prosecuting Attorney, for the people.

John W. Ujlaky for defendant.

Before: SAAD, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM. Defendant, Dakota Lee Turn, appeals by leave granted[1] the trial court's order of restitution following his plea of guilty to a charge of assault with intent to commit murder, MCL 750.83. The trial court sentenced Turn as a third-offense habitual offender, MCL 769.11, to serve 18½ to 35 years in prison for the conviction. Additionally, the court ordered Turn to pay

[1] *People v Turn*, unpublished order of the Court of Appeals, entered July 31, 2015 (Docket No. 327910).

restitution to Nathaniel Scramlin, the individual he assaulted, and to Scramlin's insurer. On appeal, Turn challenges the court's authority to order him to pay restitution to Scramlin for his loss of accumulated sick, personal, and vacation time. Because we conclude that the Crime Victim's Rights Act, MCL 780.751 *et seq*., requires full restitution to crime victims, we affirm.

I. BASIC FACTS

During the plea hearing, Turn admitted that he stabbed Scramlin several times in the back and side. As a result of Turn's assault, Scramlin was taken to the hospital, received numerous stitches, remained hospitalized for two-and-a-half to three days, and, pursuant to his doctor's orders, was unable to immediately return to work following his release from the hospital.

At sentencing, the trial court ordered Turn to pay $17,744.44 in restitution. Turn moved for resentencing, challenging the propriety of the restitution order. The trial court scheduled a restitution hearing and heard testimony from Scramlin. Following the hearing, the court ordered Turn to pay $7,957.86 to Scramlin's insurer for actual medical expenses and $100 to Scramlin for the loss of his jacket.[2] The court ordered additional briefing and allowed for the submission of additional evidence on the question whether Scramlin was entitled to restitution for the loss of the accumulated sick, personal, and vacation time he used after the assault and, if so, how much he was entitled to receive.

It is undisputed that Scramlin, who was employed by the Michigan Economic Development Corporation

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[2] This portion of the restitution order has not been challenged on appeal.

as a community assistance specialist, had to use 112 hours of sick, personal, and vacation time in order to recuperate from his injuries. Scramlin was compensated by his employer at an after-tax rate of $19.23 per hour for the leave time he used. Scramlin testified that the time he used was no longer available. He also stated that accumulated leave time was payable by his employer upon termination of employment.

The trial court concluded that Scramlin had only received compensation for his time away from work by depleting his accumulated sick, personal, and vacation time. The court reasoned that the depletion of accumulated time represented a loss to Scramlin, who could not use the time in the future, either for its intended purpose or for monetary compensation upon termination of his employment. The court found that in order to award "full restitution" as required by MCL 780.766(2), Scramlin needed to be compensated for the loss of his accumulated leave time. The court found that the economic benefit of the lost time was $2,153.77.[3]

II. RESTITUTION

A. STANDARD OF REVIEW

Turn argues that the trial court erred by ordering him to reimburse Scramlin for his lost sick, personal, and vacation time. We review for clear error a trial court's factual findings related to an order of restitution. *People v Garrison*, 495 Mich 362, 366-367; 852 NW2d 45 (2014). A factual finding is clearly erroneous

[3] The trial court reached this amount by multiplying the number of hours of sick, personal, and vacation time that Scramlin used by his after-tax hourly rate of $19.23. On appeal, Turn has not challenged the amount of restitution awarded.

"when the reviewing court is left with a definite and firm conviction that an error occurred." *People v Fawaz*, 299 Mich App 55, 60; 829 NW2d 259 (2012) (quotation marks and citation omitted). A trial court's restitution order is reviewed for an abuse of discretion. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Pinkney*, 316 Mich App 450, 474; 891 NW2d 891 (2016) (quotation marks and citation omitted). Questions of statutory interpretation are reviewed de novo. *Gubachy*, 272 Mich App at 708.

B. ANALYSIS

In Michigan, a crime victim has a constitutional right to restitution. Const 1963, art 1, § 24. The right to restitution is further set forth in both § 16 of the Crime Victim's Rights Act, MCL 780.766, and in the general restitution statute, MCL 769.1a. Both statutes define "victim" as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission" of a crime. MCL 780.766(1); MCL 769.1a(1)(b). Further, both statutes provide that a sentencing court must order a defendant convicted of a crime to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction[.]" MCL 780.766(2); MCL 769.1a(2). Our Supreme Court has defined the term "full restitution" to mean "restitution that is complete and maximal." *Garrison*, 495 Mich at 365.

The trial court awarded restitution under Subsection 4(c) of MCL 780.766, which provides:

> If a crime results in physical or psychological injury to a victim, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:
>
> * * *
>
> (c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the crime.[4]

Turn argues that because the Crime Victim's Rights Act does not expressly indicate that restitution is available for a victim's use of accumulated sick, personal, and vacation time, Scramlin was not entitled to restitution for his lost time. However, Subsections (3) through (5) of MCL 780.766 enumerate a nonexhaustive list of types of restitution available under Michigan law. *Garrison*, 495 Mich at 368-370. Accordingly, the fact that the loss of accumulated sick, personal, and vacation time is not expressly listed is not dispositive. See *id*. at 368-370, 374 (ordering restitution for a crime victim's travel expenses even though travel expenses are not expressly listed in MCL 780.766(3) or MCL 769.1a).

Moreover, the time Scramlin used to recuperate from his injuries falls within the definition of "income loss" even though he was paid by his employer for the time he used. This Court has interpreted the word "income" as used in the Crime Victim's Rights Act to mean " '[t]he return in money from one's business, labor, or capital invested; gains, profits, salary, wages,

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[4] Using substantially similar language, the general restitution statute also provides that "[i]f a felony, misdemeanor, or ordinance violation results in physical or psychological injury to a victim, the order of restitution may require that the defendant . . . [r]eimburse the victim . . . for after-tax income loss suffered by the victim as a result of the felony, misdemeanor, or ordinance violation." MCL 769.1a(4)(c).

etc.' " *People v Corbin*, 312 Mich App 352, 371; 880 NW2d 2 (2015), quoting *Black's Law Dictionary* (6th ed) (alteration in original). Scramlin earned his accumulated sick, personal, and vacation time by working, and he was entitled to receive monetary compensation from his employer for any unused time. By using 112 hours of accumulated leave time, Scramlin lost the ability to use that paid leave time in the future, and he lost the opportunity to be paid for that time upon termination of his employment. Therefore, when Scramlin used his accumulated leave time, he suffered a monetary loss.

Likewise, the restitution order does not entitle Scramlin to be paid twice for the same time because, although Scramlin's employer paid him the wages he would have earned if he had returned to work and had not used his accumulated time, Scramlin was not compensated by his employer for the loss of his accumulated leave time even though that time had monetary value.

The trial court did not abuse its discretion by awarding Scramlin restitution for income lost as a result of Turn's actions.

Affirmed.

SAAD, P.J., and JANSEN and M. J. KELLY, JJ., concurred.

LYON CHARTER TOWNSHIP v PETTY

LYON CHARTER TOWNSHIP v HOSKINS

Docket Nos. 327685 and 327686. Submitted October 5, 2016, at Detroit. Decided October 13, 2016, at 9:00 a.m. Vacated in part and leave to appeal denied in all other respects 500 Mich 1010.

Lyon Charter Township brought two actions in the Oakland Circuit Court, one against James E. Petty, Judith Petty, James Petty, Jr., and Petty Trucking, and one against Marlene Hoskins and Paul Hoskins Landscaping, Inc. In both actions the township sought judicial intervention to enforce the township's ordinances and force defendants to cease their business operations at their current locations. The Petty and Hoskins families each owned property in the township, which they used as their primary residences and the sites of their family-owned business operations. Their commercial uses had violated the township's zoning ordinances since they opened shop. Defendants moved for summary disposition while simultaneously filing their answers, and the township moved for summary disposition in return. The court, Rudy J. Nichols, J., agreed with the township's position and ordered defendants' compliance with the zoning restrictions. Defendants appealed. The Court of Appeals consolidated the two cases.

The Court of Appeals *held*:

It is state policy and a zoning goal that property uses that do not conform to municipal zoning ordinances be gradually eliminated. Whether and when to enforce a zoning ordinance to effectuate this gradual elimination is a matter within a township's discretion, and courts will not interfere with that decision absent extraordinary circumstances. One such extraordinary circumstance is a preexisting nonconforming use, but defendants in these cases conceded that their commercial activities never conformed to the uses approved for their properties' zoning classifications and, therefore, were never legal. Accordingly, a different extraordinary circumstance was necessary to continue their businesses from their residential or agricultural properties. The Hoskins and Petty families asserted estoppel and laches defenses, which are judicially disfavored because they invite judicial interference into areas of local public interest and are

rarely applied in the zoning context except in the clearest, most compelling circumstances. The failure to enforce a particular zoning ordinance, by itself, does not create a vested right to use property in violation of zoning regulations. The doctrine of laches requires a passage of time that results in a change in condition causing prejudice as a consequence of the delay that makes it inequitable to enforce the zoning ordinance. Equitable estoppel may be invoked if the municipality by representation, admissions, or silence intentionally or negligently induced another to believe facts, the other party justifiably relied and acted on that belief, and the other party would be prejudiced if the municipality were permitted to deny the existence of the facts. As with laches, prejudice is a mandatory element, and the prejudice may not be *de minimis*. Precedent emphasized the inadequacy of defendants' evidence in this case. The Petty defendants made no allegations and presented no evidence regarding any expenditure or action to adapt or improve their property to suit their business. Therefore, the Petty defendants created no question of fact on the element of prejudice, and their claim failed as a matter of law. The Hoskins defendants presented building permits for their original pole barn construction and two subsequent additions, totaling $10,300 in improvements. The applications did not provide any information to the township that the pole barn would be used for commercial purposes. Neither set of defendants alleged that their property could not be used for other purposes under the zoning classification. And, as a matter of law, $7,000 worth of additions to a storage barn fell short of the substantial change in position or extensive obligations and expenses necessary for equity to overcome the township's zoning authority. Enforcement of the township's zoning ordinance would inconvenience defendants, who had operated their businesses for years without the expense of owning or leasing commercial property, but that inconvenience did not overcome the township's statutory authority to ensure that neighboring parcels maintain compatible uses. The trial court properly determined that the township could enforce its zoning ordinance and ordered an end to defendants' commercial uses, which were always prohibited on their land.

Affirmed.

1. ZONING — ENFORCEMENT — DEFENSES — LACHES AND ESTOPPEL.

Laches and estoppel defenses are judicially disfavored because they invite judicial interference into an area of local public interest and are rarely applied in the zoning context except in the clearest and most compelling circumstances.

2. ZONING — ENFORCEMENT — DEFENSES — EQUITABLE ESTOPPEL.

A township can be equitably estopped from enforcing a zoning ordinance when (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts; prejudice is a mandatory element.

3. ZONING — ENFORCEMENT — DEFENSES — LACHES AND ESTOPPEL — PREJUDICE.

The prejudice necessary to establish a laches or estoppel defense cannot be a *de minimis* harm; the party fighting the zoning enforcement must show that he or she made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he or she ostensibly had acquired, or must establish a financial loss so great as practically to destroy or greatly to decrease the value of the premises for any permitted use.

Seglund Gabe Quinn Elowsky & Pawlak, PLC (by *Jennifer H. Elowsky* and *Leann K. Kimberlin*), for plaintiff.

Essex Park Law Office, PC (by *Dennis B. Dubuc*), for defendants.

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM. The Petty and Hoskins families each own property in Lyon Township, which they use as their primary residences and the sites of their family-owned business operations. Their commercial uses have violated the township's zoning ordinance since they opened shop. As the residential neighborhood developed around them, these uses became problematic, and the township enforced its ordinance by ordering a stop to the business activities. The circuit court,

faced with competing summary disposition motions, upheld the township's zoning authority. We affirm.

I. BACKGROUND

The Petty and Hoskins families each own acreage on Belladonna Road in Lyon Township. The land has been zoned R-1.0 Residential Agricultural since 1957. The Hoskins family purchased their five-acre lot in 1969. The land was vacant, and the family quickly constructed a single-family residence. In 1970, the Hoskins family erected a 30-foot by 50-foot pole barn valued at $3,300. Their building permit application indicated, "Building to be used for storage." In 2012 and 2013, the Hoskins family built additions to the pole barn, each valued at $3,500. The Hoskins family asserts that they have always used the pole barn to store equipment and material for their landscaping business: Hoskins Landscaping, formerly known as Paul Hoskins Landscaping.

The Petty family bought a 13-acre lot neighboring the Hoskins family in 1977. The previous owners ran Nunday Trenching and Power Washing Company from the property and stored trucks and commercial equipment on site. The Petty family currently operates a truck-storage facility on the land—Petty Trucking—and also stores materials such as brick pavers. They have conducted other commercial enterprises in the past. Although James Petty contends that his family has made "significant investments" and "improvements to the business," he provided no further detail in connection with this lawsuit.

It is undisputed that the Hoskins and Petty families operated their businesses without township interference for several decades despite that their uses were never permitted under their zoning classification. De-

fendants claim that township officials have visited their property several times over the years and never raised any concerns. Moreover, each presented commercial personal property tax bills connected with their Belladonna addresses. In the early days, other property owners on Belladonna Road put their land to similar uses. It is also undisputed, however, that the neighborhood's character has changed over time. Satellite images reveal that a large residential subdivision now runs along the properties' western borders. On Belladonna Road, simple farm houses have given way to modern homes of vast square footage on large lots. It appears that Hoskins Landscaping and Petty Trucking are the last local vestiges of the rural era.

Neighbors began complaining about noise and early morning activity at the landscaping and truck-storage businesses. On October 14, 2013, the township sent identical "township zoning ordinance warning notice[s]" to Marlene Hoskins and James Petty. The township advised defendants that their business uses were not permitted in a residential zoning district and that defendants had been in violation of the ordinance since the inception of their commercial enterprises. The notices continued, "Although portions of your business activities have existed for years, the Township would like to meet with you to discuss options available to bring your property into compliance with the Zoning Ordinance." Ultimately, the township sought judicial intervention to force the Hoskins and Petty families to cease their business operations in their current locations. Defendants filed a joint motion for summary disposition contemporaneous with their answers, and the township responded with a summary disposition motion of its own. The circuit court agreed with the township's position and ordered the Pettys' and Hoskinses' com-

pliance with the zoning restrictions on their land. The Pettys and Hoskinses now appeal.

II. STANDARD OF REVIEW

We review de novo a circuit court's grant of summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> 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 appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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. [*Zaher*, 300 Mich App at 139-140.]

We review de novo the applicability and merit of the equitable defenses raised by the Hoskins and Petty families. See *Mason v Menominee*, 282 Mich App 525, 527; 766 NW2d 888 (2009).

III. ANALYSIS

Townships have statutory authority to enact and enforce zoning ordinances for the orderly planning of their communities. See Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. Zoning ordinances must be reasonable and promote "the public health, safety, morals, or general welfare." *Euclid v Ambler Realty Co*,

272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). Indeed, MCL 125.3201(1) of the Michigan Zoning Enabling Act provides:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, *to ensure that use of the land is situated in appropriate locations and relationships*, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and *to promote public health, safety, and welfare*. [Emphasis added.]

To achieve these goals, "[i]t is the policy of this state and a goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated." *Jerome Twp v Melchi*, 184 Mich App 228, 231; 457 NW2d 52 (1990). Whether and when to enforce its zoning ordinance to effectuate this gradual elimination is a matter within a township's discretion. 83 Am Jur 2d, Zoning and Planning, § 936, p 893; *Randall v Delta Charter Twp*, 121 Mich App 26, 32; 328 NW2d 562 (1982) ("[D]ecisions of a planning commission, or other similar local agency, concerning whether to enforce zoning ordinances are decisions which are so basic to the operation of a municipality that any attempt to create liability with respect thereto would constitute an unacceptable interference with [the municipality's] ability to govern.") (quotation marks and citation omitted; second alteration in original). "[A]bsent extraordinary circumstances," courts will not interfere with

such decisions. 2 Cameron, Michigan Real Property Law, § 23.30, p 1367.

One such "extraordinary circumstance[]" is the presence of a preexisting "nonconforming use." "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). To be protected, the nonconforming use must have been legal at one time; a use that violates the zoning ordinances since its inception does not draw such protection. 1 Anderson, American Law of Zoning 3d, § 6.14, p 481. Defendants concede that their commercial activities have never conformed to the uses approved for their properties' zoning classification. Accordingly, defendants were required to find other extraordinary circumstances to demand the continuation of their businesses from their R-1.0 Residential Agricultural properties.

In defense of the township's enforcement actions, the Hoskins and Petty families contended that the township's decades-long pattern of ignoring their zoning violations, and the investments they made in their businesses as a result, precluded the township from taking enforcement action now. To this end, the Hoskins and Petty families asserted laches and estoppel defenses. These defenses "are judicially disfavored" because they invite judicial interference into an area of local "public interest" and are "rarely applied in the zoning context except in the clearest and most compelling circumstances." 83 Am Jur 2d, § 937, p 894. And relevant to both, a historical failure to enforce a particular zoning ordinance, standing alone, is insufficient to preclude enforcement in the present. Anno: *Right of Municipality or Other Public Authority to*

Enforce Zoning or Fire Limit Regulations as Affected by its Previous Conduct in Permitting or Encouraging Violation Thereof, 119 ALR 1509, 1511, § IIIa. See also *Marzo v Abington Twp Zoning Hearing Bd*, 30 Pa Commw 225, 230; 373 A2d 463 (1977) ("[M]ere delay in enforcement does not create a vested right to use property in violation of zoning regulations.") (quotation marks and citation omitted).

"The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Boston-Edison Protective Ass'n v Teahen*, 337 Mich 353, 360; 60 NW2d 162 (1953) (quotation marks and citation omitted). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004). To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay. *Id.*; *Gallagher v Keefe*, 232 Mich App 363, 369-370; 591 NW2d 297 (1998); *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997). Proof of prejudice is essential.

A township can be equitably estopped from enforcing a zoning ordinance when:

> "(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. . . ." [*Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575; 425 NW2d 180 (1988), quoting *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 828; 346 NW2d 881 (1984).]

Just as with a laches defense, prejudice is a mandatory element.

The prejudice necessary to establish a laches or estoppel defense cannot be a *de minimis* harm. As described in 83 Am Jur 2d, § 937, p 894, the party fighting the zoning enforcement must show that he or she "made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he or she ostensibly had acquired." Courts have also held that the property owner must establish "a financial loss . . . so great as practically to destroy or greatly to decrease the value of the . . . premises for any permitted use." *Carini v Zoning Bd of Appeals*, 164 Conn 169, 173; 319 A2d 390 (1972). Precedent emphasizes the inadequacy of the evidence in this case.

In *Oliphant v Franzo*, 381 Mich 630; 167 NW2d 280 (1969), a case in which the state intervened in an action to claim title to the subject land that had once been submerged under Lake St. Clair, *id*. at 631, the state "sat on its hands" and "did nothing" for 17 years "while homes were being built, streets paved, water and sewers installed, [and] taxes collected," *id*. at 637. This was deemed sufficient prejudice to estop the state's interference. *Id*. at 636.

In *Pittsfield Twp v Malcolm*, 375 Mich 135, 137; 134 NW2d 166 (1965), the defendant constructed and operated an animal kennel contrary to the township's zoning regulations. The township building inspector issued a building permit before construction. In reliance on that permit, the defendant expended $45,000 to erect his building. He then operated the kennel for nearly a year before the township attempted to stop the use. *Id*. The Supreme Court estopped the township

from enforcing the zoning ordinance against the defendant. Not only did a township official issue a building permit (albeit in error) and the township wait 10½ months to take action, but the defendant also spent significant funds "for a specialty type building of otherwise doubtful utility." *Id*. at 148.

In contrast, in *Papadelis (On Remand)*, 226 Mich App at 97, the defendant paved a residentially zoned lot to use as parking for an adjacent greenhouse business. Although the building inspector "frequently visited the property" and was aware of the violation, the city waited three years to take action. *Id*. This Court found evidence of prejudice lacking:

> Defendants have not demonstrated any prejudice that has resulted from plaintiff's delay in bringing this action to enjoin the use of the residential parcel as a parking lot for defendants' business. Although the evidence indicates that defendants paved part of their residential property to provide parking for the greenhouse business, there is no indication in the record that this action was taken in reliance on plaintiff's failure to initiate suit earlier. [*Id*.]

Rather, the defendant constructed the parking lot after the adjacent road was widened, eliminating several parking spots on the greenhouse parcel. *Id*. at 93.

The Hoskins and Petty families brought their motion for summary disposition with inadequate proof of prejudice. The Petty defendants made no allegation and presented no evidence regarding any expenditure or action to adapt or improve their property to suit their business. As such, the Pettys created no question of fact on the element of prejudice, and their claim fails as a matter of law.

The Hoskins family presented building permits for their original pole barn construction as well as two additions. These documents recite $10,300 in improve-

ments. We first note that the issuance of building permits in this case did not establish knowledge on the part of the township. Marlene Hoskins and her now-deceased husband applied for the original building permit only one year after erecting a single-family home on the property. The application indicated merely that the pole barn would be used for storage. The later permit applications for the additions include even less information. Accordingly, township officials had no reason to believe the pole barn would be used for commercial purposes. The documents reflect the construction of a pole barn for storage uses incident to a residential structure. Cf. *Fass v Highland Park*, 326 Mich 19, 27-28; 39 NW2d 336 (1949), citing *Building Comm of the City of Detroit v Kunin*, 181 Mich 604; 148 NW 207 (1914) (in which the property owners sought city approval of their land use but then extended their uses to ones prohibited in the zoning district); *Valparaiso Bd of Zoning Appeals v Beta Tau Housing Corp*, 499 NE2d 780 (Ind Ct App, 1986) (holding that because the defendant's 1971 variance application and 1973 and 1974 official discussions with city officials notified the city that the defendant intended to use the subject properties for a fraternity house and the defendant thereafter expended $15,000 to remodel, the city was estopped from preventing the use); *Utah Co v Young*, 615 P2d 1265 (Utah, 1980) (allowing the county to enforce its zoning ordinance when the defendants applied for a permit to construct a "barn" on their agricultural property valued at $1,600 but then expended $23,000 to outfit the building as a public auction house).[1]

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[1] Both sets of defendants also presented personal property tax assessments in an attempt to establish the township's knowledge of their commercial uses of their property. These assessments merely show that

Moreover, neither set of defendants made any allegation that their property cannot be used for other purposes allowed under the zoning classification. A pole barn can be used for any number of activities, including serving as a garage for a residential structure. Similarly, a dirt parking area, like that on the Petty property, can be put to various uses. Accordingly, neither can establish that their expenditures were wasted or that their property is unfit for any use within the zoning classification. See *Mazo v Detroit*, 9 Mich App 354, 361; 156 NW2d 155 (1968) (holding that the defendant would not be estopped from enforcing the zoning ordinance when the plaintiff spent $6,500 in reliance on erroneous approval from city officers, but there were no allegations that "her expenditures have rendered her premises useless except as a bar").

The Hoskins family also presented no evidence that they expended $10,300 on their pole barn as a result of the township's inaction. In her affidavit submitted with the summary disposition motion, Marlene Hoskins averred, "We built a pole barn with Lyon Township's building permits specifically for our landscaping business and there was no problem with building inspections or the building's use." This statement contradicts the 1970 building permit application, which indicated simply that the pole barn would be used for storage. Given this plain and clear documentary evidence, the Hoskins family cannot show that they consulted with township officials regarding the legality of running their business from their property before its inception and, therefore, cannot establish a causal relationship for their initial investment.

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the taxpayer who lives at a particular address owns commercial personal property, not that the taxable personal property is located or used at the taxpayer's address.

In relation to the 2012 and 2013 additions, Ms. Hoskins alleged that "various Township Officials," including a former township supervisor, "have visited the property for a host of reasons" over the decades and yet raised no concerns regarding the Hoskins family's commercial enterprise or its compliance with the zoning ordinance. Ms. Hoskins contends that this complacency lulled her into believing it would be acceptable to extend the pole barn to create more room for Hoskins Landscaping's equipment. This case is distinguishable from *Papadelis (On Remand)*, 226 Mich App 90, in that no intervening cause, such as road construction, appears to have influenced the Hoskins family's recent expansion.

Moreover, as a matter of law, $7,000 worth of additions to a storage barn falls short of the "substantial change in position" or "extensive obligations and expenses" necessary for equity to overcome a township's zoning authority. 83 Am Jur 2d, § 937, p 984. The 2012 and 2013 additions and their attendant costs are not comparable to the construction of a business facility open to the public as in *Malcolm*, 375 Mich at 137, or the planning and construction of an entire neighborhood like in *Oliphant*, 381 Mich at 637. See also *North Miami v Margulies*, 289 So 2d 424 (Fl App, 1974) (finding a $650,000 investment sufficient to estop the city from enforcing its zoning ordinance). The enforcement of the township's zoning ordinance will work an inconvenience to defendants, who have operated their businesses for years without the expense of owning or leasing commercial property. That inconvenience, however, does not overcome the township's statutory authority to ensure that neighboring parcels maintain compatible uses.

Ultimately, both sets of defendants chose to pursue summary disposition based on their laches and estop-

pel defenses. Their evidence did not establish the prejudice necessary to continue their commercial enterprises on land surrounded by quiet residential property. Therefore, the circuit court properly determined that Lyon Township could enforce its zoning ordinance and order an end to defendants' commercial uses, which had always been prohibited on their R-1.0 Residential Agricultural land.

We affirm.

FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ., concurred.

SPINE SPECIALISTS OF MICHIGAN, PC v STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 327997. Submitted October 5, 2016, at Detroit. Decided October 13, 2016, at 9:05 a.m.

Spine Specialists of Michigan, PC, and American Anesthesia Associates, LLC, filed an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company, seeking to recover payment under the no-fault act, MCL 500.3101 *et seq*., for the medical services they had provided to Alonzo Garvin, who had been injured in an automobile accident. Dr. Louis Radden, a neurosurgeon and the owner of Spine Specialists, had provided medical services to Garvin. During the discovery process, Spine Specialists filed preliminary and amended witness lists, naming Radden as a witness and another physician as a potential expert. When State Farm sought to depose Radden, he refused to be deposed unless State Farm paid him $5,000 for three hours of deposition testimony because he anticipated that State Farm would ask his expert medical opinion on whether Garvin's injuries were the result of the accident and whether the provided treatment was reasonable and necessary. Plaintiffs moved to enforce Radden's expert witness fee. The court, John A. Murphy, J., granted plaintiffs' motion but reduced the fee. The Court of Appeals granted State Farm's application for leave to appeal the circuit court's order.

The Court of Appeals *held*:

1. The Michigan Court Rules are construed to facilitate trial preparation because the purpose of discovery is to simplify and clarify issues. For that reason, the court rules permit broad discovery of unprivileged matters that are relevant to the subject matter of a pending case.

2. A witness testifying at a deposition does not usually receive payment for his or her testimony. However, MCR 2.302(B)(4) provides a framework through which a party may discover the facts known and opinions held by the other party's experts that are otherwise discoverable under the provisions of Subrule (B)(1) and that were acquired or developed in anticipation of litigation or for trial. Specifically, under MCR 2.302(B)(4)(a)(ii), a party may

take the deposition of a person whom the other party expects to call as an expert witness at trial. MCR 2.302(B)(4)(c)(i) provides that unless manifest injustice will result, the trial court must require the party seeking discovery under Subrule (B)(4)(a)(ii) to pay the expert a reasonable fee for his or her deposition testimony but not for preparation time.

3. The circuit court erred by ordering State Farm to pay plaintiffs for Radden's deposition testimony. Radden acquired facts about Garvin during his treatment of the patient, not in anticipation of the litigation or for trial, which is a condition for receiving payment as an expert witness under MCR 2.302(B)(4). Moreover, because Radden is an employee of a party to the litigation—Spine Specialists—he may not charge a fee for his deposition. While a party or an employee of a party with specialized knowledge may offer an expert opinion within his or her field, the subrule does not require payment to a party offering an opinion on its own behalf. Accordingly, the expert witness fee required by MCR 2.302(B)(4) applies only to those experts who examine the facts from a distance, offer opinion, and have no financial stake in the outcome of the case.

Reversed.

COURT RULES — EXPERT WITNESSES — EXPERT WITNESS FEES — PARTY ACTING AS EXPERT NOT ENTITLED TO EXPERT WITNESS FEES.

MCR 2.302(B)(4)(c)(i) provides that a party seeking discovery of the opinion of the other party's expert under Subrules (B)(4)(a)(ii) or (iii) or (b) must pay the expert a reasonable fee for time spent in a deposition, but not for preparation time; a witness who is a party or an employee of a party and testifying on the party's behalf may offer an expert opinion within his or her field if he or she possesses specialized knowledge, but may not recover an expert witness fee under MCR 2.302(B)(4) for that deposition testimony; the expert witness fee required by MCR 2.302(B)(4) applies only to those experts who examine the facts from a distance, offer opinion, and have no financial stake in the outcome of the case.

Kostopoulos Rodriguez, PLLC (by *Elizabeth L. Sokol*), for Spine Specialists of Michigan, PC, and American Anesthesia Associates, LLC.

Miller, Canfield, Paddock & Stone (by *Paul D. Hudson* and *James L. Woolard*) and *E. Smith & Associates,*

PC (by *Eric D. Smith* and *Scott W. Malott*), for State Farm Mutual Automobile Insurance Company.

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

GLEICHER, J. Alonzo Garvin sustained injuries in a motor vehicle accident and received treatment from plaintiffs Spine Specialists of Michigan, PC, and American Anesthesia Associates, LLC. Plaintiffs brought this action against State Farm Mutual Automobile Insurance Company, seeking payment for the care provided to Garvin. Dr. Louis Radden, a neurosurgeon, solely owns Spine Specialists. The issue presented is whether State Farm must pay Dr. Radden an expert witness fee to take his deposition.

Dr. Radden refused to be deposed unless State Farm paid him $5,000 for three hours of testimony. When State Farm objected, the circuit court lowered the fee to $1,000 for the first 90 minutes of testimony and $1,000 for each hour thereafter. We granted State Farm's application for leave to appeal the fee ruling, *Spine Specialists of Mich PC v State Farm Mut Ins Co*, unpublished order of the Court of Appeals, entered November 25, 2015 (Docket No. 327997), and now reverse. Dr. Radden is an employee of Spine Specialists and is not entitled to a fee for testifying on its behalf.

I

Dr. Radden treated Garvin with epidural and facet joint steroid injections. Spine Specialists' complaint avers that State Farm has unreasonably denied its claims for payment for those medical services. State Farm's answer asserts that some or all of Garvin's injuries may not have arisen from the motor vehicle

accident and that Spine Specialists' services and charges may not have been reasonable or necessary.

Spine Specialists filed a "preliminary witness list," naming Dr. Radden as a witness. The list named another physician, Dr. Scott Primack, as a "[p]otential [e]xpert." Spine Specialists did not designate Dr. Radden as an expert witness. State Farm's witness list likewise identified Dr. Radden as an ordinary witness. Spine Specialists later filed an "amended . . . preliminary witness list" again naming Dr. Radden as a witness, but not an expert.

State Farm scheduled Dr. Radden's discovery deposition. Spine Specialists announced that Dr. Radden required a fee of $5,000 for three hours of testimony and preemptively filed a "motion to enforce Dr. Louis Radden's expert witness fee." The motion asserted that "Dr. Radden, in anticipation that he will be asked his medical opinion regarding the treatments rendered, requested an expert witness fee to compensate him for his testimony." The circuit court granted the motion, reasoning:

> [T]he doctor in these no-fault cases, will take the position eventually, why even treat a person who's involved in an accident if I'm going to tie up a full day every time I submit a Record for payment to a carrier. Eventually, Doctors may be reluctant to treat auto accident claimants for this very reason.

The court ordered that State Farm pay Dr. Radden $1,000 for the first 1½ hours of the deposition and $250 for each 15 minutes thereafter. State Farm's motion for reconsideration was denied.

II

We review de novo a circuit court's construction and application of the Michigan Court Rules. *Dextrom v*

Wexford Co, 287 Mich App 406, 416; 789 NW2d 211 (2010). We employ statutory construction principles when interpreting court rules, applying the rule's plain and unambiguous language as written. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002), citing *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000).

III

Michigan's court rules permit broad discovery of unprivileged matters relevant to the subject matter of a pending case. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Because "the purpose of discovery is to simplify and clarify issues," the court rules "should be construed in an effort to facilitate trial preparation and to further the ends of justice." *Id*. Our Supreme Court has emphasized that the rules "should promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment." *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991) (quotation marks and citation omitted).

Witnesses testifying at a deposition usually do not receive payment for their testimony. The court rules carve out an exception applicable to "experts." MCR 2.302(B)(4) sets forth the rules governing the pretrial "[d]iscovery of facts known and opinions held by experts." The initial sentence of this subrule states, "Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) *and acquired or developed in anticipation of litigation or for trial*, may be obtained only as follows[.]"[1]

[1] Subrule (B)(1) sets forth the general rule that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the

(Emphasis added.) Subrule (B)(4)(a)(i) allows for the use of interrogatories. Subrule (a)(ii) addresses depositions:

> A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7).

MCR 2.302(B)(4)(b) concerns experts who are not expected to be called as witnesses at trial. The next subrule addresses expert witness fees:

> Unless manifest injustice would result
>
> (i) the court shall require that the party seeking discovery under subrules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time[.] [MCR 2.302(B)(4)(c)(i).]

Dr. Radden "acquired facts" about Garvin during his treatment of the patient rather than in anticipation of litigation or for trial. Perhaps it was for this reason that Spine Specialists did not list Dr. Radden as an expert on either of its two witness lists. Spine Specialists asserts that State Farm should pay Dr. Radden for his deposition time because State Farm likely will pose questions to Dr. Radden seeking his expert opinion regarding whether Garvin's injuries arose from the accident and whether the treatment provided was reasonable and necessary. But because Dr. Radden is an employee of a party to this litigation, he is ineligible to charge a fee for his deposition.

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subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party . . . ."

The court rules do not define the word "expert." We look instead to the manner in which the word "expert" is generally used in the legal context presented. "The normal use of that term applies to a witness retained by a party in relation to litigation." *Ginnever v Scroggins*, 867 SW2d 597, 599 (Mo App, 1993). While a party (or an employee of a party, as here) with specialized knowledge may offer an expert opinion within his or her field, the court rules do not contemplate payment to a party offering an opinion on its own behalf. MCR 2.302(B)(4) applies to experts who are third parties to the litigation; such experts examine the facts from a distance, offer opinions, and have no financial stake in the outcome other than receiving a court-approved witness fee.[2] Dr. Radden owns Spine Specialists, will serve as its spokesperson at trial, and has a vested interest in the outcome of this case. While "there is no agency relationship between a plaintiff and an expert," *Barnett v Hidalgo*, 478 Mich 151, 163 n 7; 732 NW2d 472 (2007), Dr. Radden is an agent of Spine Specialists.[3]

Historically, "[o]ne argument against discovery of expert information has been that it is unfair to let one party have for free what the other party has paid for." 8 Fed Practice & Procedure, Witness Fees, § 2034, p 467. Rules requiring the party seeking the discovery to share the burden of the expert's fees remedy that unfairness. *Id*. But when a party serves as his or her

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[2] See MCL 600.2164(1) (providing that "[n]o 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 permitted by the court).

[3] We emphasize that our use of the term "expert" in this opinion is confined to the application of MCR 2.302(B)(4). Parties may certainly qualify as experts under MRE 702 and potentially under other rules or statutory provisions.

own expert witness, there has been no payment to any expert, and no unfairness to offset.

We note that nothing in the rules prohibits voluntary payment of expert witnesses. Nor does this case implicate MCL 600.2164(1), which "authorizes a trial court to award expert witness fees as an element of taxable costs." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001). This cost-shifting provision allocates trial expenses, rewarding the prevailing party. The statute specifically exempts reimbursement for "witnesses testifying to the established facts" and applies "only to witnesses testifying to matters of opinion." MCL 600.2164(3). If Dr. Radden's testimony is confined to the facts surrounding his treatment of Garvin, Spine Specialists would not be entitled to recover an expert witness fee. And if Dr. Radden does provide expert testimony, Spine Specialists would not be entitled to recover any costs, as Spine Specialists has not paid Dr. Radden for his testimony.

Finally, even were we to conclude that Dr. Radden is eligible to receive a fee under MCR 2.302(B)(4), we would nevertheless hold that the circuit court erred by ordering State Farm to pay Dr. Radden for his testimony. MCR 2.302(B)(4)(c) permits a circuit court to order payment of an expert witness fee "[u]nless manifest injustice would result." A witness acting as a representative of a party and testifying on the party's behalf incurs no hourly costs that the deposing party equitably should bear. As the sole owner of Spine Specialists and the physician who treated Garvin on Spine Specialists' behalf, Dr. Radden was obligated to provide deposition testimony. Without knowledge of his testimony, State Farm could not effectively prepare its defense. Conditioning the acquisition of that knowledge on payment of a witness fee contravenes the

concept animating Michigan's discovery rules—that information should be easily obtainable in a process that does not encumber the parties' abilities to use the tools provided by the rules. Requiring payment to a party for the right to take the party's deposition would unreasonably burden the process of trial preparation, constituting manifest injustice.

We reverse.

FORT HOOD, P.J., and O'BRIEN, J., concurred with GLEICHER, J.

NOLL v RITZER

Docket No. 328131. Submitted October 11, 2016, at Grand Rapids. Decided October 18, 2016, at 9:00 a.m.

Thomas L. Noll petitioned the 3-B District Court for a hearing to contest the reasonableness of the towing and storage fees assessed for a motorcycle he had sold to an individual who was later involved in a fatal accident. Noll remained the title owner of the motorcycle because he had failed to retain documentation of the sale. The motorcycle was towed from the scene of the accident by respondent, David J. Ritzer, doing business as Steve's Auto Parts. At the direction of the Michigan State Police, Ritzer stored the motorcycle during the police investigation of the accident. The storage fee was $35 a day. After Noll received notice that he was the title owner of the motorcycle, he filed the petition under MCL 257.252a(6) for a hearing to contest the reasonableness of the towing and storage fees, which totaled more than $11,000. Noll did not post a bond. The court, Jeffrey C. Middleton, J., concluded that although the letter of the law required Noll to post a bond of $40 and the full amount of the accrued towing and storage fees, the court's practice was to require that a bond be posted only if the owner of the vehicle sought its release before the hearing. Following the hearing, the court ruled that the police and the towing agency had properly complied with the procedures for removal of the motorcycle and that the towing and storage fees were reasonable. However, the court concluded that Ritzer was limited by MCL 257.252i(2) to $1,000 in damages. Ritzer appealed the district court's decision in the circuit court. The St. Joseph Circuit Court, Paul E. Stutesman, J., affirmed the district court's decision to hold the hearing without requiring the bond. The Court of Appeals denied Ritzer's application for leave to appeal. Ritzer applied for leave to appeal in the Supreme Court, which remanded the case to the Court of Appeals for consideration as on leave granted. 499 Mich 912 (2016).

The Court of Appeals *held*:

Portions of MCL 257.252a(6) and (13) use language indicating that an owner requesting a hearing to contest the fact that a vehicle was abandoned or the reasonableness of the towing and

storage fees must post a bond equal to the amount of $40 plus the accrued fees before a hearing is held. Other portions of those subsections, however, indicate that the bond is not required except to obtain release of the vehicle, rendering the statutory language ambiguous. Examining the history of the statute revealed the Legislature's intent that the owner of an abandoned vehicle post a bond equal to the amount of $40 plus the accrued towing and storage fees before a hearing is held to determine whether the vehicle was abandoned and whether the towing and storage fees are reasonable. The bond is required regardless of whether the owner seeks release of the vehicle before the hearing. In this case, the district court erred by conducting the hearing to contest the reasonableness of the fees without first requiring Noll to post a bond in the amount of $40 plus the accrued towing and storage fees. The circuit court erred by affirming the district court's decision to hold a hearing without Noll's first having posted the required bond.

Reversed and remanded. Circuit court directed to vacate district court's order.

MOTOR VEHICLES — ABANDONED VEHICLES — HEARING TO CONTEST ABANDONMENT OR REASONABLENESS OF TOWING AND STORAGE FEES — REQUIRED BOND.

Under MCL 257.252a(6) and (13), the title owner of a vehicle who requests a hearing to determine whether the vehicle should be considered abandoned, or to contest the reasonableness of the fees accrued for towing and storing the vehicle, must post a bond in the amount of $40 plus the amount of the accrued towing and storage fees; the bond must be posted before a hearing is held regardless of whether the owner seeks release of the vehicle before the hearing.

Law Offices of Jerome & McClean (by *David E. Jerome* and *Daniel D. McLean*) for defendant.

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

BOONSTRA, J. In this case regarding the abandonment of a vehicle, respondent appeals as on leave granted[1] the

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[1] Respondent applied in this Court for leave to appeal the circuit court's order, which we denied. *Noll v Ritzer*, unpublished order of the

circuit court's order affirming the district court's ruling that petitioner was not required to post a bond under MCL 257.252a in order to proceed with an abandoned-vehicle hearing when petitioner was not seeking release of the vehicle before the hearing. We reverse and remand for further proceedings consistent with this opinion, and we direct the circuit court to vacate the district court's order.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioner sold a motorcycle to a third party for cash, but he failed to maintain documentation to prove that the sale had taken place. The third party was subsequently involved in an accident with the motorcycle that involved a fatality. At the direction of the Michigan State Police, respondent towed the motorcycle from the scene and then stored it for nearly a year while the police investigated the incident. The towing and storage fees charged by respondent during that time totaled more than $11,000.

On May 8, 2014, petitioner was sent a Notice of Abandoned Vehicle, which informed him that he was the title owner of the motorcycle that was taken into police custody as an abandoned vehicle. The notice informed petitioner that he could contest the determination that the vehicle was abandoned or the reasonableness of the towing and storage fees by completing the enclosed petition to request a hearing. Petitioner submitted a petition under MCL 257.252a(6), requesting a hearing to challenge the reasonableness of the towing and storage fees. The district court held a

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Court of Appeals, entered October 23, 2015 (Docket No. 328131). On May 2, 2016, our Supreme Court, in lieu of granting leave to appeal, entered an order remanding the case to this Court for consideration as on leave granted. *Noll v Ritzer*, 499 Mich 912 (2016).

hearing regarding petitioner's challenge even though petitioner did not first post a bond with the court in the amount of $40 plus the accrued towing and storage fees. Relevant to this appeal, the district court noted that although "the letter of the law" required petitioner to post a bond in the full amount of the towing and storage fees, the district court's practice was to not require the bond be paid unless a petitioner sought release of a vehicle before the hearing. The district court ultimately concluded that the police had complied with the procedures for processing the vehicle, that respondent, as the towing agency, had complied with the procedures for proper removal of the vehicle, and that the towing and daily storage fees were reasonable. However, the district court held that respondent was limited to $1,000 in damages due to limitations set by MCL 257.252i(2).[2] Respondent appealed the district court's decision in the circuit court. The circuit court ruled that the district court did not err by determining that petitioner was not required to pay a bond under MCL 257.252a in order to proceed with the hearing on petitioner's petition because petitioner was not seeking release of the vehicle. The circuit court did conclude that the district court had erred in other respects not at issue in this appeal.

II. STANDARD OF REVIEW

We review de novo questions of statutory interpretation. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719

[2] MCL 257.252g requires a police agency or designated third party to sell the vehicle at public auction and to first apply the proceeds toward accrued towing and storage fees. If a balance remains after receiving the money from the sale, "the towing company may collect the balance of those unpaid fees from the last titled owner" subject to MCL 257.252i. MCL 257.252g(2)(a). MCL 257.252i(2) limits these damages and essentially caps them at $1,000.

NW2d 1 (2006). Our review of a circuit court's review of a district court's order is also de novo. See *First of America Bank v Thompson*, 217 Mich App 581, 583; 552 NW2d 516 (1996).

III. ANALYSIS

Respondent argues that the circuit court's affirmance of the district court's order was erroneous because the district court held a hearing on petitioner's petition in violation of the requirements of MCL 257.252a. We agree.

The Michigan Vehicle Code, MCL 257.1 *et seq*., prohibits the abandonment of vehicles and provides a statutory scheme for the removal and disposition of abandoned vehicles. The code also provides the processes by which a person may recover a vehicle or challenge the removal or seizure of a vehicle. See MCL 257.252a, MCL 257.252b, and MCL 257.252d to MCL 257.252m. In this case, petitioner's vehicle was removed pursuant to MCL 257.252d(1)(e), which allows a police agency to "provide for the immediate removal of a vehicle from public or private property to a place of safekeeping at the expense of the last-titled owner of the vehicle" if "the vehicle must be seized to preserve evidence of a crime, or if there is reasonable cause to believe that the vehicle was used in the commission of a crime."

Respondent asks this Court, as an issue of first impression, to interpret MCL 257.252a as it relates to posting a bond for towing and storage fees before a hearing. "The primary goal of statutory interpretation is to give effect to the Legislature's intent." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). "If the language of a statute is clear and unambiguous, the statute must be enforced as written

and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). Judicial construction of a statute is only permitted when statutory language is ambiguous. *Id*. at 312. A statute is not considered ambiguous simply because reasonable minds could differ regarding the meaning of the statute. *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 165-166; 680 NW2d 840 (2004). Instead, a statute is ambiguous only if it creates an irreconcilable conflict with another provision or it is equally susceptible to more than one meaning. *Id*. at 166.

"[A]pparently plain statutory language can be rendered ambiguous by its interaction with other statutes." *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 562; 710 NW2d 59 (2005). In the case of tension or conflict between the sections of a statute, the sections should be construed, if possible, to give meaning to each section so that they are harmonized. *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002). It is well settled that when construing a statute, a court must read it as a whole. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). "[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

In this case, respondent relies on MCL 257.252a(6) and (13), which state as follows:

> (6) *The owner may contest the fact that the vehicle is considered abandoned or the reasonableness of the towing fees and daily storage fees by requesting a hearing and posting a bond equal to $40.00 plus the amount of the*

accrued towing and storage fees. A request for a hearing shall be made by filing a petition with the court specified in the notice described in subsection (5)(c) within 20 days after the date of the notice. If the owner requests a hearing, the matter shall be resolved after a hearing conducted under sections 252e and 252f. An owner who requests a hearing may obtain release of the vehicle by posting a towing and storage bond in an amount equal to the $40.00 plus the accrued towing and storage fees with the court. The owner of a vehicle who requests a hearing may obtain release of the vehicle by paying a fee of $40.00 to the court and the accrued towing and storage fees instead of posting the towing and storage bond.

* * *

(13) The owner may contest the fact that the vehicle is abandoned or, unless the towing fees and daily storage fees are established by contract with the local governmental unit or local law enforcement agency and comply with section 252i, the reasonableness of the towing fees and daily storage fees by requesting a hearing. A request for a hearing shall be made by filing a petition with the court specified in the notice within 20 days after the date of the notice. If the owner requests a hearing, the matter shall be resolved after a hearing conducted under section 252f. An owner who requests a hearing may obtain release of the vehicle by posting with the court a towing and storage bond in an amount equal to $40.00 plus the accrued towing and storage fees. The owner of a vehicle who requests a hearing may obtain release of the vehicle by paying a fee of $40.00 to the court plus the towing and storage fees instead of posting the towing and storage bond. *An owner requesting a hearing but not taking possession of the vehicle shall post with the court a towing and storage bond in an amount equal to $40.00 plus the accrued towing and storage fees*. [Emphasis added.]

MCL 257.252a(6) thus states that the owner may contest the reasonableness of the fees "by requesting a hearing and posting a bond equal to $40.00 plus the

amount of the accrued towing and storage fees." And MCL 257.252a(13) states that "[a]n owner requesting a hearing but not taking possession of the vehicle shall post with the court a towing and storage bond in an amount equal to $40.00 plus the accrued towing and storage fees." Use of the word "shall" by the Legislature "generally indicates a mandatory directive, not a discretionary act." *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013). Therefore, looking only at the italicized portions of the statute relied on by respondent, the statute appears to be unambiguous and to support respondent's claim.

However, as stated, "apparently plain statutory language can be rendered ambiguous" by other statutory language. *Ross*, 268 Mich App at 562. If possible, conflicting sections of a statute should be construed harmoniously to give meaning to each section. *Nowell*, 466 Mich at 483. MCL 257.252a(6) also states that "[a]n owner who requests a hearing may obtain release of the vehicle by posting a towing and storage bond in an amount equal to the $40.00 plus the accrued towing and storage fees with the court." This language appears to suggest that although a hearing has been requested, a bond is not required except to obtain release of the vehicle. And the first sentence of MCL 257.252a(13) provides that an "owner may contest the fact that the vehicle is abandoned or . . . the reasonableness of the towing fees and daily storage fees by requesting a hearing," without any mention that a bond for the towing and storage fees must be posted. As with Subsection (6), Subsection (13) also provides that "[a]n owner who requests a hearing may obtain release of the vehicle by posting with the court a towing and storage bond in an amount equal to $40.00 plus the accrued towing and storage fees," which again appears to contemplate a situation in which a hearing has been

requested but a bond is not required except to obtain release of the vehicle. Similarly, MCL 257.252b(8), which applies to abandoned scrap vehicles, states that "[a]n owner who requests a hearing may obtain release of the vehicle by posting a towing and storage bond equal to $40.00 plus the accrued towing and storage fees with the court." Furthermore, MCL 257.252e(3) refers to "the towing and storage bond posted with the court to secure release of the vehicle under section 252a, 252b, or 252d," and for situations in which the police agency or towing agency did not comply with the required procedures, MCL 257.252f(3)(b) and (g) refer to "any fee or bond posted by the owner." All of these provisions at least imply that a bond is required to be posted only to secure release of the vehicle, not as a mandatory prerequisite for holding a hearing.

Therefore, the language of MCL 257.252a(6) and (13) "is equally susceptible to more than a single meaning"; that is, the language is ambiguous. *Lansing Mayor*, 470 Mich at 166 (emphasis omitted). Indeed, both the district court and the circuit court in this case expressed frustration with the language of the statute and the apparently conflicting requirements regarding the posting of a bond. Because the statute must be read as a whole, *Apsey*, 477 Mich at 127, this Court must determine which language in the statute supersedes the other conflicting language.

MCL 257.252a was amended in 2008. See 2008 PA 539.[3] Subsections (6) and (13) remained completely unchanged from the previous versions of those provisions, see 2004 PA 495, except for two additions to the statutory language. First, the phrase "and posting a bond equal to $40.00 plus the amount of the accrued

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[3] The version of MCL 257.252a, as amended by 2008 PA 539, effective January 13, 2009, was the version in effect at the time of the instant case.

towing and storage fees" was added to the first sentence of Subsection (6). Second, the sentence "An owner requesting a hearing but not taking possession of the vehicle shall post with the court a towing and storage bond in an amount equal to $40.00 plus the accrued towing and storage fees" was added to the end of Subsection (13). See 2004 PA 495 and 2008 PA 539. Before the 2008 amendment, the statute made no mention of posting a bond for towing and storage fees except in reference to an owner seeking release of the vehicle before the hearing; other parts of the relevant statutes referring to payment of (or posting a bond for) towing and storage fees did so only in the context of an owner who sought release of the vehicle before the hearing. The language added by the 2008 amendment reflects the intent of the Legislature to mandate or clarify that a bond in the amount of $40 plus accrued towing and storage fees must be posted before a hearing can take place. *Bush*, 484 Mich at 167.

We hold that the 2008 amendment of the statutory language in MCL 257.252a(6) and (13) reveals the Legislature's intent that posting of a bond in the amount of $40 plus accrued towing and storage fees must accompany a request for a hearing under MCL 257.252a unless the fees have already been paid (or bond posted).[4]

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[4] This is the same conclusion reached by the State Court Administrative Office (SCAO), as demonstrated by a March 19, 2009 advisory memorandum that SCAO issued following the effective date of 2008 PA 539. In that memorandum, SCAO stated that "[f]or a vehicle towed under MCL 257.252a or 257.252d, the court must now collect a bond in the amount of $40 plus accrued towing and storage fees when a petition is filed (unless the accrued towing and storage fees have already been paid by the vehicle owner), even if the owner is not seeking release of the vehicle." SCAO, Memorandum, *Contesting the Abandonment Process or Towing and Storage Fees of Vehicles under MCL 257.252a, et seq*. (March 19, 2009), p 1.

On the basis of our interpretation of MCL 257.252a, we hold that the district and circuit courts erred by determining that MCL 257.252a allowed a hearing challenging the reasonableness of towing and storage fees when petitioner did not post a bond in the amount of those towing and storage fees. The district court should not have held a hearing on petitioner's petition, and it erred by issuing an order on that petition.[5]

Reversed and remanded for further proceedings consistent with this opinion and with direction to the circuit court to vacate the district court's order. We do not retain jurisdiction.

K. F. KELLY, P.J., and O'CONNELL, J., concurred with BOONSTRA, J.

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[5] We note that this Court has recently held that the requirement that a bond be posted for a claimant to contest the seizure of property under Michigan's civil asset forfeiture scheme, MCL 333.7521 *et seq*., may not be applied to an indigent claimant to defeat the claimant's due process right to be heard. See *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562; 892 NW2d 388 (2016). No constitutional challenge or argument concerning indigency was raised in the instant case.

DAWOUD v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket Nos. 327915 and 327927. Submitted October 5, 2016, at Detroit. Decided October 18, 2016, at 9:05 a.m.

Kevin Dawoud; Mikho Essa by next friend, Bilbil Mano; and Rasha Kamel (plaintiffs) filed an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company, seeking to recover personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries Dawoud, Essa, and Kamel allegedly received in an automobile accident. Plaintiffs applied for benefits through the Michigan Automobile Insurance Placement Facility because they were not eligible for PIP benefits through any automobile insurance. See MCL 500.3171 *et seq*. Plaintiffs' claims were assigned to State Farm, and plaintiffs filed this action. Grace Transportation, Inc., and Utica Physical Therapy (the service providers), who provided transportation and therapy services to plaintiffs, intervened in the action by stipulation of the parties to pursue direct payment of their bills from State Farm. The court, Daphne Means Curtis, J., dismissed plaintiffs' claims with prejudice when they failed to comply with discovery orders and failed to attend three scheduled depositions. State Farm moved for summary disposition of the service providers' claims, arguing that the dismissal of plaintiffs' underlying action constituted an adjudication on the merits under MCR 2.504 and therefore that the service providers' derivative claim was barred. The circuit court granted State Farm's motion. Utica Physical Therapy (Docket No. 327915) and Grace Transportation, Inc. (Docket No. 327927) appealed, and the Court of Appeals ordered the cases consolidated.

The Court of Appeals *held*:

1. Under MCL 500.3112 of the no-fault act, a provider has standing to bring a direct cause of action against an insurer to recover PIP benefits on behalf of the injured individual for services provided. MCR 2.313(B)(2)(c) provides that when a party fails to comply with a discovery order, the court may enter an order dismissing the action or a part of the action. Under

MCR 2.504(B)(3), unless a court otherwise specifies in its order for dismissal, a dismissal under that subrule or a dismissal not provided for in that subrule—other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205—operates as an adjudication on the merits. The circuit court did not err by granting summary disposition in favor of State Farm. Because the circuit court did not provide otherwise in the order when it dismissed plaintiffs' action, the dismissal operated as an adjudication on the merits of plaintiffs' rights to PIP benefits, and, for that reason, the service providers' derivative claim was also substantively barred on the merits.

2. The service providers failed to develop any argument in support of their assertion that the circuit court's order violated the Due Process Clause of the Michigan Constitution, Const 1963, art 1, §§ 16 and 17, and the issue was therefore considered abandoned.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — SERVICE PROVIDERS — INDEPENDENT ACTION DERIVATIVE OF INSURED INDIVIDUAL'S ACTION — EFFECT OF DISMISSAL OF INSURED INDIVIDUAL'S ACTION.

A service provider may bring an independent cause of action for personal protection insurance (PIP) benefits against an insurer for medical expenses associated with the treatment of the injured individual under the no-fault act, MCL 500.3101 *et seq*., but that action is derivative of the injured individual's cause of action; a service provider's cause of action to recover PIP benefits on behalf of an injured individual is barred if the injured individual's claim was dismissed and that order constituted an adjudication on the merits for purposes of MCR 2.504(B)(3).

Temrowski & Temrowski (by *Lee Roy H. Temrowski, Jr.*) for Utica Physical Therapy and Grace Transportation, Inc.

Scarfone & Geen, PC (by *John C. W. Hohmeier* and *Robert J. Scarfone*), for State Farm Mutual Automobile Insurance Company.

Before: SAAD, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM. In this consolidated appeal,[1] intervening plaintiffs Grace Transportation, Inc., and Utica Physical Therapy (collectively, the service providers) appeal the trial court's order that granted summary disposition in favor of defendant, State Farm Mutual Automobile Insurance Company, and dismissed their claims on the grounds that the service providers' claims were barred because the insureds were precluded from recovery, as their underlying claims had been dismissed for discovery violations. For the reasons provided below, we affirm.

I. BASIC FACTS

On November 28, 2012, plaintiffs Kevin Dawoud, Rasha Kamel, and Mikho Essa (plaintiffs) were allegedly involved in a motor vehicle accident. They applied for no-fault benefits through the Michigan Automobile Insurance Placement Facility because they were not eligible for those benefits through any automobile insurance. See MCL 500.3171 *et seq*. State Farm was assigned the claim, and plaintiffs filed a lawsuit seeking personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., from State Farm. The service providers, who provided therapy and transportation services to plaintiffs, were allowed to intervene by stipulation of all parties to pursue direct payment of their bills by State Farm. Plaintiffs, who failed to comply with discovery orders and failed to attend three scheduled depositions, had their claims dismissed with prejudice.[2] Plaintiffs had no further

[1] Although appellants filed separate claims of appeal from the same case, this Court consolidated the two claims. *Dawoud v State Farm Mut Auto Ins Co*, unpublished order of the Court of Appeals, entered July 22, 2015 (Docket Nos. 327915 and 327927).

[2] The trial court also originally dismissed the service providers' claims but later set aside the dismissal with respect to the service providers.

involvement in this case and are not involved in this appeal.

Thereafter, State Farm moved for summary disposition and argued that the dismissal of the underlying plaintiffs' case operated as an adverse adjudication on the merits pursuant to MCR 2.504, which barred the service providers from proceeding with their derivative claims. The service providers argued that their claims should be allowed to proceed because Michigan law allows for such providers to bring a cause of action in their own name. Following a hearing, the trial court granted State Farm's motion. The service providers then filed a motion for reconsideration, which the court also denied.

II. ANALYSIS

On appeal, the service providers argue that the trial court erred when it granted State Farm's motion for summary disposition and dismissed the case. We disagree.

Although the trial court did not specify the court rule it relied on when it granted State Farm's motion for summary disposition, MCR 2.116(C)(10) is the applicable rule. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009). A motion under this subrule is properly granted if "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 278. All documentary evidence submitted by the parties is considered, and it is considered in the light most favorable to the nonmoving party. *Id*.

The parties agree, or at least the service providers concede, that if an injured party's no-fault act claim fails *substantively* on the merits (for example, if the individual's injury is not the result of an automobile accident), the service providers would have no claim against the insurer because their claims are derivative. At issue here is whether the same principle applies when the injured party's no-fault claim "fails," as it did here, because of the injured party's failure to attend depositions and otherwise comply with discovery orders and obligations.

The service providers rely only on MCL 500.3112 and *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389; 864 NW2d 598 (2014), to support their argument that the lower court's decision should be reversed. MCL 500.3112 states as follows:

> Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:
>
> (a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor.

> (b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

Clearly, the text of this statute does not address the issue presented in this appeal. It says nothing about whether a provider can proceed against an insurer when the injured party's claim has been dismissed because of a discovery violation. It merely states that an "interested party may apply to the circuit court for an appropriate order" if there is doubt about the proper allocation of PIP benefits and that PIP benefits "are payable . . . for the benefit of an injured person."

In *Wyoming Chiropractic*, 308 Mich App at 396-397, this Court affirmed the trial court's order that entered judgment in favor of Wyoming Chiropractic and held that a provider has standing to bring a direct cause of action against an insurer to recover PIP benefits on behalf of the injured individual for services provided. After discussing MCL 500.3112 and relevant caselaw, this Court held that MCL 500.3112, and specifically the phrase "or for the benefit of" in that statute, allows a provider to bring a claim against an insurer for PIP benefits. *Id*. at 392-397. However, the Court only addressed whether a provider has *standing* under MCL 500.3112 to sue an insurer for PIP benefits. *Id*. at 390, 392. The parties agree that the service providers here have standing under MCL 500.3112 to sue State Farm for PIP benefits. However, the narrow legal issue is whether the service providers' claims for PIP benefits can survive when plaintiffs' underlying claim for PIP benefits was dismissed with prejudice because plaintiffs failed to attend depositions and otherwise comply with discovery orders and obligations.

In regard to the argument that their claims for PIP benefits are "derivative" of plaintiffs' claim for PIP

benefits, the service providers assert without further explanation that "[t]he 'derivative' argument is precisely the standing argument [in *Wyoming Chiropractic*] under a different cloak, especially here where the 'failure' of the injured parties' claim was due to litigation misconduct and not any substantive validity of the claim for no fault benefits." The service providers also assert that an injured individual may ultimately be precluded from pursuing a cause of action for PIP benefits if he or she fails to abide by a court order but that such preclusion does not invalidate the claim for benefits on substantive grounds.

These arguments are not persuasive. As already noted, the standing issue in *Wyoming Chiropractic* has little to do with the issue in this appeal. Additionally, the service providers agree that if an injured party's claim fails for "substantive" reasons, the provider is precluded from obtaining PIP benefits. Thus, they inherently recognize that a provider's claim to PIP benefits, at least in some circumstances, *is derivative* of the injured party's claim to PIP benefits. Accordingly, this case boils down to the specific question of whether the dismissal of plaintiffs' underlying claims with prejudice due to discovery violations should be treated differently than a "substantive" dismissal "on the merits." We hold that it should not be treated differently.

Although the trial court did not specify the court rule under which it dismissed plaintiffs' claims, it stated that it was dismissing them "for the reasons stated in the brief and on the record." In its trial court brief, State Farm referred to, among other things, MCR 2.313, which pertains to the failure to provide or to permit discovery. MCR 2.313(B)(2)(c) provides that for failing to comply with a court's discovery order a court may enter

> an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, *dismissing the action or proceeding or a part of it*, or rendering a judgment by default against the disobedient party[.] [Emphasis added.]

And the court rules describe the effect given to such an involuntary dismissal in MCR 2.504(B)(3):

> *Unless the court otherwise specifies in its order for dismissal*, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, *operates as an adjudication on the merits*. [Emphasis added.]

And because the court did not provide otherwise in its order for dismissal, the dismissal of plaintiffs' claims operated "as an adjudication on the merits" with regard to their rights to PIP benefits under the clear language of the applicable court rule. Further, as the service providers have acknowledged, if an insured's claim is substantively barred on the merits, any derivative claims necessarily fail as well. See *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 313 Mich App 50, 54; 880 NW2d 294 (2015);[3] *Moody v Home Owners Ins Co*, 304 Mich App 415, 440-441; 849 NW2d 31 (2014), rev'd on other grounds by *Hodge v State Farm Mut Ins Co*, 499 Mich 211 (2016). Accordingly, the trial court did not err when it granted State Farm's motion for summary disposition with respect to the service providers' derivative claims.[4]

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[3] Lv gtd 499 Mich 941 (2016).

[4] The service providers also appear to argue that the trial court's decision violated due process. Their actual "argument" consists of the following:

> The Court Rules and statutes clearly give authority for sanctions to disobedient parties, but there is nothing that allows punish-

Affirmed. State Farm, as the prevailing party, may tax costs pursuant to MCR 7.219.

SAAD, P.J., and JANSEN and M. J. KELLY, JJ., concurred.

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ment for the acts of others (such punishment would seem to raise constitutional issues as well, Mich Const, Art I, § 16 (prohibiting cruel and unusual punishment); Art I, § 17 (deprivation of property without due process)).

The service providers do not develop any argument with respect to this purported "constitutional issue[]." Accordingly, we treat that issue as abandoned. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). As the trial court noted, it appears that the service providers' remedy is to recover the costs of the therapy and transportation services from plaintiffs.

MORSE v COLITTI

Docket No. 328212. Submitted October 12, 2016, at Grand Rapids. Decided October 18, 2016, at 9:10 a.m.

Richard Morse brought an action in the Barry Circuit Court against Marc and Joan Colitti, James McManus, and the Barry County Planning and Zoning Department, alleging trespass, nuisance, and violation of the Barry County Zoning Ordinance (BCZO) after the Colittis created a retaining wall and several other structures on a walkway (the Walk) that ran between Morse's lot and the Colittis' lot. Morse also requested that the court make a number of determinations regarding his ownership interest in the Walk and the Colittis' construction of a dock on the lake that was in line with the Walk. The Colittis filed a counterclaim against Morse that was eventually dismissed by stipulation. Morse's claims against McManus and the Barry County Planning and Zoning Department were also dismissed by stipulation. The Colittis' and Morse's lots bordered a lake in the West Beach neighborhood, and the West Beach plat made in 1928 dedicated the "streets, alleys and parks" to "the use of the present and future lot owners." The plat also designated a park (the Park) as running along the lakeshore, separating the lake from the platted lots. By order dated November 4, 2014, the court, Amy L. McDowell, J., denied the parties' cross-motions for summary disposition, determining that the Walk was not subject to the reversionary interest Morse claimed and that all lot owners were entitled to use the Walk as an easement. By order dated June 2, 2015, the court granted summary disposition in favor of the Colittis pursuant to MCR 2.116(C)(7) (claim barred by limitations period) on Morse's nuisance, trespass, and violation of the BCZO claims. The court further held that the lot owners had an easement interest in the Park, describing the park as "merely an extension of the easement of the walkway . . . subject to . . . the public's right to traverse the area." Following a bench trial, the court issued a judgment on June 18, 2015, ordering the removal of the Colittis' dock because it overburdened the property at issue. The Colittis appealed, and Morse cross-appealed.

The Court of Appeals *held*:

1. When a person purchases property that is recorded in a plat, the purchaser receives both the interest described in the deed and the rights indicated in the plat. A court seeks to effectuate the intent of the plattor when interpreting a plat. The plat "dedicated" the Park to "the use of the present and future lot owners." Because language dedicating land for "the use" of others was consistent with a grant of an easement, not a grant of fee ownership, the plat granted an easement in the Park. Moreover, because "the use" of the Park was dedicated to "the present and future lot owners," the holders of the easement were the present and future lot owners, not the public at large. The trial court erred when it described the dedication of the Park as a public dedication.

2. The trial court's statement that the Park was "merely an extension of the easement of the walkway" served to describe the scope of the easement in the Park as the same as the scope of the easement in the Walk; the trial court was not stating that the Park and the Walk constituted a single property feature. Instead, the statement reflected the trial court's conclusion that because of the Park's character, the scope of the easement in the Park did not include traditional park purposes but was limited to the right to traverse the Park. Accordingly, the Colittis' argument that the trial court treated the Walk and the Park as a single property feature was without merit.

3. When a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large. In this case, because Morse at a minimum had an easement in the Park, he had a substantial interest in determining what rights the Colittis and others had in building a dock and mooring a boat at the shore of the Park. In other words, because only lot holders had an easement in the Park, Morse had a special injury or right, or a substantial interest, that would be detrimentally affected in a manner different from the citizenry at large. Accordingly, Morse had standing to challenge the Colittis' erection of the dock.

4. If a dominant estate with easement rights is divided, all resulting parcels take a share in the easement as long as an unreasonable burden is not imposed on the servient estate. Generally, a mere increase in the number of persons using an unlimited right of way to which the land is subject is not an unlawful additional burden. In this case, Lot 44 in the West

Beach plat—the owner of which possessed easement rights in the Walk—was divided, and the Colittis had tenants who lived on one of the resulting parcels. Because a mere increase in the number of persons using a right of way is not an unlawful additional burden, the mere use of the Walk by the tenants (absent some further showing) did not impose an unreasonable burden on the servient estate. Accordingly, the Colittis' tenants had a right to use the Walk to access the lake, and the trial court did not err by failing to preclude them from doing so.

5. An owner of property abutting a public street has a reversionary interest to the center of the street. Regardless of how the street was dedicated to the public, title to a street that is vacated or abandoned vests in the owners of the lots abutting the street. In *Thies v Howland*, 424 Mich 282 (1985), the Supreme Court applied the general rule that, unless a contrary intent appears, the owners of land abutting a street are presumed to own the fee in the street to the center, subject to the public easement. The Supreme Court then applied a variant of this rule in *2000 Baum Family Trust v Babel*, 488 Mich 136 (2010), when the Court held that owners of land abutting a privately platted walkway that is contiguous to the water are presumed to own the fee in the entire walkway, subject to an easement. On the basis of these two cases and the Supreme Court's determination in *Little v Hirschman*, 469 Mich 553 (2004), that pre-1968 private dedications convey "at least an irrevocable easement in the dedicated land," the 1928 plat in this case conveyed not only an easement to the lot owners generally, but it conveyed an additional fee interest to the lot owners whose property lay adjacent to the platted walks. Therefore, Morse and the Colittis each owned a fee interest to the midpoint of the Walk, subject to the easement rights of the lot owners generally, and the trial court erred by failing to grant summary disposition in favor of Morse on that issue.

6. The owner of a fee interest has the right to keep his or her property free from trespass and significant encroachment. In this case, trial exhibits and testimony showed that at least some portion of the fence was built near Morse's property line—and therefore within the portion of the Walk in which he owned a fee interest—but the extent to which the fence and related structures encroached onto Morse's portion of the Walk could not be determined. Remand was necessary for that determination as well as for a determination of the appropriate remedies.

7. The holder of an easement cannot make improvements to the servient estate if those improvements are unnecessary for the effective use of the easement or if the improvements unreasonably

burden the servient estate. Testimony describing frequent feuds between Morse and the Colittis indicated that a fence might possess some utility in providing a barrier between the neighbors; however, it was questionable at best whether the fence, as erected, was necessary to the effective use of the Walk as an easement. Additionally, placement of the fence combined with other structures that the Colittis erected on the easement had the effect of making it appear as though the Walk was part of the Colittis' lot, which could have deterred lot owners who wished to use the easement. The trial court clearly erred by focusing solely on the fence, by offering no rationale for its finding that the fence did not overburden the Walk other than that, given the poor relations between Morse and the Colittis, it was "probably beneficial for the parties to keep that fence up," and by failing to address whether the fence and related structures on Morse's portion of the Walk were necessary for the effective use of the easement.

8. With regard to the portion of the Walk owned by the Colittis, the Colittis were permitted to use the property in any manner that did not conflict with the rights of the easement holders. Because the exact location of the structures could not be determined from the record, the trial court was directed on remand to determine which portions of the fence erected on the Colittis' side of the midpoint of the Walk were valid uses of the property that did not conflict with the rights of the easement holders.

9. The "last antecedent" rule of statutory construction provides that 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. Section 514 of the BCZO provides that "[f]ences and walls shall not be located outside or beyond the property or lot lines of the lot or parcel." Plaintiff pointed to nothing in the BCZO that prohibited applying the modifying clause—"of the lot or parcel"—only to the last antecedent, i.e., "lot lines." Because testimony showed that the fence and wall were located entirely within "the property" of the Walk, the fence and wall did not violate the BCZO.

10. A trespass is an unauthorized invasion of the private property of another. MCL 600.5805(1) provides that a plaintiff shall not bring an action to recover damages for injury to property unless, after the claim first accrued to the plaintiff, the action is commenced within the limitations period. MCL 600.5805(10) provides that the period of limitations is three years after the time of the injury for all actions to recover damages for injury to property. MCL 600.5827 provides that the limitations period runs

from the time the claim accrues and that the claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damage results. The "wrong" is "done" when both the act and the injury first occur. In this case, with regard to Count I, the alleged act constituting the trespass and the injury to Morse occurred when the Colittis built the pathway and stairway, which was no later than September 14, 2009. Because Morse did not file his trespass claim within three years after the claim accrued, the claim (insofar as it sought monetary damages) was time-barred. The trial court did not err by granting summary disposition to the Colittis on Count I insofar as it sought monetary damages for trespass. However, under a fair reading of Morse's complaint, the relief that he principally sought was injunctive in nature because Morse alleged that the Colittis seized a portion of his property, i.e., Morse's portion of the Walk, and requested that the trial court grant injunctive relief to rectify the alleged seizure. Because Morse sought injunctive relief, the applicable statute of limitations was MCL 600.5801, which contains a 15-year limitations period. The trial court erred by granting summary disposition on statute-of-limitations grounds in favor of the Colittis insofar as the claim sought injunctive relief. With regard to Count II, because there was evidence that the Colittis' alleged act of improperly installing gravel did not cause injury to Morse's property until the summer of 2012—which, if established, meant that the claim did not accrue until 2012—Morse's nuisance claim was not barred by the statute of limitations. Therefore, the trial court erred by granting summary disposition to the Colittis on Count II. Finally, because neither the fence nor the wall violated the BCZO, the trial court did not err by granting summary disposition to the Colittis on Count III.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

PROPERTY — WATER AND WATERCOURSES — RIPARIAN RIGHTS — OWNERS OF LAND ABUTTING A PRIVATELY PLATTED WALKWAY CONTIGUOUS TO WATER.

An owner of property abutting a public street has a reversionary interest to the center of the street; regardless of how the street was dedicated to the public, title to a street that is vacated or abandoned vests in the owners of the lots abutting the street; generally, unless a contrary intent appears, the owners of land abutting a street are presumed to own the fee in the street to the center, subject to the public easement; owners of land abutting a privately platted walkway that is contiguous to the water are presumed to own the fee in the entire walkway, subject to an easement.

Tripp & Tagg, Attorneys at Law (by *David H. Tripp*), for Richard Morse.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for Marc and Joan Colitti.

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

BOONSTRA, J. In this property dispute, defendants Marc and Joan Colitti[1] appeal by right the trial court's June 18, 2015 judgment following a bench trial. The trial court held, in part, that defendants' dock overburdened the property at issue, and the court ordered its removal. Defendants contest plaintiff's standing and also challenge certain other aspects of the trial court's rulings. Plaintiff, Richard Morse, cross-appeals regarding the trial court's denial of his request for removal of a fence erected by defendants on the property, its failure to preclude the use of the property by defendants' back-lot tenants, and its earlier grant of partial summary disposition in favor of defendants with respect to defendants' construction on the property of a stairway and a pathway forged with landscaping blocks. We affirm in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendants own lots in the West Beach neighborhood bordering Fine Lake in Barry County. The 1928 West Beach plat dedicated the "streets, alleys and parks" to "the use of the present and future lot

[1] Defendants James McManus and Barry County Planning and Zoning Department (of which McManus is the director) are not parties to this appeal. Plaintiff's claims against those defendants were dismissed by stipulation. We therefore will refer to Marc and Joan Colitti as "defendants."

owners." The plat designates a park (the Park) as running along the lakeshore, separating Fine Lake from platted Lots 1 through 26 (the front lots). Additionally, a 10-foot-wide "walk" (the Walk) exists between Lot 5, which is owned by defendants, and Lot 6, which is owned by plaintiff.[2] In 2009, defendants used landscaping blocks to create a pathway, including a retaining wall, on the Walk. They also built a stairway from the pathway to the lake. They subsequently erected a wooden fence on the Walk within inches of the lot line separating the Walk and plaintiff's Lot 6. Defendants also own the back-lot property at 3406 West Shore Drive, which lies to the west of the West Beach plat but includes a strip of the southern 16 feet of Lot 44 in the West Beach plat. After defendants rented out the property at 3406 West Shore Drive, they built a dock on Fine Lake that was in line with the Walk.

Plaintiff filed suit in 2013, in part alleging and seeking monetary damages for trespass, nuisance, and the violation of the Barry County Zoning Ordinance (BCZO). Plaintiff additionally requested that the trial court (1) determine that he owned the fee to the center of the Walk, subject to an easement for ingress and egress; (2) determine that defendants had trespassed on his property and order defendants to remove all dirt, landscaping blocks, and fences from his portion of the Walk (and that, if defendants failed to do so and plaintiff removed the items, plaintiff would receive a judgment against defendants with damages trebled); (3) determine that defendants' erection of a dock at the end of the Walk violated the BCZO; (4) enjoin defendants from allowing their tenants at 3406 West Shore Drive to use the Walk to gain access to Fine Lake; and (5) grant plaintiff attorney fees and costs. Plaintiff

[2] Similar walks are platted elsewhere within West Beach, between other front lots, providing back-lot access to the Park and Fine Lake.

later added a claim that, as an owner of land abutting the Walk, he had a reversionary interest in the fee of the Walk to its center, which would become a possessory interest if and when the Walk was vacated.[3]

By order dated November 4, 2014, the trial court denied the parties' cross-motions for summary disposition. The court further determined "that the [Walk] is not, at this time, subject to the reversionary interest that Plaintiff claims" and "that all lot owners are entitled to use [the Walk] as a [sic] easement." By order dated June 2, 2015, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) (claim barred by limitations period) on plaintiff's nuisance, trespass, and violation of the BCZO claims regarding the pathway and stairway. The trial court also held that lot owners had an easement interest in the Park and described the Park as "merely an extension of the easement of the walkway . . . subject to the right of the public's right [sic] to traverse the area."[4] The trial court reserved other issues regarding the fence and the dock for trial. Following a bench trial, the trial court issued the judgment described, in part, earlier. This appeal and cross-appeal followed.

II. DEFENDANTS' APPEAL

A. PUBLIC DEDICATION

On appeal, defendants argue that the trial court erred when it described the dedication of the Park as a

[3] Defendants filed a counterclaim against plaintiff regarding a retaining wall and a riparian platform built by plaintiff that extended into the Walk. During trial, when the evidence demonstrated that the wall and platform were built before 1999, the parties stipulated dismissal of the counterclaim. It is not at issue on appeal.

[4] The legal nature of the Park and the possession of easement rights in the Park by lot owners are relevant to whether plaintiff has standing to challenge defendants' erection of the dock. See Part II(C) of this opinion.

public dedication. Plaintiff concedes that this description was erroneous. We agree. At the hearing in which the trial court granted partial summary disposition in favor of defendants, the trial court stated that the Park "was subject to . . . the public's right to traverse the area." "The scope and extent of an easement is generally a question of fact that is reviewed for clear error on appeal." *Wiggins v Burton*, 291 Mich App 532, 550; 805 NW2d 517 (2011). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). We review de novo a trial court's grant or denial of summary disposition. *Wiggins*, 291 Mich App at 550.

When a person purchases property that is recorded in a plat, the purchaser receives both the interest described in the deed and the rights indicated in the plat. *Minerva Partners, Ltd v First Passage, LLC*, 274 Mich App 207, 219; 731 NW2d 472 (2007). When interpreting a plat, this Court seeks to effectuate the intent of the plattor. *Tomecek v Bavas*, 482 Mich 484, 490-491; 759 NW2d 178 (2008) (opinion by KELLY, J.); *id*. at 499 (CAVANAGH, J., concurring in part and dissenting in part). When the language of a legal instrument is plain and unambiguous, it is to be enforced as written, and no further inquiry is permitted. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003).

The plat "dedicated" the Park to "the use of the present and future lot owners." Because language dedicating land for "the use" of others is consistent with a grant of an easement, not a grant of fee ownership, *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998), the plat granted an easement in the Park. Moreover, because "the use" of the Park was

dedicated to the "present and future lot owners," the holders of the easement were the present and future lot owners, not the public at large. The trial court erred by more broadly stating that the public had a right to traverse the Park.[5]

B. SEPARATE PROPERTY FEATURES

Defendants also argue that the trial court erred by describing the Park as "merely an extension of the easement" in the Walk. According to defendants, the trial court treated the Park and the Walk as one property feature. Although defendants concede that this error is "seemingly minor," they still seek its correction because they claim that the trial court's statement "casts grave uncertainty [on] whether riparian rights run to the Park or to the Walks or both." Indulging defendants, we disagree that the trial court ever treated the Park and Walk as a single property feature.

At the summary disposition hearing, the trial court stated that, because of the word "use" in the dedication, the lot owners only received an easement in the Park. It then defined the scope of the easement, concluding that the Park "is merely an extension of the easement" in the Walk. When this challenged statement is read in context, the trial court was not stating that the Park and the Walk constituted a single property feature. Rather, the statement reflected the trial court's conclusion that, because of the Park's character, the scope of the easement in the Park did not include traditional park purposes, but was limited to the right to traverse the Park. Therefore, the trial court's state-

[5] We agree with plaintiff that this statement by the trial court was likely a simple misstatement.

ment served to describe the scope of the easement in the Park as the same as the scope of the easement in the Walk. Accordingly, defendants' argument that the trial court treated the Walk and the Park as a single property feature is without merit.

C. STANDING

Next, defendants argue that plaintiff lacked standing to challenge any alleged misuse of riparian rights in the Park (i.e., defendants' erection of the dock) because he did not have any riparian rights in the Park. The issue whether a party has standing to assert a claim is a legal question reviewed de novo. *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015).

Land that includes or is bounded by water is defined as riparian. *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985).[6] Owners of riparian land enjoy certain exclusive rights, including the rights to erect and maintain docks and to permanently anchor boats off the shore. *2000 Baum Family Trust v Babel*, 488 Mich 136, 166; 793 NW2d 633 (2010). Generally, it is an "indispensable requisite" that land actually touch water to be riparian, but there are exceptions to this rule. *Id*. at 167.

Taking different views of the Supreme Court's decision in *Thies*, 424 Mich 282, and this Court's decision in *Dobie*, 227 Mich App 536, the parties disagree about whether the existence of the Park between the front lots and Fine Lake means that the front lots are not riparian. However, we need not determine whether the

[6] More accurately, land that includes or borders a river is defined as riparian, while land that includes or borders a lake is defined as littoral. *Thies*, 424 Mich at 288 n 2. However, the term "riparian" is often used to describe both types of land. *Id*.

front lots are riparian and, if not, who owns the fee in the Park in order to resolve defendants' argument that plaintiff lacks standing to challenge the use of alleged riparian rights in the Park. Even assuming for the sake of argument that plaintiff does not have riparian rights in the Park, there is no dispute that plaintiff is a lot owner who therefore has an easement in the Park. And an easement is a property interest. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378; 699 NW2d 272 (2005).

In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), the Supreme Court set forth the general rule regarding standing:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Because plaintiff at a minimum has an easement in the Park, he has a substantial interest in determining what rights defendants and others had in building a dock and mooring a boat at the shore of the Park. In other words, because only lot holders had an easement in the Park, plaintiff had a special injury or right, or substantial interest, that would be detrimentally affected in a manner different than the citizenry at large.

Id. Accordingly, plaintiff had standing to challenge defendants' erection of the dock.[7]

III. PLAINTIFF'S CROSS-APPEAL

A. USE OF THE WALK BY DEFENDANTS' TENANTS

Plaintiff argues that the trial court erred by failing to address whether defendants' tenants were allowed to use the Walk to access Fine Lake. The parties dispute whether plaintiff adequately pleaded this issue; the trial court held that he did not do so. However, even if plaintiff adequately pleaded this issue, plaintiff is not entitled to an order precluding the tenants from using the Walk to access Fine Lake.

If a dominant estate with easement rights is divided, all resulting parcels take a share in the easement as long as an unreasonable burden is not imposed upon the servient estate. See *von Meding v Strahl*, 319 Mich 598, 611; 30 NW2d 363 (1948); *Walker v Bennett*, 111 Mich App 40, 44; 315 NW2d 142 (1981). "Generally, a mere increase in the number of persons using an unlimited right of way to which the land is subject is not an unlawful additional burden." *Henkle v Goldenson*, 263 Mich 140, 143; 248 NW 574 (1933).

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[7] While not necessary to our determination that plaintiff has standing to challenge defendants' erection of a dock, it does not escape our notice that plaintiff and defendants are similarly situated—both own front lots abutting the Park that separates their respective properties from Fine Lake—yet defendants simultaneously contend that they had a right to build a dock, but that "[b]ecause [plaintiff] lacks any fee interest, he also lacks any riparian rights—i.e. the right to erect and maintain docks along the owner's shore and to permanently anchor boats off the shore . . . to the Park property." While the record suggests that defendants might contend that they own the entire fee in the Walk and Park as supposed successors to the original plattors, defendants were not determined to be such, and the irony and inconsistency of defendants' position—that they and only they have a right to erect a dock—is not lost on us.

Lot 44 in the West Beach plat (the owner of which possessed easement rights in the Walk) was divided, and a strip of the southern 16 feet of the lot became part of the property identified as 3406 West Shore Drive. When Lot 44 was split, the two resulting parcels each took an easement in the Walk as long as there was no unreasonable burden imposed on the servient estate. See *von Meding*, 319 Mich at 611; *Walker*, 111 Mich App at 44. Because a mere increase in the number of persons using a right of way is not an unlawful additional burden, *Henkle*, 263 Mich at 143, the mere use of the Walk by the tenants (absent some further showing) did not impose an unreasonable burden on the servient estate. Accordingly, defendants' tenants have a right to use the Walk to access Fine Lake, and the trial court did not err by failing to preclude them from doing so.

B. THE FENCE AND RELATED STRUCTURES

Plaintiff raises several issues relating to the fence that defendants erected on the Walk, specifically that it interferes with his access to the Walk, that it overburdens the easement on the Walk, and that it violates the BCZO. In moving for summary disposition, plaintiff argued that, because he owns land abutting the Walk, he has a fee interest in the Walk (subject to the easement interests of lot owners generally) and was entitled to "free" access from his property to the Walk. The trial court held that all lot owners had an easement in the walk and initially indicated at the summary disposition hearing that it did not need to address whether plaintiff had a reversionary fee interest because there was no indication that the Walk would ever be abandoned. Yet, as noted, the trial court subsequently determined in its November 4, 2014

order "that the walkway is not, at this time, subject to the reversionary interest that Plaintiff claims." At the conclusion of the bench trial, the trial court held that the fence did not overburden the easement. The scope and extent of an easement is a question of fact that this Court reviews for clear error. *Wiggins*, 291 Mich App at 550. The question whether the scope of an easement has been exceeded is also a question of fact reviewed for clear error. *Id*. This Court reviews de novo a trial court's grant or denial of summary disposition. *Id*. We also review de novo questions involving the interpretation of an ordinance. *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 663-664; 697 NW2d 180 (2005).

1. PLAINTIFF'S INTEREST IN THE WALK

Plaintiff argues that, as an owner of property abutting the Walk, he owns a fee interest in one-half of the Walk and is therefore entitled to access it from "any" and "all" points along the boundary line between his property and the Walk, that defendants' fence prevents him from doing this, and that the trial court therefore erred by refusing to order its removal. Indeed, the record reflects that defendants' erection of the fence within the Walk (and just outside plaintiff's property line) effectively forecloses plaintiff's access to the Walk except by entering from the street that fronts both plaintiff's and defendants' lots. For the reasons that follow, we agree that plaintiff possesses a fee interest to the midpoint of the Walk, that the trial court erred by failing to grant summary disposition in favor of plaintiff on that issue, and that a remand is therefore required.[8]

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[8] Although much of the parties' arguments center around the fence, the trial court's error in failing to recognize plaintiff's fee interest

In support of his argument, plaintiff relies on *2000 Baum Family Trust* and *Thies*. In *2000 Baum Family Trust*, 488 Mich at 152, our Supreme Court explained the "threefold relation" that an owner of property abutting a public street has to the street. First, an abutting landowner, as a member of the public, has a right to use the street for travel. *Id*. Second, an abutting landowner possesses a reversionary interest to the center of the street. *Id*. at 152, 155. Regardless of how the street was dedicated to the public, title to a street that is vacated or abandoned vests in the owners of the lots abutting the street. *Id*. at 155-156. Third, an abutting landowner possesses a right of ingress and egress to and from the street. *Id*. at 152, 157.

In *Thies*, 424 Mich at 291-294, the property owners possessed lots abutting a 12-foot "walk" that separated a front row of lots from a lake and was dedicated for the joint use of the owners of the plat (i.e., present and future lot owners). The Supreme Court held that each owner possessed a fee interest in the walk for the portions that abutted the owner's property. *Id*.[9]

In this case, the 1928 plat dedicates "the streets, alleys and parks" to "the use of the present and future lot owners." While the Walk is not specifically described as either a "street" or an "alley," our review of the plat map indicates that there is nothing that could be termed an "alley" other than the walks that periodi-

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impacts plaintiff's claims not only in relation to the fence, but also in relation to other structures erected by defendants on plaintiff's portion of the Walk.

[9] Unlike in the instant case, the walk in *Thies* was bounded by lots on only one side because the walk ran along the waterfront. The Court therefore concluded that the lot owners owned the fee in the entire width of the walk (rather than to its center) for that portion of the walk that abutted their property, subject to the easement interest of the remaining lot owners. See *Thies*, 424 Mich at 297.

cally separate front lots that abut the Park (thereby providing back-lot access to the Park and Fine Lake). The Walk, unlike the "walk" in *Thies*, does not run along the lake. Rather, it is situated entirely between Lots 5 and 6 in the West Beach plat, paralleling those lots, running perpendicular toward the lake, and abutting the Park at the front line of the lots. But this distinction is of no matter. In *Thies*, the Supreme Court began with the general rule that, unless a contrary intent appears, the owners of land abutting a street are presumed to own the fee in the street to the center, subject to the public easement. *Id*. at 291. Based on this general rule, and given that the Supreme Court in *Thies* applied a variant of it, i.e., that owners of land abutting a "privately platted walkway" that is contiguous to the water are presumed to own the fee in the entire way, subject to an easement, *2000 Baum Family Trust*, 488 Mich at 181, we conclude that plaintiff owns the fee in the Walk to its center, subject to an easement given to the lot owners generally.[10] We therefore reject defendants' argument that plaintiff owns *only* an easement interest in the Walk. While we have said in other contexts that "a private dedication in a plat made before January 1, 1968, conveys an irrevocable easement, whereas a private dedication in a plat after January 1, 1968, conveys a fee interest,"[11] *Redmond v*

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[10] The fee interest of an abutting landowner in a roadway means that the landowner has the right to use of the land under which the road runs, subject to the prohibition that they must not interfere with the use by easement holders. *Smeberg v Cunningham*, 96 Mich 378, 385; 56 NW 73 (1893) ("He may set out shade trees, construct a sidewalk, and exercise other acts of ownership and possession which do not interfere with the public use."). The landowner also possesses the right to eject trespassers. See *id*. (noting that ejectment was the proper remedy when a fence had been built upon a portion of the street abutting the plaintiff's lots).

[11] The 1968 date refers to the effective date of the Land Division Act, i.e., the plat act of 1967, MCL 560.101 *et seq*. MCL 560.253(1) provides,

Van Buren Co, 293 Mich App 344, 354; 819 NW2d 912 (2011), the genesis of that statement is our Supreme Court's determination that pre-1968 private dedications convey "*at least* an irrevocable easement in the dedicated land," *Little v Hirschman*, 469 Mich 553, 564; 677 NW2d 319 (2004) (emphasis added).

We conclude that the context of the instant case provides real meaning to the words "at least" and that, based on the general principles articulated in *Thies* and *2000 Baum Family Trust*, the plat in this case conveys not only an easement to lot owners generally, but an additional fee interest to the lot owners whose property lies adjacent to the platted walks. We therefore hold that plaintiff and defendants each own a fee interest in one-half of the Walk, subject to the easement rights of lot owners generally, and that the trial court erred by failing to grant summary disposition in favor of plaintiff on that issue.

It is undisputed that the owner of a fee interest has the right to keep his or her property free from trespass and significant encroachment. See *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 315; 788 NW2d 679 (2010); *Kratze v Indep Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993); *Smeberg v Cunningham*, 96 Mich 378, 385; 56 NW 73 (1893). From the trial exhibits and testimony, it appears that at least some portion of the fence (if not the entire fence) is built near plaintiff's property line (and therefore within the portion of the Walk in which plaintiff owns a fee interest); however, we are unable to definitively determine from the record to what extent the fence and related structures encroach onto plaintiff's portion of the Walk. Having determined that plaintiff owns a fee

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in relevant part, that a dedication is deemed to convey the dedicated property in fee simple to the recipients of the dedication.

interest in one-half of the Walk, we therefore remand for a determination of the extent to which the fence and related structures encroach on plaintiff's interest and for a determination of the appropriate remedies therefor.[12]

2. BURDEN ON THE EASEMENT

Plaintiff next argues that the trial court erred by finding after trial that defendants' fence did not overburden the Walk. We conclude that the trial court clearly erred by focusing solely on the fence, by offering no rationale for its finding that the fence did not overburden the Walk other than that, given the apparently poor relations between plaintiff and defendants, it was "probably beneficial for the parties to keep that fence up," and by failing to address whether the fence and related structures on plaintiff's portion of the Walk were necessary for the effective use of the easement. *Wiggins*, 291 Mich App at 550. For the reasons that follow, we further have serious reservations about whether the fence (and related structures) were necessary for the effective use of the easement and whether they did, in fact, overburden the easement.[13]

Our analysis of this issue is affected by our determination that plaintiff and defendants each own a fee interest to the centerline of the Walk, subject to the easement for lot owners, and also are themselves lot

[12] Although, as discussed later in this opinion, we conclude that plaintiff has alleged in Count I a viable claim insofar as plaintiff seeks equitable relief with regard to that claim, on remand plaintiff may move to amend his complaint to more clearly allege a claim of quiet title or ejectment. *Smeberg*, 96 Mich at 385.

[13] We note that, in allowing the fence to remain (so as to minimize contact between plaintiff and defendants), the trial court stated, "However, if anyone else comes in and requests it down, then I guess that would have to be reconsidered."

owners. Thus, plaintiff and defendants each own a portion of the Walk while simultaneously possessing an easement right in the Walk. A party who enjoys an easement is entitled to maintain it so that it is capable of the use for which it was given. *Carlton v Warner*, 46 Mich App 60, 61; 207 NW2d 465 (1973). However, a "fundamental principle" of property law is that the holder of an easement "cannot make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden" the servient estate. *Blackhawk Dev Corp v Dexter*, 473 Mich 33, 41; 700 NW2d 364 (2005) (citation and quotation marks omitted); see also *Unverzagt v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943). A two-step inquiry has evolved for repairs or improvements to an easement. *Blackhawk Dev Corp*, 473 Mich at 42; *Mumrow v Riddle*, 67 Mich App 693, 700; 242 NW2d 489 (1976). The first inquiry is whether the repair or improvement is necessary for the effective use of the easement. *Blackhawk Dev Corp*, 473 Mich at 42; *Mumrow*, 67 Mich App at 700. The second inquiry is whether the repair or improvement unreasonably burdens the servient estate. *Blackhawk Dev Corp*, 473 Mich at 42; *Mumrow*, 67 Mich App at 700.

Joan Colitti testified that plaintiff had at least one aggressive dog and that plaintiff's invisible dog fence went across the Walk and ended underneath defendants' hedges (meaning the dogs were able to access the Walk). Further, Marc Colitti testified that plaintiff once "sic'd" his dogs on neighbors who were using the Walk. Joan testified that at some time before the fence was erected, plaintiff "charged out" at defendants while they were weed-whacking on the Walk. She also testified that plaintiff threatened her and called her names. Additionally, Joan testified that plaintiff, when he mowed his lawn, directed the discharge from the

mower toward the Walk and that sometimes the discharge landed on the pathway. Marc testified that he once found plaintiff removing stones that he had placed on the Walk. It therefore does appear that a fence might possess some utility in providing a barrier between feuding neighbors. But it is questionable at best whether the fence, as erected, is necessary to the effective use of the Walk as an easement. The fence does not aid lot owners in traversing it, apart, perhaps, from protecting them from walking on lawn debris and from the alleged bad behavior of the neighbors. We are not convinced that a permanent structure would need to be built to ensure that the easement remains useful to all lot owners, especially because plaintiff cannot be barred from either the use of the easement or the use of land in which he owns a fee. If defendants wished to avoid contact with plaintiff, nothing prevented them from building a fence on their own property line or at least on their side of the Walk, again subject to the easement rights of lot owners.

Additionally, from the record before us, the placement of the fence combined with other structures defendants erected on the easement have the effect of making it appear as though the Walk is part of defendants' lot. That is, the nature of the fence and its apparent placement on the far side of the Walk along plaintiff's lot line—in combination with the placement of landscaping blocks, a retaining wall, and a stairway leading down to defendants' dock (at least some of which, from the record before us, appears not to be confined to defendants' side of the Walk)—all give the appearance that the Walk is or has been appropriated to fall within the confines of defendants' lot. This could well have a deterrent effect on lot owners who might wish to use the easement. In sum, the fence might both be unnecessary to the effective use of the easement and

overburden the servient estate. We are, in any event, left with a definite and firm conviction that the trial court erred by focusing solely on the fence, by offering no rationale for its finding that the fence did not overburden the Walk other than that, given the apparently poor relations between plaintiff and defendants, it was "probably beneficial for the parties to keep that fence up," and by failing to address whether the fence and related structures were necessary for the effective use of the easement. *In re Bennett Estate*, 255 Mich App at 549.

With regard to the portion of the Walk owned by defendants, defendants are permitted to use the property in any manner that does not conflict with the rights of the easement holders (including plaintiff). *Smeberg*, 96 Mich at 385; *Morrow v Boldt*, 203 Mich App 324, 329; 512 NW2d 83 (1994). These rights include the right to unobstructed passage over the Walk at all times and "such rights as are incidental or necessary to the right of passage." *Morrow*, 203 Mich App at 329. As noted earlier, we are unable to determine from the record before us the exact location of the entirety of the fence or the other structures placed within the Walk. On remand, in addition to determining which portions of the fence and other structures need to be removed as violative of plaintiff's fee interest, the trial court should conduct further proceedings to determine which portions erected on defendants' side of the midpoint of the Walk are valid uses of the property that do not conflict with the rights of the easement holders to use the Walk.

3. VIOLATION OF THE BCZO

Next, in Count III, plaintiff argues that the fence and a "landscaping wall" (or indeed the erection of any

fence or wall within the Walk) violates the BCZO and is thus a nuisance per se.[14] We disagree. The trial court did not explicitly rule on whether the fence or wall violates the BCZO; however, because plaintiff raised the issue before the trial court and the trial court subsequently refused to order the removal of the fence or wall, the trial court impliedly rejected plaintiff's argument.

The rules governing statutory interpretation apply to ordinances. *Bonner v Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014). Thus, this Court's goal in the interpretation of an ordinance is to discern and give effect to the intent of the legislative body. If the language used by the legislative body is clear and unambiguous, the ordinance must be enforced as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008); *Warren's Station, Inc v Bronson*, 241 Mich App 384, 388; 615 NW2d 769 (2000).

Section 514 of the BCZO provides that "[f]ences and walls shall not be located outside or beyond the property or lot lines of the lot or parcel." Barry County Zoning Ordinance, § 514. According to plaintiff, the fence violates the BCZO because it is located on the Walk, and the Walk is not a "lot or parcel" as those terms are defined by the BCZO.[15] However, "[t]he 'last

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[14] A structure erected in violation of a zoning ordinance constitutes a nuisance per se. MCL 125.3407; *Lima Twp v Bateson*, 302 Mich App 483, 493; 838 NW2d 898 (2013).

[15] The BCZO defines "lot, parcel or tract" as "[a]n area of land separated from other parcels of land by description on a plat, condominium subdivision plan or by metes and bounds description, recorded in the Barry County Office of the Register of deeds and may have a unique tax identification number, and which complies with the dimensional requirements of this Ordinance." Barry County Zoning Ordinance, § 213. In this case, the Walk does not meet the dimensional

antecedent' rule of statutory construction provides that 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." *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002). Plaintiff has pointed to nothing in the BCZO that prohibits applying the modifying clause—"of the lot or parcel"—only to the last antecedent, i.e., "lot lines." In fact, our review of other sections of the BCZO supports the conclusion that the term "property" does not exclusively refer to land that fits the definition of a "lot" or "parcel." Testimony showed that the fence and wall were located entirely within "the property" of the Walk. Because the fence and wall were built within the property of the Walk, they did not violate the BCZO.[16]

C. STATUTE OF LIMITATIONS

Finally, plaintiff argues that the trial court erred by granting summary disposition on Counts I, II, and III—insofar as they relate to the pathway and stairway—of the first amended complaint. We review de novo a trial court's decision on a motion for summary disposition. *Wiggins*, 291 Mich App at 550. Summary disposition is proper under MCR 2.116(C)(7) if "[e]ntry of judgment . . . is appropriate because . . . [the] statute of limitations" barred the claim. In reviewing a motion for summary disposition

requirements of a lot or parcel; instead, the Walk would appear to fit the BCZO's definition of "private road." *Id*. at § 219.

[16] Of course, as discussed earlier in this opinion, the fact that the fence and wall do not by their mere existence violate the BCZO does not answer the questions of whether they are necessary to the effective use of the easement, whether they overburden the easement, or whether they encroach on plaintiff's property.

under MCR 2.116(C)(7), a court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010).

A plaintiff shall not bring an action to recover damages for injury to property unless, after the claim first accrued to the plaintiff, the action is commenced within the limitations period. MCL 600.5805(1). "[T]he period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(10).

For many years, Michigan courts recognized an exception to application of the statute of limitations when there were continuing wrongful acts. See *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 280; 769 NW2d 234 (2009). Under the "continuing wrongs" doctrine, the limitations period, rather than beginning to run on the occurrence of the first wrongful act, did not begin to run until the continuing wrong was abated. *Id*. However, the Michigan Supreme Court in 2005 abrogated the continuing-wrongs doctrine. *Id*. at 288.

The limitations period runs from the time the claim accrues. MCL 600.5827. "[T]he claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id*. The term "wrong" in MCL 600.5827 "refers to the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant

acted negligently." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 290 (citation and quotation marks omitted). In other words, the "wrong" is "done" when both the act and the injury first occur. *Id*. at 291. Therefore, in *Marilyn Froling Revocable Living Trust*, this Court concluded that the plaintiff's claims for trespass and nuisance accrued in June 2001 because that was when the plaintiff first experienced flooding on its property after the defendants' last wrongful act. *Id*.

In Count I of the second amended complaint, plaintiff alleged that defendants trespassed on the Walk by placing landscaping blocks on the Walk, raising a portion of the Walk, erecting a retaining wall, and filling the area with gravel. A trespass is an unauthorized invasion of the private property of another. *Dalley*, 287 Mich App at 315. To establish a trespass, there must be proof of an unauthorized intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Once such an intrusion is proved, the trespass is established, and the plaintiff is entitled to at least nominal damages. *Id*. The alleged act constituting the trespass and the injury to plaintiff occurred when defendants built the pathway and stairway. The evidence showed that the pathway and stairway were completed no later than September 14, 2009. Because plaintiff did not file his trespass claim within three years after the claim accrued, the claim (insofar as it sought monetary damages) was time-barred. MCL 600.5805(1) and (10); MCL 600.5827. The trial court did not err by granting summary disposition to defendants on Count I insofar as it relates to monetary damages for a trespass or encroachment on plaintiff's land caused by the pathway and stairway.

However, plaintiff's trespass claim sought monetary damages in the alternative. The relief that plaintiff principally sought for defendants' alleged trespass was injunctive in nature inasmuch as plaintiff requested that the trial court order defendants "to remove all cement landscaping blocks and fill and fencing and order the walk restored to the natural grassy state as previously agreed to by the parties." Plaintiff therefore contends that the trial court should have determined whether the pathway and stairway constituted a seizure of the property in derogation of plaintiff's right to use the Walk. We conclude that, under a fair reading of plaintiff's complaint, plaintiff alleged that defendants seized a portion of plaintiff's property, i.e., plaintiff's portion of the Walk, and requested that the trial court determine that plaintiff has ownership of the Walk to the centerline as well as grant injunctive relief to rectify the alleged seizure. Thus, the gravamen of the injunctive relief portion of Count I of plaintiff's complaint is to quiet title to his portion of the Walk. See MCL 600.2932; see also *Adams v Adams (On Reconsideration)*, 276 Mich App 704; 710-711; 742 NW2d 399 (2007) ("It is well settled that 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.").

The statute of limitations applicable to a quiet-title cause of action is set forth in MCL 600.5801, which provides:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.

* * *

> (4) In all other cases under this section, the period of limitation is 15 years.

Thus, although plaintiff's trespass claim—to the extent it sought monetary damages—is barred by the statute of limitations, plaintiff's trespass claim—to the extent it sought injunctive relief—is not barred by the statute of limitations.[17] The trial court therefore erred by granting summary disposition on statute-of-limitations grounds in favor of defendants on Count I of plaintiff's second amended complaint insofar as Count I sought injunctive relief. Accordingly, we reverse in part and remand for further proceedings consistent with our determination with respect to plaintiff's ownership of a fee interest in the Walk.

In Count II of the second amended complaint, plaintiff alleged that defendants "installed gravel inexpertly" that was to have been contained within the landscaping blocks and that "the installation was not proper." Plaintiff alleged that the improper installation caused water, gravel, and sand to be cast on "[p]laintiff's property" in such a fashion and with such fre-

[17] *Terlecki v Stewart*, 278 Mich App 644; 754 NW2d 899 (2008), is not to the contrary. In *Terlecki*, the plaintiffs' property flooded after the defendants took actions on their own property that caused a nearby lake to rise. *Id*. at 647. The trial court denied the defendants' motion for summary disposition. *Id*. at 648. In reversing the trial court, this Court held that the plaintiffs' tort claims for monetary damages were barred by the applicable statutes of limitations, but that the 15-year period of limitations of MCL 600.5801(4) applied to a claim for equitable relief to enforce a flowage easement. *Id*. at 664. Although the Court found that the plaintiffs had not properly pleaded that cause of action, it specifically authorized the plaintiffs on remand to move to amend their complaint. *Id*. In this case, by contrast, we construe plaintiff's pleadings as adequately alleging the seizure of property in which he held a fee interest, as to which he sought equitable relief. This is a claim to which the 15-year limitations period of MCL 600.5801(4) applies. In addition, as in *Terlecki*, plaintiff on remand may move to amend his pleadings to more specifically allege quiet-title or ejectment claims.

quency that it had become a nuisance. Nuisance is an interference with the plaintiff's use and enjoyment of his land. *Adams*, 237 Mich App at 59. The act of defendants that caused the alleged nuisance was the installation of gravel that was to have been contained by the landscaping blocks. This act occurred in 2009. However, a claim does not accrue until both the act and the injury occur. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 291. There was evidence to support that the injury, i.e., the flooding of water, gravel, and sand onto plaintiff's property, did not occur until the summer of 2012. Plaintiff alleged that in August 2012, gravel flooded onto his property when there was a heavy downpour. Until then, according to plaintiff, he had not realized the extent of the problem created by the landscaping blocks and the gravel behind it. Because there was evidence to support that the injury did not occur until the summer of 2012, which, if established, means that the claim did not accrue until 2012, plaintiff's nuisance claim was not barred by the statute of limitations. The claim was brought within three years after it accrued. The trial court therefore erred by granting summary disposition to defendants on Count II.

In Count III of the first amended complaint, plaintiff alleged that the fence and a "landscaping wall" built by defendants in the Walk violated the BCZO. Again, a structure erected in violation of a zoning ordinance constitutes a nuisance per se. MCL 125.3407; *Lima Twp*, 302 Mich App at 493.

We need not address, however, whether Count III is barred by the applicable statute of limitations. As discussed earlier in this opinion, neither the fence nor the landscaping wall violated the BCZO. Therefore, the

trial court did not err by granting summary disposition to defendants on Count III.

IV. CONCLUSION

Affirmed with regard to the main appeal, apart from our conclusion that the trial court erred by referring to the dedication of the Park as a public dedication. Affirmed in part and reversed and remanded in part with regard to the cross-appeal. The trial court erred by not determining that plaintiff owned a fee interest in the Walk to the centerline, by failing to determine the extent to which the fence and related structures encroached on plaintiff's property and to fashion an appropriate remedy, and by holding that the fence did not overburden the easement. Further, plaintiff's nuisance claim regarding the installation of gravel and landscaping blocks was not time-barred, nor was plaintiff's trespass claim (which we construe as a claim to quiet title) insofar as it sought injunctive relief. However, the trial court did not err by determining that the fence and wall did not violate the BCZO or that plaintiff's trespass and nuisance claims were otherwise time-barred. We remand for further proceedings consistent with this opinion.

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

K. F. KELLY, P.J., and O'CONNELL, J., concurred with BOONSTRA, J.

PEOPLE v AMBROSE

Docket No. 327877. Submitted October 12, 2016, at Grand Rapids. Decided October 25, 2016, at 9:00 a.m.

Samuel D. Ambrose pleaded guilty in the Allegan Circuit Court to felonious assault, MCL 750.82, and intimidating or interfering with a witness, MCL 750.122. He was sentenced, above the recommended minimum sentence range under the sentencing guidelines, to consecutive terms of 32 to 48 months of imprisonment for felonious assault and 16 to 48 months of imprisonment for intimidating or interfering with a witness. Defendant's convictions arose from the assault of his pregnant girlfriend who had been disabled by a stroke and who used a wheelchair at the time of the assault. At sentencing, defendant contested his Offense Variable (OV) 9 score, MCL 777.39, arguing that a score of 10 points was not appropriate because two to nine victims were not placed in danger of injury or death as a result of his conduct. The court, Kevin W. Cronin, J., disagreed with defendant, noting that MCL 750.90a and MCL 750.90b criminalized conduct that caused miscarriage, stillbirth, or injury to an embryo or fetus. The court also stated that MCL 750.90a and MCL 750.90b had not been set aside by any state or federal court and that although the Legislature could dictate a different outcome in the future, the court was satisfied that the laws criminalizing conduct causing injury to a fetus supported counting an endangered fetus as a victim for purposes of OV 9. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. A defendant should be assigned 10 points for OV 9 when his or her conduct placed two to nine victims in danger of physical injury or death. The statute requires that all persons placed in danger of injury, loss of property, or death be counted as victims. The statutory language does not, however, contain any limiting language that would support a conclusion that only persons can be considered victims under OV 9. The term "victim" means one that is acted on by the defendant's criminal conduct and placed in danger of loss of life, bodily injury, or loss of property. Because the Legislature has enacted MCL 750.90a and MCL 750.90b, which

penalize conduct that causes injury or death to an embryo or fetus, it follows that an embryo or a fetus may be counted as a victim for purposes of OV 9. In this case, the assault victim's fetus was apparently not harmed, but defendant's conduct placed the fetus at risk of injury, which was sufficient to support an OV 9 score of 10 points.

2. A departure sentence no longer needs to be supported by substantial and compelling reasons for the departure, but a departure sentence must be reasonable. Although a sentencing court may depart from the guidelines without stating any substantial and compelling reasons for departure, the court must score the appropriate OVs and consider the resulting recommended minimum sentence as advisory when making its sentencing decision. In this case, the sentencing court departed minimally from the guidelines as calculated using 10 points for OV 9, and the court gave a litany of reasons for the departure. The departure sentence was reasonable because it was minimal and well supported by the court's reasoning.

Affirmed.

O'CONNELL, J., concurring, agreed with both the reasoning and result of the majority opinion but emphasized that the Legislature is the final arbiter of public policy and that the Legislature had clearly expressed in MCL 750.90a and MCL 750.90b that a fetus may be a victim of a defendant's criminal conduct. Therefore, OV 9 was correctly scored at 10 points. It was unnecessary to the disposition of this case to determine whether a fetus is a person under the law. OV 9 uses the term "victim" broadly, and there is no reason to impose a stricter definition on the term. Moreover, even if OV 9 had not been properly scored, defendant would not have been entitled to resentencing because the departure sentence was reasonable.

CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLE 9 — NUMBER OF VICTIMS INCLUDES FETUSES AND EMBRYOS.

A fetus or an embryo may be counted as a victim for purposes of scoring Offense Variable 9, MCL 777.39, if the embryo or fetus was placed in danger of physical injury or death by a defendant's conduct.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

Charles B. Covello for defendant.

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

BOONSTRA, J. Defendant pleaded guilty to felonious assault, MCL 750.82, and intimidating or interfering with a witness, MCL 750.122. The trial court sentenced him to consecutive terms of 32 to 48 months' imprisonment (with credit for 212 days served) for felonious assault and 16 to 48 months' imprisonment (with credit for 201 days served) for intimidating or interfering with a witness. Defendant appeals his felonious-assault sentence by delayed leave granted, the issue limited to the scoring of Offense Variable (OV) 9, MCL 777.39.[1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

A detailed recitation of the facts underlying defendant's plea is unnecessary for resolution of the issue on appeal. Defendant pleaded guilty to feloniously assaulting his pregnant girlfriend, including wrestling her out of her wheelchair, threatening her with a knife, punching her in the abdomen, and holding her head under water. At sentencing, the trial court concluded that OV 9 was properly scored at 10 points because two to nine victims had been placed at risk of bodily injury or loss of life. The trial court stated:

> [A]nd I'm affirming the score of OV9 for the number of victims and I guess I take my queue [sic] from statutes MCL 750.90(a) and 90(b), criminalizing behavior which intentionally causes miscarriage or stillbirth or injury to an embryo or a fetus. It criminalizes that behavior so these

[1] *People v Ambrose*, unpublished order of the Court of Appeals, entered August 13, 2015 (Docket No. 327877).

> statutes affected both of them on June 1, 2001, never been set aside by any court in Michigan or any federal court as violative of law, constitution or any other legal mandate. Seemed to send the message, we respect the right of a fetus to calm and peaceful environmental circumstances without threat of harm to them. And the defendant, it said in this report, punched the victim not only in her head but in her belly area when she was pregnant with this child so I'm satisfied that if the legislature wants to tell us we can't criminalize the defendant's behavior because, as a second person, because that second person is a fetus, well they can give us that guidance and we'll, you know, we'll respond accordingly.

The trial court imposed a sentence that was an upward departure from the minimum sentence range recommended under the sentencing guidelines. The trial court asserted that the following substantial and compelling reasons justified the departure:[2] the victim was a stroke victim, disabled, in a wheelchair, and pregnant; part of the victim's body was not functional; the victim could not defend herself; defendant knew about the victim's stroke and the wheelchair; the victim was obviously very frightened; the victim's injuries, which included a bruise and scratches; the mud on the victim's face and hair; the use of a knife against the victim; the victim's terror at being held under water as a stroke victim who could not struggle as could a fully healthy person; and the victim's terror at being held under water contemplating her death and that of her baby. The trial court noted that its minimum sentence of 32 months departed "slightly more than 10% above the maximum guideline" of 29

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[2] A sentencing court is no longer required to justify a departure with substantial and compelling reasons, as we discuss later in this opinion. *People v Lockridge*, 498 Mich 358, 364-365; 870 NW2d 502 (2015), cert den sub nom *Michigan v Lockridge*, ___ US ___; 136 S Ct 590; 193 L Ed 2d 487 (2015).

months and that this departure was "minimalistic even given the high state of terror and the callousness demonstrated in this crime." This appeal followed.

II. STANDARD OF REVIEW

We review de novo issues of statutory interpretation. *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010). Issues involving "the proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 *et seq*., . . . 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) (citation omitted).

III. ANALYSIS

Defendant argues that the trial court erred by scoring OV 9 at 10 points instead of zero points because a fetus cannot be counted as a "victim" when scoring OV 9. We disagree.[3]

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[3] On appeal, the prosecution has not advanced its argument below that the trial court correctly scored OV 9, instead focusing its appellate argument on whether resentencing is in any event necessary. However, we disagree with any assumption that defendant's OV 9 score requires that a fetus be found to be a "person" under the law. Instead, and because we conclude that the trial court could properly consider the fetus as a victim without finding the fetus to be a person, we hold, in our

"The fundamental task of statutory construction is to discover and give effect to the intent of the Legislature." *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). "The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute." *People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009). If the statutory language is unambiguous, then the statute is applied as written. *Borchard-Ruhland*, 460 Mich at 284. "If the statute defines a term, that definition controls." *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010). When interpreting the Michigan Penal Code, MCL 750.1 *et seq.*, this Court is not to apply strict construction, but must construe the provisions "according to the fair import of their terms, to promote justice and to effect the objects of the law." MCL 750.2; *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010).

The legislative instructions for scoring OV 9 are found in MCL 777.39, which provides in relevant part:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) There were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss ....10 points
>
> (d) There were fewer than 2 victims who were placed in danger of physical injury or death, or fewer than 4 victims who were placed in danger of property loss..........0 points

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de novo review of the interpretation and application of the sentencing guidelines, that the trial court did not err by scoring OV 9 at 10 points.

> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of physical injury or loss of life or property as a victim.

For OV 9 to be scored at 10 points, there must have been "2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c). MCL 777.39(1)(c) does not define the term "victim" as a dictionary would—by setting forth the meaning of the term. However, MCL 777.39(2)(a) does instruct courts to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." Notably, MCL 777.39(2)(a) contains no words limiting the definition of "victim" to *persons* who were placed in danger of physical injury or loss of life or property. Rather, it simply states that those persons *must* be counted as victims.[4] Therefore, we determine that there is no basis on which to conclude that the word "victim" as used in MCL 777.39 must be defined only to include persons who suffered danger of physical injury or loss of life. See, e.g., *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 172; 610 NW2d 613 (2000) (refusing to limit the statutory definition of "member" in a particular act to only accredited associations in light of the lack of limiting language in the act's definition of "member").

Further, because we read MCL 777.39(2)(a) as only providing guidance to the trial court about who *must* be counted as a victim, and not as providing a complete and limiting definition of the term "victim," we may consult a dictionary for guidance. See *People v Stone*, 463 Mich

[4] "Person," as it is defined under the Penal Code, "include[s], unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations." MCL 750.10. A similar definition, including "an individual" in its definition of "person," appears in the Code of Criminal Procedure. MCL 761.1(a).

558, 563; 621 NW2d 702 (2001). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "victim" as "one that is acted on and usu[ally] adversely affected by a force or agent[.]" We therefore conclude that MCL 777.39 allows a trial court when scoring OV 9 to count as a victim "one that is acted on" by the defendant's criminal conduct and placed in danger of loss of life, bodily injury, or loss of property. *Stone*, 463 Mich at 563.

Our Legislature has indicated that a crime has been committed when a defendant's conduct places a fetus at risk of loss of life or bodily injury. For example, MCL 750.90a provides:

> If a person intentionally commits conduct proscribed under sections 81 to 89 [which involve various types of assaultive offenses] against a pregnant individual, the person is guilty of a felony punishable by imprisonment for life or any term of years if all of the following apply:
>
> (a) The person intended to cause a miscarriage or stillbirth by that individual or death or great bodily harm to the embryo or fetus, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person's conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus.
>
> (b) The person's conduct resulted in a miscarriage or stillbirth by that individual or death to the embryo or fetus.

Additionally, MCL 750.90b provides:

> A person who intentionally commits conduct proscribed under sections 81 to 89 against a pregnant individual is guilty of a crime as follows:
>
> (a) If the conduct results in a miscarriage or stillbirth by that individual, or death to the embryo or fetus, a felony punishable by imprisonment for not more than 15 years or a fine of not more than $7,500.00, or both.
>
> (b) If the conduct results in great bodily harm to the embryo or fetus, a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both.

(c) If the conduct results in serious or aggravated physical injury to the embryo or fetus, a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

(d) If the conduct results in physical injury to the embryo or fetus, a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

And MCL 750.90e provides:

> If a person operates a motor vehicle in a careless or reckless manner, but not willfully or wantonly, that is the proximate cause of an accident involving a pregnant individual and the accident results in a miscarriage or stillbirth by that individual or death to the embryo or fetus, the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

In this case, the trial court identified conduct by defendant that placed the fetus at risk of bodily injury or loss of life, not only as an indirect result of the risk of death or harm to the victim-mother but also as a direct result of blows to the victim-mother's abdominal area. Under the circumstances of this case, and without declaring the fetus in this case to be a person under the law, we conclude that the trial court did not err by counting the fetus as a victim for purposes of scoring OV 9.[5]

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[5] The instant case is distinguishable from this Court's recent decision in *People v Jones*, 317 Mich App 416; 894 NW2d 723 (2016). In *Jones*, this Court determined that "a fetus is not a 'child' for purposes of the first-degree child abuse statute," MCL 750.136b(2). *Id*. at 428-429. Importantly, the term "child" is statutorily defined as " 'a *person* who is less than 18 years of age and is not emancipated by operation of law . . . .' " *Id*. at 422, quoting MCL 750.136b(1)(a). The issue in *Jones* was whether a fetus is included in the definitions of "person" found in the Penal Code and the Code of Criminal Procedure, which, for

Further, even if we were to assume that the trial court erred by scoring OV 9 at 10 points, we would conclude that resentencing is not required. Under *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015), a trial court's departure from a defendant's recommended sentencing guidelines range is reviewed by this Court for reasonableness. Defendant has not challenged the trial court's departure from the guidelines as unreasonable. In light of the facts of this case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, we hold that the departure was reasonable. Although in *People v Biddles*, 316 Mich App 148, 156-158; 896 NW2d 461 (2016), we recently clarified the distinction between *Francisco* errors[6] and *Lockridge* errors, *Biddles* did not deal with an upward departure. We do not read *Biddles* as requiring remand for a *Francisco* error when we have determined (as in this case) that a sentencing departure is reasonable under *Lockridge* and that the sentence "did not rely on the minimum sentence range from . . . improperly scored guidelines . . . ." *Lockridge*, 498 Mich at 394; see also *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003) (holding that it was unnecessary to determine if there was a scoring error under OV 11 that required resentencing when the sentence imposed was a departure "above the recommended range in any event, and the court expressly stated the . . . reasons that justified the departure").

Affirmed.

K. F. KELLY, P.J., concurred with BOONSTRA, J.

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the reasons we state in this opinion, is a determination not necessary for resolution of the issue before us in the instant case.

[6] *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

O'CONNELL, J. (*concurring*). I concur with both the reasoning and the result of the majority opinion. I write separately to emphasize that the Michigan Legislature, as the final arbiter of public policy in this state, *Van v Zahorik*, 227 Mich App 90, 95; 575 NW2d 566 (1997), has clearly enunciated that a fetus can be a victim under Michigan law. Consistent with Michigan law and Michigan's public policy, the learned trial court concluded that a fetus was a victim for purposes of scoring Offense Variable (OV) 9. I agree with the majority and would affirm the trial court's well-reasoned decision.

I. PUBLIC POLICY

At issue in this case are the instructions for scoring OV 9 found in MCL 777.39 concerning the number of victims. MCL 777.39(1)(c) directs the trial court to assess 10 points if two to nine victims were placed in danger of physical injury or death. The statute defines "victim" broadly, and this Court cannot limit the word "victim" in OV 9 to mean "person" only.

No appellate decision has considered whether, when scoring OV 9, a fetus may be counted as a victim placed in danger of physical injury or death. The facts of this case are reprehensible, leaving no doubt that defendant placed the mother and her fetus in both danger of death and physical injury. The trial court departed from the sentencing guidelines and explained its reasons as follows:

> There's prior domestic violence convictions and I just can't remember when I've been so appalled at a defendant's behavior of what-what cruelty, what total disregard for human life and decency there was in this particular incident. I just can't wrap my head around it. It's probably going to stick with me for quite sometime.

* * *

He's holding her underwater when she's in a ditch. This report suggests that he flopped her in the ditch in the water on the side that was paralyzed. I mean callousness to the-to the max degree. It's just-really this is something you'd only do to someone you're trying to destroy and this lady was pregnant. How the defendant could rationalize this is just beyond me. It's just unspeakably inhumanly belligerent and-and disrespectful to the child she was carrying as well as to herself and frightening to anybody in the community that would see any part of this would be just appalled.

* * *

The Court has authority to go over the guidelines when it thinks there's substantial and compelling reasons to do so. The evidence is-provided the evidence is objective and verifiable. I've talked about the bruise on the victim, the mud on her face and hair. The scratches that were referred to and the conversations between the two of them. The knife, the fact that she was in a wheelchair and had a stroke and both of those things were known to this defendant. All of these are reasons that make this particular crime one that can legitimately be described as careless [sic, callous?] and one that the guidelines don't really adequately treat in terms of its gravity, its terror.

The idea of being in a ditch in the water when you are a fully healthy person that can struggle against that and come up for air is one thing. Being there when you're a stroke victim and you've just been tossed out of your wheelchair unexpectedly, is an entirely different level of terror. I would acquaint it to what some prisoners in (inaudible) under went when they were in that prison and were water boarded. Struggling when you know you don't have the-a hope, a prayer of resisting your oppressors and you're likely to drown and knowing that the end of [y]our life almost certainly means your unborn baby is going to die with you and all of that for what, because you're having an argument with a boyfriend of yours and it's just-it's just the stuff of which nightmares and horror films are made of but it's the fact that it got played out in Allegan County . . . .

Defendant relies on *People v Guthrie*, 97 Mich App 226; 293 NW2d 775 (1980), for the proposition that unborn babies are not persons and therefore cannot be victims within the meaning of MCL 777.39(1)(c). In the 36 years since *Guthrie* was decided, our Legislature has enacted laws that criminalize actions that harm or have the potential to harm unborn babies. As the trial court recognized, defendant could have been charged under MCL 750.90a for intentional criminal conduct against a pregnant individual if he acted in wanton or willful disregard of the likelihood that the natural tendency of his conduct would "cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus." MCL 750.90b and MCL 750.90c penalize intentional conduct and grossly negligent conduct, respectively, against a pregnant individual resulting in miscarriage, stillbirth, death, serious or aggravated physical injury, or great bodily harm to an embryo or fetus. And MCL 750.90d penalizes conduct resulting in a vehicular accident involving a pregnant individual causing miscarriage, stillbirth, death, serious or aggravated injury, or great bodily harm to the embryo or fetus. Further, in 2002, this Court extended the defense-of-others defense to allow the use of deadly force to protect a fetus. *People v Kurr*, 253 Mich App 317, 321, 328; 654 NW2d 651 (2002) (indicating that a fetus put in danger by an assault of the mother may be considered "another" for purpose of the defense-of-others defense).

MCL 777.39(1)(c) does not mention the word person; the provision speaks broadly in terms of victims, not persons. In light of these developments in the law to criminalize acts against the unborn, embryos, and fetuses, and because caselaw indicates that a fetus may be considered "another," it is clear that fetuses can be victims for purposes of OV 9 regardless of whether

a fetus is considered a person. Therefore, I concur with the majority opinion.

II. DEPARTURE SENTENCE

If ever a case would waste judicial resources by a remand for resentencing, it is this case. The trial court's departure was minimal and its reasons for departure were extensive. I note that even if this Court reduced defendant's OV 9 score from 10 points to zero points, defendant's OV score would only change the recommended minimum sentence range under the sentencing guidelines from 14 to 29 months' imprisonment to 12 to 24 months' imprisonment. Defendant's well-deserved departure sentence was 32 months, which only minimally exceeded either of the two guidelines ranges.

Under *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015), the sentencing guidelines are now only advisory and departure sentences are reviewed for reasonableness. In light of the facts of this case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure, defendant's sentence was clearly not unreasonable—rather, it was well deserved. I conclude that the guidelines were properly scored and, even if the guidelines were wrongly scored, a remand for resentencing under these facts would be a waste of judicial resources.

I concur in affirming the trial court's sentencing decision.

PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST BOARD OF TRUSTEES v CITY OF PONTIAC (ON REMAND)

Docket No. 316418. Submitted June 10, 2016, at Lansing. Decided October 25, 2016, at 9:05 a.m. Leave to appeal sought.

The Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust brought an action against the city of Pontiac in the Oakland Circuit Court, alleging that the city's failure to pay the annual contribution to the city's health and insurance trust for fiscal year July 1, 2011, through June 30, 2012, which was required by collective bargaining agreements (CBAs), violated Const 1963, art 9, § 24 and the ordinance under which the trust had been codified and breached the CBA contracts. The trust was established as a tax-exempt voluntary employees' beneficiary association, 26 USC 501(c)(9), to hold the contributions of police and firefighters and those of the city pursuant to CBAs under which retired police officers and firefighters were to receive various healthcare benefits funded by the trust. The trust required the city to make annual payments in an amount determined by the trust's actuary, and it specified that the benefits it funded were to be considered guaranteed by Const 1963, art 9, § 24. The city's emergency manager issued Executive Order 225 (EO 225) on August 1, 2012, under § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k); the order stated that it was amending the trust to provide that the city no longer had an obligation to continue to make contributions to the trust and that the order had immediate effect. 2011 PA 4 was later repealed. The city moved for summary disposition, arguing that Const 1963, § 24 did not apply under *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642 (2005), and that there was no ordinance violation or breach of contract because 2011 PA 4 authorized the emergency manager to amend city ordinances and modify CBAs. The court, Daniel P. O'Brien, J., granted the city's motion for summary disposition of plaintiff's claims. Plaintiff appealed. The Court of Appeals, MARKEY, P.J., and OWENS and FORT HOOD, JJ., concluded that the suspension and repeal of EO 225 did not affect the validity of the emergency manager's actions, and it upheld the circuit court's dismissal of plaintiff's Const 1963, art 9, § 24 claim

because *Studier* held that healthcare benefits are not accrued financial benefits protected by that constitutional provision. The Court of Appeals also rejected plaintiff's ordinance violation claim because plaintiff failed to identify a city ordinance governing the trust or healthcare benefits that the city had violated. However, the Court of Appeals reversed the circuit court's order that granted the city summary disposition of plaintiff's breach of contract claim, concluding that EO 225 had not retroactively eliminated the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012; the city's contractual obligation to fund the trust arose from the CBAs, and the city's actuarially required contribution to the trust was past due on July 1, 2012, creating a breach of contract before EO 225 was issued. Because EO 225 removed the city's obligation to make future obligations, the order did not apply to the contribution that was past due when the order was issued. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 1*, 309 Mich App 590 (2015). The Supreme Court reversed in part and vacated in part the Court of Appeals opinion and remanded the case to the Court of Appeals. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac*, 499 Mich 921 (2016). In its order, the Supreme Court held that the Court of Appeals erred when it concluded that the emergency manager had not intended to extinguish the city's 2011–2012 fiscal year contribution because the language of the order that terminated the city's obligation to contribute to the trust did not differentiate between already accrued but unpaid obligations and future obligations. On that basis, the Supreme Court vacated the portion of the Court of Appeals judgment that discussed plaintiff's breach of contract claim. The Supreme Court directed the Court of Appeals on remand to consider (1) whether the retroactive analysis stated in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), applied to EO 225, (2) if so, whether under *LaFontaine* it was permissible for EO 225 to extinguish the city's accrued but unpaid 2011–2012 fiscal year contribution, and (3) if *LaFontaine* did not apply, the appropriate method for determining whether EO 225 constituted a permissible retroactive modification of the 2011–2012 fiscal year contribution.

On remand, the Court of Appeals *held*:

1. Retroactive application of legislation presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. To determine under *LaFontaine* whether a law has retroactive effect, a court must consider

four principles: (1) whether the statutory language contains specific language providing for retroactive application, (2) that in some situations, a statute does not operate retroactively merely because it relates to an antecedent event, (3) that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past, and (4) that a remedial or procedural act not affecting vested rights may be given retroactive effect when the injury or claim is antecedent to the enactment of the statute. The principles enunciated in *LaFontaine* regarding whether a statute may permissibly be given retroactive effect applied to EO 225 because the determination of retroactivity is primarily a matter of interpretation and executive orders are interpreted similarly to statutes.

2. Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application. The Legislature's expression of intent to have a statute apply retroactively must be clear, direct, and unequivocal from the context of the statute itself; the language must be so clear and positive that there is no room to doubt that retroactive application was the intention of the Legislature. A statute may not be applied retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past. These requirements apply equally to executive orders because executive orders are interpreted like statutes.

3. The circuit court erred by granting summary disposition in favor of the city with respect to plaintiff's breach of contract claim; EO 225 was not a permissible retroactive modification of plaintiff's accrued right to the contribution. Although the emergency manager intended that EO 225 apply retroactively to both future obligations and accrued but unpaid obligations, the language of the order lacked clear, direct, and unequivocal language that it should be applied retroactively. Plaintiff's breach of contract claim based on the city's failure to make its annual contribution to the trust accrued, and all the facts became operative and known, on July 1, 2012, before the emergency manager issued EO 225; plaintiff had a vested right in the accrued cause of action on that day. Retroactive application was not appropriate because retroactive application of EO 225 would have impaired or abolished plaintiff's existing cause of action for breach of contract.

Reversed in part and remanded.

EXECUTIVE ORDERS ISSUED BY EMERGENCY MANAGERS — RETROACTIVE APPLICATION.

The retroactive analysis principle for determining whether a statute may properly be applied retroactively, as set forth in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), apply to the same determination in relation to an executive order issued by an emergency manager.

Sullivan, Ward, Asher & Patton, PC (by *Ronald S. Lederman* and *Matthew I. Henzi*), for plaintiff.

Giarmarco, Mullins & Horton, PC (by *Stephen J. Hitchcock* and *John L. Miller*), for defendant.

ON REMAND

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM. This case returns to this Court on remand from our Supreme Court to consider whether defendant, the city of Pontiac, acting through its emergency manager (EM), may retroactively eliminate its accrued contract obligation to make its annual contribution to plaintiff, the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust, for the fiscal year ending June 30, 2012. In our prior opinion, we held that the EM's Executive Order (EO) 225, issued August 1, 2012, which purported to amend the trust pursuant to § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k), "did not retroactively eliminate the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012; consequently, we reverse[d] and remand[ed] for further proceedings." *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 1*, 309 Mich App 590, 592; 873 NW2d 121 (2015) (*City of Pontiac I*), rev'd in part, vacated in part, and remanded 499 Mich 921 (2016)

(*City of Pontiac II*). After considering the questions our Supreme Court posed in its remand order, we again conclude that EO 225 may not be applied retroactively to extinguish defendant's accrued but unpaid 2011–2012 fiscal year contribution to the trust. We therefore reverse the trial court's order granting summary disposition to defendant with respect to plaintiff's breach of contract claim and remand for further proceedings.

I. PERTINENT FACTS AND PROCEEDINGS

The amount that defendant was actuarially determined to owe the trust for the fiscal year ending June 30, 2012, was $3,473,923.28. *Id*. at 594. As explained in this panel's prior opinion:

> The trust was established in 1996 as a tax-exempt voluntary employees' beneficiary association (VEBA), 26 USC 501(c)(9), to hold the contributions of police and firefighter employees and those of the city pursuant to collective bargaining agreements (CBAs) between the city and the various unions of the city's police officers and firefighters. The trust held and invested these contributions to provide health, optical, dental, and life-insurance benefits to police and firefighters who retired on or after August 22, 1996, as required by the various CBAs. At issue is the efficacy of Executive Order 225 issued on August 1, 2012, pursuant to § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k), by the city's emergency manager (EM), Louis H. Schimmel, which purported to amend the trust to remove the city's annual obligation to contribute to the trust agreement "as determined by the Trustees through actuarial evaluations." The trial court accepted defendant's argument that the city's EM properly modified the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012, by modifying the existing CBAs between the city and police and firefighter unions. The trial court also ruled that plaintiff's claim under Const 1963, art 9, § 24, was without merit under *Studier v Mich Pub Sch Employees*

> *Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005). [*City of Pontiac I*, 309 Mich App at 592-593.]

Although the trust agreement did not directly state when defendant's required contribution was due, the parties agreed that the actuarially required contribution for the fiscal year ending June 30, 2012, was due on or before June 30, 2012. *Id*. at 597. "On August 1, 2012, the city's EM issued Executive Order (EO) 225, which purported to amend the trust pursuant to § 19(1)(k) of 2011 PA 4, to terminate the city's annual actuarially required contribution to the trust for the fiscal year ending June 30, 2012." *Id*. In particular, EO 225 stated, in relevant part:

> Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations.
>
> The Order shall have immediate effect. [*City of Pontiac I*, 309 Mich App at 597-598; quoting EO 225 (quotation marks omitted).]

Plaintiff filed this action, alleging that defendant's failure to make the actuarially required contribution to the trust constituted a violation of Const 1963, art 9, § 24, a violation of an ordinance, and a breach of contract. *City of Pontiac I*, 309 Mich App at 599-600. On March 6, 2013, defendant moved for summary disposition, arguing that there was no violation of Const 1963, art 9, § 24 because our Supreme Court held in *Studier* that the provision does not apply to healthcare benefits, that there was no ordinance violation because 2011 PA 4 authorized the EM to amend ordinances, and that there was no breach of contract because 2011 PA 4 authorized the EM to modify a CBA.

Id. at 600. The trial court granted summary disposition to defendant in accordance with defendant's arguments. *Id*.

On appeal, we reversed on the ground that EO 225 as written had not retroactively eliminated defendant's obligation to contribute to the trust for the fiscal year ending June 30, 2012. *City of Pontiac I*, 309 Mich App at 608-610. We initially determined that the suspension and repeal by referendum of 2011 PA 4 *after* the EM's issuance of EO 225 did not affect the validity of the EM's actions. *Id*. at 602-603. And we upheld the trial court's dismissal of plaintiff's claim under Const 1963, art 9, § 24 in light of the holding in *Studier* that healthcare benefits are not accrued financial benefits protected by that constitutional provision. *Id*. at 603-605. We also found without merit plaintiff's ordinance violation claim because a city ordinance governing the trust or healthcare benefits for retired police officers and firefighters was not identified. *Id*. at 605-606.

With respect to plaintiff's breach of contract claim, we explained that defendant's contractual obligation to fund the trust arose from the pertinent CBAs and not the trust agreement itself. *City of Pontiac I*, 309 Mich App at 607. We concluded, on the basis of the parties' submissions, that defendant's actuarially required contribution to the trust was past due on July 1, 2012, and that, without modification of the pertinent CBAs, defendant's obligation to fund the trust was breached on that date. *Id*. at 597, 607. We reasoned that the EM had the *authority* under 2011 PA 4 to retroactively amend the CBAs with respect to defendant's obligation to contribute to the trust. *Id*. at 607-608. We noted that

> after complying with the conditions specified in 2011 PA 4, the EM could "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agree-

> ment." MCL 141.1519(1)(k). Because the parties to a collective bargaining agreement could apply its modified terms retroactively, we conclude that the EM also could do so under § 19(1)(k). [*City of Pontiac I*, 309 Mich App at 608.]

But we later concluded that EO 225 did *not*, in fact, eliminate defendant's actuarially required contribution to the trust for the fiscal year ending June 30, 2012. *Id*. at 608-609. We reasoned that EO 225 removed defendant's obligation to *continue to make* contributions to the trust, and considering that EO 225 was given immediate effect upon its adoption on August 1, 2012, we determined that EO 225 applied to defendant's present or future obligations, not to defendant's accrued but unpaid contributions to the trust for the fiscal year ending June 30, 2012. *Id*. at 608-609. We found support for our reading of EO 225 in the written communications between the EM and the State Treasurer preceding the issuance of EO 225. *Id*. at 609-610.

Defendant applied for leave to appeal in our Supreme Court, which held oral argument on the application. On May 18, 2016, our Supreme Court reversed in part and vacated in part this Court's opinion and remanded the case to this Court. *City of Pontiac II*, 499 Mich 921. Our Supreme Court's order states, in relevant part:

> The Court of Appeals erred in its reading of Executive Order 225 (EO 225). Contrary to the Court of Appeals conclusion, EO 225 by its plain language expresses the intent of the emergency manager to extinguish the defendant's 2011-2012 fiscal year contribution. Although that contribution accrued on June 30, 2012, the defendant had not yet paid the obligation when EO 225 went into effect. EO 225 clearly states that, as of August 1, 2012, the defendant no longer has an obligation "to continue to make contributions" under Article III of the Trust Agreement. It does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both. Accordingly, the Court of Appeals erred by

> concluding that the emergency manager did not intend to extinguish the defendant's 2011-2012 fiscal year contribution. Nonetheless, although the Court of Appeals determined that the emergency manager could retroactively extinguish the 2011-2012 fiscal year contribution through his authority under 2011 PA 14 [sic], it did not specifically address whether EO 225 was a permissible retroactive modification of the plaintiff's accrued right to the contribution. See *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26[; 852 NW2d 78] (2014). We therefore reverse that part of the Court of Appeals judgment which interprets EO 225, vacate that part of the Court of Appeals judgment which discusses the plaintiff's breach of contract claim, and remand this case to the Court of Appeals for it to consider: (1) whether the retroactivity analysis stated in *LaFontaine* applies to EO 225; (2) if so, whether the extinguishment of the defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*; and (3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution. [*City of Pontiac II*, 499 Mich at 921.]

On remand, this Court allowed the parties to file supplemental briefs. *Bd of Trustees of the City of Pontiac v City of Pontiac*, unpublished order of the Court of Appeals, entered June 24, 2016 (Docket No. 316418). We now consider the three questions presented by our Supreme Court in its remand order.

II. ANALYSIS

(1) DOES THE *LaFONTAINE* RETROACTIVITY ANALYSIS APPLY TO EO 225?

In *LaFontaine*, our Supreme Court articulated the following principles to consider when deciding whether legislation may permissibly be applied retroactively:

> Retroactive application of legislation presents problems of unfairness because it can deprive citizens of

legitimate expectations and upset settled transactions. We have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect. In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [*LaFontaine*, 496 Mich at 38-39 (quotation marks, ellipsis, and citations omitted); see also *In re Certified Questions*, 416 Mich 558, 570-571; 331 NW2d 456 (1982) (stating the same four principles).]

We have not located any caselaw stating whether the principles set forth in *Certified Questions* and *LaFontaine* for determining whether a statute may be applied retroactively should also be used when considering whether an emergency manager's executive order may be given retroactive effect. Nevertheless, we conclude that it is appropriate to apply the *Certified Questions* and *LaFontaine* principles concerning when legislation may permissibly be given retroactive effect to an emergency manager's executive order. The determination of whether legislation applies retroactively is primarily a question of statutory interpretation. See *LaFontaine*, 496 Mich at 34 (stating that "questions of statutory interpretation [are reviewed] de novo, including questions regarding retroactivity of amendments"); *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) ("In determining whether a statute should be applied retroactively or prospectively only, the primary and overriding

rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.") (quotation marks and citation omitted). Executive orders are generally subject to the same rules of interpretation as statutes. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 756-757; 330 NW2d 346 (1982); *Aguirre v Dep't of Corrections*, 307 Mich App 315, 320-321; 859 NW2d 267 (2014). Because the determination of retroactivity is primarily a matter of interpretation and because executive orders are interpreted similarly to statutes, we believe the principles enunciated in *LaFontaine* that were used to determine whether a statute may permissibly be given retroactive effect should also be used to determine whether an executive order applies retroactively. We therefore answer our Supreme Court's first question in the affirmative. The retroactivity analysis set forth in *LaFontaine* applies to EO 225.[1]

(2) UNDER *LaFONTAINE*, MAY DEFENDANT EXTINGUISH THROUGH EO 225 ITS ACCRUED BUT UNPAID 2011–2012 FISCAL YEAR TRUST CONTRIBUTION?

Having determined that the *LaFontaine* analysis is applicable to EO 225, we now analyze whether the extinguishment of defendant's accrued but unpaid 2011–2012 fiscal year contribution to the trust is permissible under *LaFontaine*.[2] The first principle to

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[1] This conclusion is supported by the fact that the United States Supreme Court has stated "that congressional enactments *and administrative rules* will not be construed to have retroactive effect unless their language requires this result." *Landgraf v USI Film Prod*, 511 US 244, 272; 114 S Ct 1483; 128 L Ed 2d 229 (1994) (emphasis added; quotation marks and citation omitted).

[2] The issue here is *not* whether the EM had authority under 2011 PA 4 to modify collective bargaining agreements; there is no question that

consider is "whether there is specific language providing for retroactive application." *LaFontaine*, 496 Mich at 38. In the statutory context, legislative silence regarding retroactivity undermines any argument that a statutory provision was intended to apply retroactively. *Id*. at 40. "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012).[3] "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006).

In its order remanding the case to this Court, our Supreme Court stated that "EO 225 clearly states that, as of August 1, 2012, the defendant no longer has an obligation 'to continue to make contributions' under Article III of the Trust Agreement." *City of Pontiac II*, 499 Mich at 921. But because EO 225 "does not differentiate between already accrued, but unpaid obligations and future obligations, . . . [it] thus by its

the EM had that authority. See *City of Pontiac I*, 309 Mich App at 607 (stating that "[u]nder 2011 PA 4, the EM could modify collective bargaining agreements, and, hence, could modify the city's obligation to contribute to the trust"). Rather, the question presented is whether the particular executive order at issue in this case, EO 225, comprised a permissible retroactive modification of defendant's contractual obligation to contribute to the trust under the retroactivity analysis set forth in *LaFontaine*.

[3] This presumption against retroactive legislation is premised on enduring legal principles " 'deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.' " *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 166; 725 NW2d 56 (2006), quoting *Landgraf*, 511 US at 265.

terms applies to both." *Id*. Thus, our Supreme Court held that this Court "erred by concluding that the emergency manager did not intend to extinguish the defendant's 2011-2012 fiscal year contribution." *Id*. The law-of-the-case doctrine binds this Court on remand to follow a decision of our Supreme Court regarding a particular issue in the same case. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). This Court is therefore bound by our Supreme Court's determination that EO 225 by its terms applies to both accrued but unpaid obligations and future obligations and that the EM intended to extinguish defendant's 2011–2012 fiscal year contribution.

But our Supreme Court did not determine whether EO 225 satisfies the first principle set forth in *LaFontaine*, i.e., "whether there is specific language providing for retroactive application." *LaFontaine*, 496 Mich at 38. Indeed, the Supreme Court's decision to remand the case to this Court to conduct an analysis under *LaFontaine* strongly suggests that the Supreme Court did not mean to resolve that issue. The fact that, as our Supreme Court determined, EO 225 "does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both," *City of Pontiac II*, 499 Mich at 921, does not answer the question whether EO 225 expresses *with the requisite degree of clarity* the intent that EO 225 would have a retroactive effect. See *Davis*, 272 Mich App at 155-156 (requiring a clear, direct, and unequivocal expression of intent to have a statute apply retroactively); *id*. at 167 (explaining that the United States Supreme Court has "emphasized that to give legislation retroactive effect, Congress is required to so indicate in the language of the statute in a manner that is 'so clear and positive as to leave no

room to doubt that such was the intention of the legislature' "), quoting *Landgraf v USI Film Prod*, 511 US 244, 272; 114 S Ct 1483; 128 L Ed 2d 229 (1994) (citation and quotation marks omitted).[4] See also *Frank W Lynch & Co*, 463 Mich at 587 (expressing agreement "with the *Landgraf* Court that a requirement that the Legislature make its intention clear 'helps ensure that [the Legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness' ") (alteration in original), quoting *Landgraf*, 511 US at 268.[5]

Our Supreme Court reasoned that EO 225 by its terms applies to both future obligations and accrued but unpaid obligations, given that EO 225 does not differentiate between those obligations. Although such an inference arises from the lack of differentiation between the two types of obligations, EO 225 does not clearly, directly, and unequivocally state that it is intended to apply retroactively to unpaid but accrued obligations. We conclude that the text of the order does

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[4] This Court in *Davis* noted that due process interests of fair notice and repose should be considered when deciding whether a statute should be applied retroactively. *Davis*, 272 Mich App at 158 n 3, citing *Landgraf*, 511 US at 266. See also *LaFontaine*, 496 Mich at 38 (noting that problems of unfairness arise from the retroactive application of legislation and citing *Downriver Plaza Group v Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994), which addressed a due process issue concerning the retroactivity of legislation that might " 'deprive citizens of legitimate expectations and upset settled transactions' ") (citation omitted).

[5] Although these cases address the obligation of a *legislative* body to express with sufficient clarity the intent to apply a provision retroactively, we have already concluded that the same requirement should apply equally to the author of an executive order given that executive orders are interpreted like statutes. See *Soap & Detergent Ass'n*, 415 Mich at 756-757; *Aguirre*, 307 Mich App at 320-321. Also, applying executive orders retroactively can present problems of unfairness similar to applying legislation retroactively. See *LaFontaine*, 496 Mich at 38.

not acknowledge with the required clarity the existence of accrued but unpaid obligations or state directly that such obligations were being retroactively removed. See *LaFontaine*, 496 Mich at 40 (noting that the Legislature had previously used specific retroactivity language when amending the relevant statute and that the Legislature's silence regarding retroactivity in the amendment at issue undermined any claim that the amendment was intended to apply retroactively); *Frank W Lynch & Co*, 463 Mich at 584 (noting the absence of express language regarding retroactivity and the fact that the Legislature knows how to clearly state its intention that a statute apply retroactively). Also, EO 225 was given immediate effect, but this does not clearly express an intention that it is to apply retroactively. See *LaFontaine*, 496 Mich at 40 (noting that "the Legislature provided for the law to take immediate effect *upon its filing date* . . . only confirms its textual prospectivity"); *Johnson*, 491 Mich at 430 (noting that giving legislation "immediate effect" does not "at all suggest" that the legislation applies retroactively). We therefore conclude that the first principle stated in *LaFontaine*, 496 Mich at 38—"whether there is specific language providing for retroactive application"—indicates that EO 225 should apply prospectively only because it lacks "clear, direct, and unequivocal" language providing for its retroactive application. *Davis*, 272 Mich App at 155-156.

The second principle under *LaFontaine* is that "in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event." *LaFontaine*, 496 Mich at 38-39. This principle " 'relate[s] to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute.' " *Id*. at 38 n 25, quoting *Certified Questions*, 416 Mich at 571.

We believe this principle is inapplicable under the facts and circumstances of this case.

The third principle identified in *LaFontaine* is that "in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past." *LaFontaine*, 496 Mich at 39, citing *Certified Questions*, 416 Mich at 571. "A statute may not be applied retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past." *Davis*, 272 Mich App at 158. When all the facts become operative and are known, a cause of action accrues and it becomes a vested right. *Certified Questions*, 416 Mich at 573; see also *Doe v Dep't of Corrections (On Remand)*, 249 Mich App 49, 61-62; 641 NW2d 269 (2001) ("A cause of action becomes a vested right when it accrues and all the facts become operative and known."). "In general, a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008) (quotation marks and citation omitted).

In this case, "[t]here is no dispute that Article III, § 1 of the trust obligates defendant to pay annual contributions to the trust that are determined to be 'actuarially necessary' to fund the future healthcare benefits of the pertinent retirees as required by the applicable [CBAs]." *City of Pontiac I*, 309 Mich App at 606. Further, the parties agree that defendant's actuarially required contribution to the trust for the fiscal year of 2011–2012 was due on or before June 30, 2012. *Id*. Defendant had not paid that obligation when EO 225

went into effect on August 1, 2012. *City of Pontiac II*, 499 Mich at 921. Hence, as of July 1, 2012, defendant was in breach of its contractual obligation to make its annual contribution to the trust for the fiscal year of 2011–2012. Plaintiff's cause of action for breach of contract therefore accrued, and all the facts became operative and known, on July 1, 2012, when defendant failed to perform under the contract. *Tenneco Inc*, 281 Mich App at 458. This accrued cause of action became a vested right as of that date. *Doe*, 249 Mich App at 61-62. Retroactive application of EO 225 would impair or abolish this vested right by eliminating defendant's contractual obligation, which forms the basis for plaintiff's breach of contract claim. By impairing or abolishing an existing cause of action, EO 225 falls within the general proscription on retroactive provisions identified in the third *LaFontaine* principle. See *Certified Questions*, 416 Mich at 573; *Doe*, 249 Mich App at 62.

The fourth *LaFontaine* principle is that "a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute." *LaFontaine*, 496 Mich at 39, citing *Certified Questions*, 416 Mich at 571. As discussed, retroactive application of EO 225 would impair or abolish plaintiff's accrued cause of action for breach of contract. Hence, even if EO 225 could be deemed remedial or procedural, the fourth *LaFontaine* principle does not support retroactive application of EO 225 given that a vested right would be affected. Our "Supreme Court has held that a statute significantly affecting a party's substantive rights should not be applied retroactively merely because it can also be characterized in a sense as 'remedial.' " *Doe*, 249 Mich App at 62, citing *Frank W Lynch & Co*, 463 Mich at 585. In the context of retroactivity analysis under *LaFontaine* and *Certified Questions*,

characterization of a statute as "remedial" "should only be employed to describe legislation that does not affect substantive rights." *Frank W Lynch & Co*, 463 Mich at 585. In this case, because EO 225 affects substantive rights, it cannot operate retroactively under the fourth *LaFontaine* principle. See *Doe*, 249 Mich App at 62-63.

Accordingly, we conclude that the retroactive application of EO 225 to extinguish defendant's accrued but unpaid contribution to the trust for the 2011–2012 fiscal year is impermissible under *LaFontaine*. EO 225 does not contain "clear, direct, and unequivocal" language providing for its retroactive application, *Davis*, 272 Mich App at 155-156, and its retroactive application would impair or abolish plaintiff's accrued cause of action for breach of contract, a vested right, *Doe*, 249 Mich App at 61-62. The trial court therefore erred by granting summary disposition in favor of defendant with respect to plaintiff's breach of contract claim.

(3) IF *LaFONTAINE* DOES NOT APPLY, WHAT IS THE PROPER METHOD TO DETERMINE WHETHER EO 225 MAY BE APPLIED RETROACTIVELY?

Our Supreme Court's remand order further directed this Court to consider whether, "if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution." *City of Pontiac II*, 499 Mich at 921. As the Court's language reflects, it is only necessary for this Court to consider an alternative analytical framework if the *LaFontaine* analysis does not apply. Having concluded that *LaFontaine* does apply, it is unnecessary to address what method for assessing the permissibility of retroactive effect would otherwise apply to this situation.

Finally, we note that plaintiff's supplemental brief on remand raises additional issues that are beyond the scope of our Supreme Court's remand order. "[W]hen an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). Accordingly, we decline to address plaintiff's arguments concerning additional issues.

In summation, we hold that the retroactivity analysis in *LaFontaine* applies to EO 225 and that the purported extinguishment of defendant's accrued but unpaid 2011–2012 fiscal year contribution is impermissible under *LaFontaine*. We therefore reverse the trial court's order granting summary disposition to defendant with respect to plaintiff's breach of contract claim and remand for further proceedings. We do not retain jurisdiction. No taxable costs are awarded to either party because a public question is involved. MCR 7.219.

MARKEY, P.J., and OWENS and FORT HOOD, JJ., concurred.

PEOPLE v PERRY

Docket No. 328409. Submitted October 11, 2016, at Grand Rapids. Decided October 27, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 1009.

Rodney D. Perry was convicted in the Muskegon Circuit Court following a jury trial of two counts of uttering counterfeit notes, MCL 750.253; one count of false pretenses involving $1,000 or more but less than $20,000, MCL 750.218(4)(a); and one count of identity theft, MCL 445.65. The charges arose from a series of events beginning when defendant allegedly stole Montay Lee's backpack and used Lee's driver's license to cash a check he found in the backpack. Those actions occurred in Grand Rapids, and defendant was charged for that conduct in the Kent Circuit Court. Defendant later used Lee's name and driver's license when he purchased a 1998 Pontiac Firebird in Muskegon County from Michael Bourdon and paid for the car with counterfeit bills. The court, Timothy G. Hicks, J., sentenced defendant as a second-offense habitual offender to three concurrent sentences of 2 to 7½ years of imprisonment and one term of 12 months in jail. Defendant appealed.

The Court of Appeals *held*:

1. MCR 6.112(H) allows a trial court to amend an information at any time before, during, or after a trial as long as the amendment does not unfairly surprise or prejudice a defendant. In this case, on the second day of trial and over defense counsel's objection, the trial court granted the prosecution's motion to amend the information to add one count of identity theft. Defendant claimed that he was unfairly surprised and prejudiced by the amendment, but the trial court noted that defendant had been aware before trial began that the prosecution intended to amend the information to include the new charge and that nothing prevented defendant's counsel from examining witnesses about the charge counsel knew might be added. Because defendant knew of the prosecution's intent to amend the charges, the amendment of the information did not unfairly surprise defendant nor did it prejudice his defense. And there was no evidence that the amendment of the information was the result of prosecutorial vindictiveness in response to defendant's exercise of his

right to trial. The addition of identity theft to the charges against defendant was within the prosecution's charging discretion and did not itself constitute evidence of vindictiveness. The trial court did not abuse its discretion by allowing the amendment of the information.

2. A defendant's Sixth Amendment right to counsel, US Const, Am VI, is offense-specific and does not attach until after the initiation of adversarial judicial criminal proceedings. In this case, adversarial judicial criminal proceedings had not yet begun in defendant's Muskegon County case (uttering counterfeit bills) even though defendant had been arrested and was in custody for the offense he committed in Kent County (cashing the stolen check). Defendant's Sixth Amendment right to counsel had therefore not attached at the time the photographic lineup was conducted in Muskegon County, and the trial court did not err by refusing to suppress the identification evidence on the basis that defense counsel was not present for the photographic lineup.

3. The crime of identity theft described in MCL 445.65(1) does not require that an individual actually be defrauded by a defendant's use of another person's identifying information. The crime of identity theft requires only that the defendant use another person's identifying information to obtain property with the intent to defraud or to violate the law. In this case, defendant presented Lee's driver's license to the seller of the Firebird so the seller could complete the title information at the time of sale. This evidence was sufficient to prove the elements of identity theft.

4. Whether a defendant may be subject to multiple punishments for the same conduct is determined by the language of the statutory provision prohibiting the conduct. Under MCL 750.253, a defendant is guilty of uttering a counterfeit bill when, with the intent to defraud, he or she tenders a counterfeit bill as payment for any debt when the defendant knows that the tendered bill is counterfeit. In this case, defendant contended that the two convictions of uttering counterfeit bills violated the Double Jeopardy Clauses of the United States and Michigan Constitutions; that is, defendant claimed he was subjected to multiple punishments for the same offense because the bills were used in a single transaction. However, the statutory language clearly penalizes the tendering of a singular bill; the language does not indicate that the offense described applies only to the specific transaction in which the counterfeit bills were tendered, regardless of the number of bills tendered. Therefore, the unit of prosecution under MCL 750.253 is determined by the number of bills knowingly tendered with the intent to defraud. In this case, defendant

tendered 40 counterfeit bills. Consequently, defendant could have been charged with 40 separate counts of uttering a counterfeit bill despite the fact that defendant tendered all 40 bills in a single transaction. The Legislature intended that the unit of prosecution be determined by the number of bills tendered because each bill has the potential to disrupt the stream of public commerce and cause harm to others once the bill is introduced into the public realm. The trial court properly denied defendant's claim that he was wrongly punished twice for the same offense.

Affirmed.

1. CRIMINAL LAW — UTTERING COUNTERFEIT BILLS — DOUBLE JEOPARDY — UNIT OF PROSECUTION.

The unit of prosecution for the crime described in MCL 750.253 is the counterfeit bill itself; a defendant may be charged with as many counts as there are counterfeit bills tendered during a single transaction; that is, the number of charges that may be brought is not limited by the number of transactions that occurred, but by the number of bills tendered.

2. CRIMINAL LAW — IDENTITY THEFT — ELEMENTS.

The crime of identity theft set forth in MCL 445.65(1) does not require that an individual actually be defrauded by the defendant's use of another person's identifying information; it requires only that the defendant use another person's identifying information to obtain property with the intent to defraud or to violate the law.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for defendant.

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

PER CURIAM. A jury convicted defendant of two counts of uttering counterfeit notes, MCL 750.253; one

count of false pretenses involving $1,000 or more but less than $20,000, MCL 750.218(4)(a); and one count of identity theft, MCL 445.65. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to three concurrent prison terms of 2 to 7½ years and one term of 12 months in jail. Defendant now appeals as of right. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

This appeal arises out of the exchange of counterfeit money during a Craigslist transaction, and the background facts involve the fraudulent cashing of a check in Grand Rapids, Michigan.

On July 27, 2014, Montay Lee participated in a basketball tournament in South Haven, Michigan, at which time his bag was stolen. His bag contained a variety of items, including his wallet, identification, and a $1,100 paycheck from the city of Grand Rapids. That same day, defendant cashed Lee's stolen check at Hall Street Party Store in Grand Rapids, Michigan. Wasif Hermiz, the owner of the party store, testified that defendant showed him Lee's identification when cashing the check. Additionally, because defendant was a new customer and because the check was for a significant amount of money, Hermiz took defendant's thumbprint and had him put it on the back of the check.

Michael Bourdon, the victim in the instant case, posted for sale on Craigslist a 1998 Pontiac Firebird for $2,500. On or around August 8, 2014, defendant and defendant's "mechanic," Marcus Lavar Smith, test-drove the Firebird. Defendant agreed to the $2,500 purchase price and handed Bourdon an envelope con-

sisting of a $100 bill, several $50 bills, and 15 to 20 $10 bills. In exchange for the money, Bourdon filled out the title work, indicating that the purchaser was Montay Lee. The transaction occurred in Muskegon County.

Bourdon's coworker, Jordan Sohasky, testified that he witnessed the transaction. After defendant and Smith left, both Bourdon and Sohasky noted that the money looked funny. Bourdon determined that there were no holograms on some of the bills, and Sohasky noticed that the bills were too thick. Bourdon immediately called the police. A police officer accompanied Bourdon to Comerica Bank where it was determined that all of the money was counterfeit except for the $100 bill. The Firebird was entered into the Law Enforcement Information Network as stolen.

A few hours later, defendant and another individual went to the Secretary of State's Office in Grand Rapids, Michigan. A worker testified that the individuals wanted to transfer a vehicle title and change an address. The worker first changed the address and put a change of address sticker on the back of a Michigan license that displayed the name "Montay Lee." The worker saw that the vehicle was identified as stolen. He went back into his office to contact the police, and the individuals left before he returned. The Firebird was found approximately a half mile away from the Secretary of State's office.

In an interview with the police, defendant admitted to passing a check at the Hall Street Party Store, but he claimed that "somebody" offered him money to cash the check and that he did not know that the check was stolen. Defendant denied knowledge of the passing of counterfeit money in Muskegon County and denied being part of that transaction. There was no physical evidence connecting defendant to the counterfeit money.

The jury found defendant guilty of identity theft, two counts of uttering counterfeit notes, and one count of false pretenses. Defendant was sentenced as previously stated. He now appeals as of right.

II. AMENDMENT OF INFORMATION

Defendant argues that the trial court erred by permitting the prosecution to amend the information during trial to add a count of identity theft because (1) the amendment was an unfair surprise, and (2) it was the product of prosecutorial vindictiveness. We disagree.

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). The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Duenaz*, 306 Mich App 85, 90; 854 NW2d 531 (2014).

First, defendant contends that the amendment of the information during the trial was an unfair surprise and unduly prejudicial because he was denied the opportunity to cross-examine witnesses on the charge. A trial court may amend an information at any time before, during, or after a trial, as long as the amendment does not unfairly surprise or prejudice the defendant. *McGee*, 258 Mich App at 686; MCR 6.112(H). A defendant may establish unfair surprise by articulating how additional time to prepare would have benefited the defense. See *McGee*, 258 Mich App at 693.

In this case, the prosecutor stated on the morning before trial that if the facts at trial supported it, she intended to move to amend the information to add a charge of identity theft for defendant's use of Lee's information when he attempted to purchase the car

from Bourdon. On the second day of trial, over defense counsel's objection, the trial court granted the prosecution's motion to amend the information to include the additional charge. The trial court ruled that the charge was not a surprise because it involved facts that had already been presented and that defense counsel "ha[d] known about that threat for a while." Because defendant knew of the prosecution's intent to amend the charges in this case before trial started, he has not demonstrated that the amendment during the trial itself denied him the opportunity to cross-examine the witnesses on the new charge. Defendant was aware of the possibility of an identity-theft charge before the witnesses were examined.

Second, defendant contends that the amendment was the result of prosecutorial vindictiveness and a punishment for his decision to exercise his right to trial. The prosecution violates a defendant's right to due process by punishing him or her for asserting protected statutory or constitutional rights. *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). However, the imposition of additional charges that are within the prosecution's charging discretion does not constitute sufficient evidence from which to presume vindictiveness. *People v Jones*, 252 Mich App 1, 8; 650 NW2d 717 (2002). If the prosecution brings greater charges after a defendant's failure to plead guilty, "the defendant must affirmatively prove actual vindictiveness in order to establish that there was a denial of due process." *Id*. Actual vindictiveness requires objective evidence of hostility or a threat that suggests that the defendant was deliberately penalized for exercising his or her rights. *Ryan*, 451 Mich at 36.

In this case, defendant relies on the timing of the prosecution's decision to seek an additional charge as

evidence that the prosecution's decision was vindictive. The timing in this case was not evidence of presumptive vindictiveness. See *Jones*, 252 Mich App at 8. The record contains no indication of actual vindictiveness on the part of the prosecution. The record is absent of any expressed hostility or threats that suggest that the prosecution deliberately penalized defendant for exercising his right to trial. We conclude that the trial court did not abuse its discretion by granting the prosecution's motion to amend the information in this case.

III. PHOTOGRAPHIC LINEUP

Defendant argues that the trial court should have suppressed evidence of his identification in the photographic lineup because he was in custody at that time and should have received a corporeal lineup attended by counsel. We disagree.

"This Court reviews de novo questions of law relevant to a motion to suppress [an identification]." *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

At trial, defendant argued that he was denied the right to counsel because he was in custody and adversarial criminal proceedings had been initiated against him when the photographic lineup occurred. Defendant further argued that the Kent County case for which he was in custody was related and intertwined with the instant case and that the right to counsel attached upon his arrest on September 22, 2014. Defendant noted that the Kent County case was not initiated until the Grand Rapids Police Department was informed that a bad check was cashed in its jurisdiction. Defendant argued that the police could have easily determined that defendant had been arrested and was in custody. The trial court disagreed and denied defendant's motion to suppress.

On appeal, defendant relies on *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled by *Hickman*, 470 Mich 602, arguing that the trial court erred and that he was entitled to a corporeal identification with counsel present instead of the photographic identification procedure. In *Anderson*, the Michigan Supreme Court ruled that when a suspect is in custody, investigators should not use a photographic identification procedure, and that a defendant has as much right to counsel during a photographic identification as he or she would have during a corporeal identification. *Anderson*, 389 Mich at 186-187. But the Michigan Supreme Court subsequently overruled *Anderson*, stating that a defendant's right to counsel "attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *Hickman*, 470 Mich at 603. See *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977). Although the *Hickman* decision was made in the context of a corporeal identification, the decision broadly overruled *Anderson* to the extent that the *Anderson* decision went "*beyond the constitutional text* and extend[ed] the right to counsel to a time before the initiation of adversarial criminal proceedings," *Hickman*, 470 Mich at 603-604 (emphasis added), and it also explained the consistency between the federal and state provisions providing the right to counsel, *id*. at 607-609. Therefore, applying *Hickman*'s reasoning to photographic identifications that occurred before the initiation of adversarial judicial proceedings is consistent with the *Hickman* decision as it pertained to corporeal identifications.

Defendant was taken into custody on September 22, 2014, in the Kent County case, and it appears that the photographic lineup occurred on September 25, 2014. Defendant does not dispute that adversarial judicial criminal proceedings for the instant case had not yet

been initiated when the photographic lineup occurred. Because adversarial judicial criminal proceedings for the instant case had not been initiated when the photographic lineup occurred, defendant did not have a right to counsel—even under Michigan law. *Hickman*, 470 Mich at 603-604, 607-609 (holding that the right to counsel attaches at or after the initiation of adversarial judicial proceedings and that the protections under the Michigan Constitution are consistent with the Sixth Amendment right to counsel); *People v Smielewski*, 214 Mich App 55, 60; 542 NW2d 293 (1995) ("The Sixth Amendment right [to counsel], *which is offense-specific* and cannot be invoked once for all future prosecutions, attaches only at or after adversarial judicial proceedings have been initiated.") (emphasis added).

Nevertheless, defendant argues that he had a right to counsel under *People v Kurylczyk*, 443 Mich 289; 505 NW2d 528 (1993), because he was in custody. However, *Kurylczyk* was decided before *Hickman*, *Kurylczyk*'s reasoning was based on *Anderson*, see *Kurylczyk*, 443 Mich at 297-298, and *Hickman* held that *Anderson* was overruled to the extent that it went "*beyond the constitutional text* and extend[ed] the right to counsel to a time before the initiation of adversarial criminal proceedings," *Hickman*, 470 Mich at 603-604 (emphasis added). Therefore, although the *Hickman* decision did not expressly overrule—or even mention—*Kurylczyk* in the majority opinion, the *Hickman* decision applies equally to *Kurylczyk*. Accordingly, defendant's reliance on *Kurylczyk* for the proposition that he was entitled to counsel because he was in custody is misplaced.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his conviction of identity theft. We disagree.

This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction. *People v Henderson*, 306 Mich App 1, 8; 854 NW2d 234 (2014). We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the crime's elements beyond a reasonable doubt. *Id*. at 9.

In pertinent part, MCL 445.65(1) prohibits a person from using the identifying information of another person to obtain property with the intent to defraud or violate the law. MCL 445.65(1)(a)(*i*). Among other things, identifying information includes "a person's name, address, telephone number, driver license or state personal identification card number . . . ." MCL 445.63(q). Circumstantial evidence and reasonable inferences arising from that evidence can sufficiently prove the elements of a crime, including the defendant's state of mind, knowledge, and intent. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

In this case, Bourdon testified that defendant identified himself as Montay Lee and presented Lee's driver's license when Bourdon was filling out the car's title information. Defendant presented the identification simultaneously with the counterfeit money. Accordingly, a rational jury could find beyond a reasonable doubt that defendant used Lee's name and license with the intent to defraud Bourdon or, at the very least, the intent to violate the law.

Defendant contends that he did not actually defraud Bourdon with Lee's stolen identification because Bourdon was not overly concerned with defendant's name, and the identification did not influence Bourdon's decision to sell the car. Defendant seeks to add an element to the crime that does not exist. Nothing in the

language of MCL 445.65(1) requires the victim to be actually defrauded by a defendant's use of another's identifying information.

We conclude that sufficient evidence supported defendant's conviction of identity theft.

V. DOUBLE JEOPARDY

Finally, defendant argues that his conviction of two counts of passing counterfeit bills violated his right against double jeopardy. We disagree.

Generally, "[a] challenge under the double jeopardy clauses of the federal and state constitutions presents a question of law that this Court reviews de novo." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, because defendant's issue is unpreserved, this Court reviews the issue for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant was convicted of two counts of uttering counterfeit notes under MCL 750.253, which provides:

> Any person who shall utter or pass, or tender in payment as true, any such false, altered, forged or counterfeit note, certificate or bill of credit for any debt of this state, or any of its political subdivisions or municipalities, any bank bill or promissory note, payable to the bearer thereof, or to the order of any person, issued as aforesaid, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud as aforesaid, shall be guilty of a felony, punishable by imprisonment of not more than five years or by fine of not more than two thousand five hundred dollars.

At trial, the prosecutor argued to the jury: "[W]e have 40 bills here. Any one of them could satisfy a count; all right? Two is just the magic number that was picked. We could be as high as 40, but that's not what we're lookin' at . . . ."

On appeal, defendant argues that there is nothing in the language of the statute clearly expressing a legislative intent to permit a separate charge for every counterfeit bill that is used to defraud when multiple bills are used within a single transaction. Accordingly, defendant argues that the "unit of prosecution" for a violation of the statute is the number of *transactions* using counterfeit currency and not the number of counterfeit *bills* used in a single transaction. The prosecution, citing the rule of lenity, concedes error. However, we are not beholden to the prosecution's concession and conclude that the plain language of the statute permits multiple convictions for uttering multiple notes during only one transaction. Given the plain reading of the statute, the rule of lenity is inapplicable.

At the outset, we note that, contrary to the prosecution's argument on appeal that the "unit of prosecution" theory "has nothing to do with the Double Jeopardy Clause," this Court has reviewed "unit of prosecution" issues in the context of double jeopardy. See, e.g., *People v Barber*, 255 Mich App 288, 293; 659 NW2d 674 (2003) (analyzing the defendant's three arson convictions in a double jeopardy context and noting that "[t]he 'unit of prosecution' has been applied in other contexts to determine whether multiple punishments violate double jeopardy principles"); see also *People v Wakeford*, 418 Mich 95, 103-104; 341 NW2d 68 (1983) ("Under Michigan law, the defendant's two sentences for his armed robbery convictions constitute separate punishments even though the sentences are to be served concurrently. Therefore, the critical inquiry is whether the punishments were imposed for the 'same offense . . . .' ").

"Both the United States and the Michigan constitutions protect a defendant from being placed twice in

jeopardy, or subject to multiple punishments, for the same offense." *McGee*, 280 Mich App at 682, citing US Const, Am V; Const 1963, art 1, § 15; and *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). "The state and federal constitutional guarantees are substantially identical and should be similarly construed." *People v Ackah-Essien*, 311 Mich App 13, 31; 874 NW2d 172 (2015). "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). "To determine whether a defendant has been subjected to multiple punishments for the 'same offense,' [this Court] must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed." *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). If "the Legislature clearly intends to impose such multiple punishments, there is no double jeopardy violation." *Id.*; see also *People v Miller*, 498 Mich 13, 17-18; 869 NW2d 204 (2015) (explaining that the double jeopardy analysis under the multiple punishment strand is controlled by the parameters set forth by the Legislature and that there is no double jeopardy violation when the Legislature specifically authorizes multiple punishments). When the dispositive question is whether the Legislature intended two convictions to result from a single statute, it presents a "unit of prosecution" issue. *Wakeford*, 418 Mich at 111. The question is whether the Legislature intended a single criminal transaction to give rise to multiple convictions under a single statute. *Id*. at 112.

When analyzing a statute to determine what unit of prosecution the Legislature intended, this Court and our Supreme Court have focused on various aspects of the statutory text. In *Barber*, 255 Mich App at 295, this Court focused on the harm that the statutory text intended to prevent when it held that there was no double jeopardy violation because the arson statutes aimed "to prevent the burning of a dwelling, building, or other real property," and each separate house was the proper unit of prosecution. See also *People v Mathews*, 197 Mich App 143, 145; 494 NW2d 764 (1992) (finding that the statutory language of the felonious driving statute "suggest[ed] that its primary purpose is the protection of individuals from crippling injuries" and holding that "there is one unit of prosecution that arises whenever a defendant's reckless driving results in a crippling injury to another"). In *Wakeford*, 418 Mich at 111-112, the Court focused on the statutory text's reference to the victim in the singular and on the purpose of the statute. In that case, the Court noted that the text in the armed robbery statute consistently referred to the victim in the singular and that protecting people was the primary purpose of the statute, and the Court concluded that "the appropriate 'unit of prosecution' for armed robbery is the person assaulted and robbed." But see *id*. at 112 (explaining that "[t]he majority rule appears to be that the theft of several items at the same time and place constitutes a single larceny").

In this case, defendant argues that only one transaction or exchange of counterfeit bills occurred and, accordingly, that only one conviction of uttering and publishing could be sustained. This approach was specifically disavowed in *Wakeford* when the Court wrote: "To the extent certain language in [various cases] suggests that the critical test is whether the

defendant committed 'one single wrongful act', we specifically disavow that test. It is up to the Legislature, not this Court, to determine what constitutes a single offense." *Wakeford*, 418 Mich at 111. Therefore, the determination of this issue requires us to analyze the statutory text to determine the intent of the Legislature.

The main goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). And "[t]he most reliable indicator of the Legislature's intent is the words in the statute." *Id*. The words are interpreted "in light of their ordinary meaning and their context within the statute and [are] read . . . harmoniously to give effect to the statute as a whole." *Id*. "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *People v Giovannini*, 271 Mich App 409, 412-413; 722 NW2d 237 (2006). However, " '[i]f no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended.' " *People v Ford*, 262 Mich App 443, 450; 687 NW2d 119 (2004), quoting *People v Robideau*, 419 Mich 458, 488; 355 NW2d 592 (1984);[1] see also *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008) ("A provision is not ambiguous just because reasonable minds can differ regarding the meaning of the provision. Rather, 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.") (quotation marks and citations omitted; alteration in original).

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[1] *Robideau*, 419 Mich 458, was overruled by *People v Smith*, 478 Mich 292 (2007).

Turning again to the statute at issue, MCL 750.253 prohibits any person from uttering or passing, or tendering in payment as true, "*any* such false, altered, forged or counterfeit *note*" with the intent to defraud. (Emphasis added.) As the prosecution observes, the statute refers to "bank bill" or "note" in the singular, but MCL 8.3b provides:

> Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number. Every word importing the masculine gender only may extend and be applied to females as well as males.

Still, MCL 8.3b does not render MCL 750.253 ambiguous. In this particular case, the clear purpose of MCL 750.253 is to punish the use of counterfeit money to obtain property, but using counterfeit money to deceive a seller is just one evil the statute addresses. We hold that the clear intent of the statute, as expressed by the Legislature's use of the singular "note," is to address placing counterfeit and false bills into the stream of commerce. Not only was Bourdon deceived into turning over property in exchange for counterfeit money, but 40 counterfeit bills were then potentially part of the stream of commerce with the potential to harm others. For example, had Bourdon not called the police and investigated whether the money was counterfeit, he may have used those bills at various times to make various purchases. The harm as contemplated in the statute is placing false money into the public commerce. The statutory text of MCL 750.253 indicates the Legislature's intent to punish a defendant for each counterfeit bill that was introduced, uttered, passed, or tendered because the text reflects an intent to prevent counterfeit bills from being used. Given the clear

indication of legislative intent and the absence of ambiguity, the rule of lenity does not apply. *Wakeford*, 418 Mich at 113-114.

Affirmed.

K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ., concurred.

PEOPLE v ENGLISH

PEOPLE v SMITH

Docket Nos. 330389 and 330390. Submitted July 12, 2016, at Detroit. Decided October 27, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 991.

In Docket No. 330389, Lymance English was charged in the Oakland Circuit Court with possession with intent to deliver less than 50 grams of cocaine on or within 1,000 feet of school property (the school zone), MCL 333.7410(3), after controlled substances were found in his home, which was located within the specified school zone. In Docket No. 330390, Brandon R. Smith was similarly charged in the Oakland Circuit Court with possession with intent to deliver less than 50 grams of heroin on or within a school zone, MCL 333.7410(3), after controlled substances were found in his apartment and motor vehicle, which were both located within the specified school zone. Each defendant moved to dismiss the charge against him, arguing that intent to deliver a controlled substance in a school zone is an essential element of the offense and asserting that there was no evidence that he had intended to deliver drugs within a school zone. In Docket No. 330389, the court, Rae Lee Chabot, J., agreed with English's argument and dismissed the charge, and in Docket No. 330390, the court, Phyllis C. McMillen, J., similarly agreed with Smith's argument and dismissed the charge. In each case, the Court of Appeals denied the prosecution's delayed application for leave to appeal. The prosecution then sought leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, remanded the cases to the Court of Appeals for consideration as on leave granted. *People v English*, 499 Mich 872 (2016); *People v Smith*, 499 Mich 873 (2016).

In an opinion by WILDER, P.J., and an opinion by MURPHY, J., the Court of Appeals *held*:

MCL 333.7410(3) of the Public Health Code, MCL 333.7401 *et seq*., provides that an individual 18 years or over who violates MCL 333.7401(2)(a)(*iv*)—which proscribes possessing with intent to deliver less than 50 grams of a controlled substance that is a narcotic drug—by possessing a controlled substance with intent to deliver the substance to another person on or within 1,000 feet of school property or a library shall be punished by a term of imprisonment of not less than two years or more than twice that authorized by

MCL 333.7401(2)(a)(*iv*). To be guilty of violating MCL 333.7410(3), the prosecution must establish that the defendant possessed a controlled substance with an intent to deliver that substance to another person on or within 1,000 feet of school property or a library; the defendant must have specifically intended to deliver the controlled substance to a person who is physically on or within the school zone. Because there was no evidence presented in either case that the respective defendant intended to deliver the controlled substance to a person who was within the specified school or library zone, the trial court in each case correctly dismissed the MCL 333.7410(3) charge.

In Docket No. 330389, the trial court order was affirmed

In Docket No. 330390, the trial court order was affirmed.

WILDER, P.J., reasoned in the lead opinion that MCL 333.7410(3) was unambiguous because under the last-antecedent rule—a modifying word or clause is confined solely to the last antecedent unless a contrary intention appears—the phrase "on or within 1,000 feet" modifies and restricts the last antecedent, which is the word "person." For that reason, MCL 333.7410(3) unambiguously imposes criminal liability only if an offender specifically intended to deliver a controlled substance to a person on or within 1,000 feet of school property or a library.

MURPHY, J., concurring, disagreed with the lead opinion that MCL 333.7410(3) is unambiguous when it is interpreted in light of the last-antecedent rule. While he agreed with the lead opinion that to prove a defendant guilty under MCL 333.7410(3) the prosecution must prove that the offender possessed a controlled substance either inside or outside a school zone with the intent to deliver the controlled substance within a school zone, that interpretation was compelled by application of the last-antecedent rule in combination with the legislative history surrounding the passage of MCL 333.7410, as amended by 1999 PA 188.

O'CONNELL, J., dissenting, disagreed that to be guilty of violating MCL 333.7410(3) the prosecution must prove that the defendant intended to deliver a controlled substance within the school zone. MCL 333.7410(3) provides that its sentence is twice that authorized by MCL 333.7401(2)(a)(*iv*)—which prohibits in part the possession of controlled substances with the intent to deliver—and MCL 333.7410(3) is therefore a sentence enhancement provision. Because the only difference between MCL 333.7410(3) and MCL 333.7401(2)(a)(*iv*) is the location in which the drugs are possessed, the Legislature intended the enhanced sentence provision of MCL 333.7410(3) to apply when a defendant possesses with intent to deliver a controlled substance within 1,000 feet of a school or library, regardless of the location of the person

to whom the defendant intends to deliver the substance. This interpretation is consistent with a similar federal law, 21 USC 860(a), which has been interpreted by federal courts as being concerned with the location of the drugs, not the intended location of distribution. Judge O'CONNELL would have reversed the trial court orders and remanded for reinstatement of the MCL 333.7410(3) charges against both defendants.

CRIMINAL LAW — CONTROLLED SUBSTANCES — POSSESSION WITH INTENT TO DELIVER CONTROLLED SUBSTANCE TO A PERSON WITHIN 1,000 FEET OF SCHOOL OR LIBRARY — DEFINITION.

To be guilty of violating MCL 333.7410(3), the prosecution must establish that the offender possessed with an intent to deliver a controlled substance to another person on or within 1,000 feet of school property or a library; the offender must have specifically intended to deliver the controlled substance to a person who is physically on or within 1,000 feet of school property or a library.

Docket No. 330389:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

Michael J. McCarthy, PC (by *Michael J. McCarthy*), for Lymance English.

Docket No. 330390:

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

Richard E. Rosenberg, PC (by *Richard E. Rosenberg*), for Brandon R. Smith.

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

WILDER, P.J. In these consolidated cases, the prosecution appeals by leave granted[1] the trial courts' dismissal of charges against defendants, Lymance English (Docket No. 330389) and Brandon R. Smith (Docket No. 330390). The charges were brought under MCL 333.7410(3) for possession with intent to deliver drugs on or within 1,000 feet of school property. Based on its interpretation of MCL 333.7410(3), each trial court dismissed the charge, reasoning that although the prosecution presented evidence to establish that the respective defendant was arrested within 1,000 feet of school property while in possession of drugs, the prosecution failed to demonstrate that the defendant intended to deliver those drugs to a person on or within 1,000 feet of school property. I conclude that the trial courts properly construed MCL 333.7410(3) in accordance with the plain meaning of the statutory language, as demonstrated by its grammatical context, and this Court affirms the trial courts' dismissal of the MCL 333.7410(3) charges against defendants.

I. FACTUAL BACKGROUND

During a drug raid at the home of English, the police discovered about 14 grams of cocaine, marijuana, a digital scale, sandwich bags, and a handgun. Officers determined that English's property was within 1,000 feet of a high school. As a result, the charges against English included one count of possession with the intent to deliver less than 50 grams of cocaine within a school zone under § 7410(3).

Similarly, during a drug raid on the apartment and car of Smith, the police discovered 2.2 grams of heroin,

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[1] *People v English*, 499 Mich 872 (2016); *People v Smith*, 499 Mich 873 (2016).

baggies, a digital scale, rubber gloves, and a handgun. The officers determined that at the time of the raid, Smith's heroin was within 1,000 feet of a high school. Therefore, the charges against Smith included one count of possession with the intent to deliver less than 50 grams of heroin within a school zone under § 7410(3).

Following their respective preliminary hearings, English and Smith moved to dismiss the charges under § 7410(3). Both defendants contended that the statute required the prosecution to show that they had intended to deliver the drugs within the school zone. Defendants further contended that there was no such evidence. Accordingly, defendants argued, the trial courts were required to dismiss the charges against them under § 7410(3). In both cases, the trial courts agreed and dismissed the MCL 333.7410(3) charges.

The instant prosecutorial appeals ensued.

II. ANALYSIS

This Court reviews de novo the interpretation and application of statutes. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). Among other things, the Public Health Code, MCL 333.1101 *et seq*., criminalizes a wide range of conduct involving controlled substances. The provision at issue here is § 7410(3), which provides:

> An individual 18 years of age or over who violates section 7401(2)(a)(*iv*)[2] *by possessing with intent to deliver to another person on or within 1,000 feet of school property or a library a controlled substance* . . . shall be pun-

[2] MCL 333.7401(2)(a)(*iv*) proscribes "possess[ing] with intent to . . . deliver" less than 50 grams of a controlled substance that is a narcotic drug.

> ished . . . by a term of imprisonment of not less than 2 years or more than twice that authorized by section 7401(2)(a)(*iv*). [Emphasis added.]

On appeal, the parties offer three distinct interpretations of this language. The prosecution argues that § 7410(3) is ambiguous and should be construed in such a way that the phrase "on or within 1,000 feet of school property" modifies the phrase "possessing with intent to deliver." Put differently, under the prosecution's interpretation, a defendant who *possesses* drugs in a school zone need not intend to *deliver* those drugs on school property or within 1,000 feet of a school to face an enhanced penalty under § 7410(3). By contrast, although English agrees that § 7410(3) is ambiguous, he contends that the phrase "on or within 1,000 feet of a school" should be interpreted as modifying the phrase "to another person." Under English's proffered interpretation, a defendant who possesses a controlled substance is not subject to an enhanced penalty unless he or she intended to deliver the controlled substance to a person on or within 1,000 feet of school property. On the other hand, Smith argues that § 7410(3) is *un*ambiguous and that the plain statutory meaning requires the prosecution to show that the defendant intended to deliver a controlled substance to another person on school property or within a school zone. Under the interpretation argued by Smith, a defendant is subject to an enhanced penalty under § 7410(3) only if that defendant intended to deliver a controlled substance to a "person on or within 1,000 feet of school property or a library." I conclude that the interpretation of the statute asserted by Smith is correct.[3]

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[3] Because I agree with Smith that § 7410(3) is unambiguous, I need not consider his alternative argument that this Court should declare § 7410(3) void as unconstitutionally vague.

My conclusion hinges on the grammatical context of § 7410(3) and application of the last-antecedent rule.

> Our primary purpose in construing statutes is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Williams*, 475 Mich at 250 (quotation marks and citation omitted).]

"A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012) (quotation marks and citation omitted). The Legislature is presumed to know the rules of grammar, *People v Henderson*, 282 Mich App 307, 329; 765 NW2d 619 (2009), and therefore "statutory language must be read and understood in its grammatical context," *People v Houthoofd*, 487 Mich 568, 580-581; 790 NW2d 315 (2010). See also *People v Beardsley*, 263 Mich App 408, 412-413; 688 NW2d 304 (2004) ("Punctuation is an important factor in determining legislative intent, and the Legislature is presumed to know the rules of grammar."); *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132 (2009) ("The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language . . . ."). 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." *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002) (emphasis added), citing *Sun Valley Foods Co v Ward*,

460 Mich 230, 237; 596 NW2d 119 (1999) ("It is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears.").

Absent application of the last-antecedent rule, § 7410(3) does appear equally susceptible to more than one reasonable interpretation and, therefore, ambiguous. Such *potential* ambiguities in statutory language are, however, precisely what the last-antecedent rule is used to clarify. The "on or within 1,000 feet" phrase in § 7410(3) is both modifying and restrictive, and its last antecedent—i.e., "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence," 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47:33, pp 494-497—is the word "person." (Quotation marks and citation omitted.) For this reason, unless something in the statute "requires" a different interpretation, *Stanton*, 466 Mich at 616, it should be presumed that the Legislature intended the phrase "on or within 1,000 feet of school property or a library" to modify the word "person." Under this construction, § 7410(3) is rendered unambiguous; it imposes criminal liability only if an offender specifically intended to deliver a controlled substance to a "person on or within 1,000 feet of school property or a library."

Notwithstanding the last-antecedent rule, the prosecution argues that this construction is contrary to apparent legislative intent. I disagree. I see nothing in the plain language of § 7410 itself that would require this Court to disregard the last-antecedent rule in this case. My construction of § 7410(3) under the last-antecedent rule is consistent with the remainder of § 7410. Indeed, arguably at least, it is the prosecution's proposed interpretation that would do violence to the

apparent legislative intent underlying § 7410(3). As was acknowledged by the prosecution during oral argument, under its interpretation, a drug dealer intending to deliver drugs to a drug house miles away from a school, but who happens to be arrested within 1,000 feet of school property while on his way to that drug house, faces the enhanced penalty of § 7410(3), whereas an enhanced penalty under § 7410(3) is impermissible for a drug dealer who *actually intends to deliver drugs to children on school property* but is arrested 1,010 feet from school property—in other words, just outside the prohibited zone. In my judgment and that of my colleague Judge MURPHY (concurring), such a result is inconsistent with the legislative intent expressed by the entirety of § 7410 and the other pertinent sections of the Public Health Code.

Similarly, the dissent compares § 7410(3) with § 7410a(1)(b),[4] another section of the Public Health Code, and reasons that our construction is contrary to apparent legislative intent. The dissent finds it significant that § 7410a(1)(b) uses the phrase "who is in a public park or private park" to describe the individual to whom an offender intends to deliver a controlled substance, whereas § 7410(3) contains no such limiting language, because generally, when the Legislature includes language in a related statute that it omits in another, we assume that the omission was intentional. The dissent concludes that the language in § 7410a(1)(b) militates against reading § 7410(3) as requiring the defendant's intended deliveree to be on or

[4] MCL 333.7410a(1)(b) provides that a person who is 18 years of age or older may be sentenced to not more than two years of imprisonment if that person violates certain Public Health Code sections by "possessing with intent to deliver a controlled substance . . . to a minor who is in a public or private park or within 1,000 feet of a public park or private park."

within 1,000 feet of school property because, had the Legislature wanted such an interpretation, § 7410a(1)(b) demonstrates that the Legislature clearly knew how to demonstrate that intent.

However, the rule of construction on which the dissent relies is only applicable when the "related statute" is a prior enactment. As discussed in 2B Singer & Singer, Sutherland Statutory Construction (7th ed), § 51:2, pp 212-213, "[g]enerally, . . . courts presume a different intent when a legislature omits words used in a *prior* statute on a similar subject." (Emphasis added.) See also *People v Watkins*, 491 Mich 450, 482; 818 NW2d 296 (2012) ("It is one thing to infer legislative intent through silence in a simultaneous or subsequent enactment, but quite another to infer legislative intent through silence in an earlier enactment, which is only 'silent' by virtue of the subsequent enactment."). The phrase "on or within 1,000 feet of school property or a library" in § 7410(3) has not changed since 1994. See 1994 PA 174. By contrast, § 7410a(1)(b) was added by 1998 PA 261. Accordingly, § 7410a(1)(b) cannot rationally be used as a means of discerning the legislative intent underlying the phrase "on or within 1,000 feet" as used in § 7410(3). When amending § 7410(3) to include that language, the Legislature did not "omit" language it had previously used in § 7410a(1)(b); the latter provision did not exist at that time.

In conclusion, because the last-antecedent rule renders § 7410(3) unambiguous, I rely on the plain meaning of the statutory language and need not resort to less precise methods of reading "the tea leaves of legislative intent."[5] As the trial courts did, we construe § 7410(3) as requiring proof that the defendant specifi-

[5] *People v Maynor*, 256 Mich App 238, 261; 662 NW2d 468 (2003) (WHITBECK, C.J., concurring).

cally intended to deliver a controlled substance to a "person on or within 1,000 feet of school property or a library." In the cases now before us, it is undisputed that such evidence was lacking. For this reason, we affirm.

MURPHY, J. (*concurring*). Because I conclude that the Legislature intended MCL 333.7410(3) to apply when an offender possesses a controlled substance either inside or outside a school zone with the intent to deliver the controlled substance within a school zone, and not when a controlled substance is possessed inside a school zone with no intent to deliver the controlled substance within the school zone, I concur in the lead opinion. Ultimately, in my view, MCL 333.7410(3) is targeted at drug traffickers who intend to distribute controlled substances within a school zone and not at traffickers who may simply live in or be traveling through a school zone with controlled substances present in their home or vehicle or on their person. Accordingly, I agree with my colleague's position in the lead opinion that we should affirm the circuit courts' orders dismissing the charges under MCL 333.7410(3). Because I reach that conclusion partly on the basis of an analysis that contemplates the legislative history of MCL 333.7410(3), I write separately.

In general, this Court reviews for an abuse of discretion a trial court's ruling with respect to a motion to dismiss criminal charges. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). We review de novo, however, the construction of a statute. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). In *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011), our Supreme Court recited the well-established rules of statutory construction:

> Our overriding goal for interpreting a statute is to determine and give effect to the Legislature's intent. The most reliable indicator of the Legislature's intent is the words in the statute. We interpret those words in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole. Moreover, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. If the statutory language is unambiguous, no further judicial construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed. [Citation and quotation marks omitted.]

When a statute is ambiguous, judicial construction is proper in order to ascertain the statute's meaning. *In re MCI Telecom Complaint*, 460 Mich 396, 411-412; 596 NW2d 164 (1999). When interpreting an ambiguous statute, "we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute." *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996). A statute is ambiguous when an irreconcilable conflict exists between statutory provisions or when a statute is equally susceptible to more than one meaning. *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016).

MCL 333.7410(3) provides:

> An individual 18 years of age or over who violates section 7401(2)(a)(*iv*) [MCL 333.7401(2)(a)(*iv*)] by possessing with intent to deliver to another person on or within 1,000 feet of school property or a library a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(*iv*)] shall be punished, subject to [MCL 333.7410(5)], by a term of imprisonment of not less than 2 years or more than twice that authorized by section 7401(2)(a)(*iv*) and, in addition,

> may be punished by a fine of not more than 3 times that authorized by section 7401(2)(a)(*iv*).[1]

The issue in these consolidated cases is whether the statute demands proof of an intent to deliver a controlled substance "to another person on or within 1,000 feet of school property" (school zone), or whether it suffices to show an intent to deliver to another person *anywhere*, including outside a school zone, as long as the controlled substance was possessed within a school zone. Stated otherwise, the issue is whether the school-zone requirement pertains to the *possession* of controlled substances or to the *intended delivery destination* of controlled substances.

Our Supreme Court has observed that "[i]t is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent . . . ." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); see also *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002) (explaining the last-antecedent rule of statutory interpretation). The lead opinion relies on the last-antecedent rule to conclude that MCL 333.7410(3) is unambiguous and that defendants' construction of the statute is correct. I find the lead opinion to be fairly persuasive. My hesitancy in fully embracing the lead opinion is premised on the awareness and appreciation that the last-antecedent rule controls "unless something in the statute requires a different interpretation," *Stanton*, 466 Mich at 616, or "unless a contrary intention appears," *Sun Valley*, 460 Mich at 237.

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[1] MCL 333.7401(2)(a)(*iv*) concerns the manufacture, creation, or delivery of a controlled substance, or the possession with intent to manufacture, create, or deliver a controlled substance, "in an amount less than 50 grams," which offense constitutes "a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both."

Subsection (2) of MCL 333.7410 enhances the punishment for delivering a controlled substance to another person within a school zone, and Subsection (4) enhances the punishment for possessing a controlled substance within a school zone. These provisions are concerned with the *actus reus* of the offenses, i.e., the location of the wrongful deeds that comprise the physical components of the crimes, *People v Likine*, 492 Mich 367, 393 n 43; 823 NW2d 50 (2012), reflecting a legislative intent to punish more severely those drug crimes physically committed within a school zone. Interpreting the words in Subsection (3) of MCL 333.7410 in light of their context in the overall statute and reading them harmoniously with Subsections (2) and (4), *Peltola*, 489 Mich at 181, there is a plausible argument that Subsection (3) should also be interpreted with a focus on the *actus reus* of the offense, which is possession of a controlled substance, not the intended destination of the substance's delivery. As pointed out by the dissent, federal courts have construed 21 USC 860(a)—which contains language that gives rise to the same interpretation problems posed by MCL 333.7410(3)—by applying this very logic, concluding that 21 USC 860(a) only requires proof of an intent to deliver drugs somewhere, as long as the drugs were possessed within a school zone. See, e.g., *United States v Harris*, 313 F3d 1228, 1239-1240 (CA 10, 2002); *United States v Ortiz*, 146 F3d 25, 28 (CA 1, 1998); *United States v McDonald*, 301 US App DC 157, 160; 991 F2d 866 (1993); *United States v Rodriguez*, 961 F2d 1089, 1092 (CA 3, 1992). In light of this authority, I am not unflinchingly confident that the last-antecedent rule governs, considering that the overall language of MCL 333.7410 arguably reveals a legislative intent that is contrary to that which is

deciphered when applying the last-antecedent rule of statutory construction.

In my view, analysis under the last-antecedent rule should be supplemented with an examination of the legislative history of MCL 333.7410(3), given that the question regarding whether § 7410(3) is ambiguous is too close to call with any degree of certainty. The Michigan Supreme Court "has recognized the benefit of using legislative history when a statute is ambiguous and construction of [the] ambiguous provision becomes necessary." *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). The Court warned "that resort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute" and that "[l]egislative history cannot be used to create an ambiguity where one does not otherwise exist." *Id.* (emphasis in original).

Before the enactment of 1999 PA 188, which was made effective November 24, 1999, MCL 333.7410(3) enhanced criminal penalties for "possessing with intent to deliver to *a minor who is a student* on or within 1,000 feet of school property a controlled substance . . . ." 1994 PA 174 (emphasis added). Although the phrasing still lacked absolute clarity, the reference to "a minor who is a student" plainly signaled the Legislature's intention that an offender had to have intended delivery within a school zone.[2] A minor student and a school zone go hand in hand. The question becomes whether 1999 PA 188, which replaced the

[2] Conceivably, the earlier language could be construed as concerning the possession of a controlled substance within a school zone with an intent to deliver the controlled substance to a student minor, regardless of the student minor's whereabouts. This would be a strained and wholly unreasonable interpretation of the earlier version of MCL 333.7410(3).

phrase "a minor who is a student" with "another person," revealed a legislative intent to expand the scope of the statute to encompass an intent to deliver anywhere, not just school zones, as long as the possession occurred within a school zone. The only information that I could locate speaking to the reason behind the amendment of MCL 333.7410 under 1999 PA 188 is found in Senate Legislative Analysis, SB 218, July 29, 1999, which provided as follows with respect to the argument supporting the amendment:

> Although the current law is well-meaning, apparently it is ineffective because an element of the offense is delivery to a student who is a minor. A successful prosecution requires the testimony of the student. A student, however, may be afraid of testifying against a drug dealer, reluctant to admit to receiving drugs, or otherwise unwilling to testify. If the enhanced penalties applied to delivery to anyone within a drug-free school zone, however, law enforcement agencies could place young-looking undercover officers in schools to pose as students. By making this change, the bill could have a big impact on combating drug-trafficking in and around schools. Reportedly, offenders in Florida are being prosecuted under a similar law.

Accordingly, the 1999 amendment simply reflected a desire not to require the involvement of a minor student for purposes of a criminal prosecution, as opposed to an effort to abolish the need to prove an intent to deliver controlled substances within a school zone. I fully appreciate that "legislative analyses should be accorded very little significance by courts when construing a statute." *In re Certified Question*, 468 Mich at 115 n 5. But even if one disregards the quoted Senate analysis, the amendment of MCL 333.7410 under 1999 PA 188 clearly concerned only the identity of the *person* to whom a drug delivery was intended to be made, not the *location* of the intended

delivery. Given the legislative history of MCL 333.7410(3), I conclude that the Legislature intended the statutory provision to apply when an offender possesses a controlled substance either inside or outside a school zone with the intent to deliver the controlled substance within a school zone, and not when a controlled substance is possessed inside a school zone but with no intent to deliver the controlled substance within the school zone.

In sum, while application of the last-antecedent rule brings me very close to a conclusive determination that the prosecution must establish an intent to deliver a controlled substance within a school zone for purposes of charges brought under MCL 333.7410(3), any lingering doubts I may have had on the matter are eliminated on consideration of the statute's legislative history, which reinforces the result produced when applying the last-antecedent rule of statutory construction.

I respectfully concur with the lead opinion.

O'CONNELL, J. (*dissenting*). In these consolidated cases, the prosecution appeals by leave granted[1] the trial courts' dismissal of charges under MCL 333.7410(3) against defendants, Lymance English (Docket No. 330389) and Brandon R. Smith (Docket No. 330390), for possessing with intent to deliver drugs within 1,000 feet of a school. The trial court in each case dismissed the charge against the respective defendant because the prosecution did not show that either English or Smith, who each possessed drugs within a school zone, intended to deliver those drugs within that school zone. Because I would conclude that

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[1] *People v English*, 499 Mich 872 (2016); *People v Smith*, 499 Mich 873 (2016).

the enhanced penalty statute prohibits possessing drugs "within 1,000 feet of a school," I would reverse and remand.

I. FACTUAL BACKGROUND

During a drug raid at the home of English, police discovered about 14 grams of cocaine, marijuana, a digital scale, sandwich bags, and a handgun. Officers determined that English's property was within 1,000 feet of a high school. As a result, English's charges included one count of possession with the intent to deliver less than 50 grams of cocaine within a school zone under MCL 333.7410(3).

Similarly, during a drug raid on the apartment and car of Smith, police discovered 2.2 grams of heroin, baggies, a digital scale, rubber gloves, and a handgun. Officers also discovered a cell phone with messages ordering heroin. Officers determined that Smith's car and apartment were within 1,000 feet of a high school. Smith's charges included one count of possession with the intent to deliver less than 50 grams of heroin within a school zone under MCL 333.7410(3).

Following their respective preliminary hearings, English and Smith moved to dismiss the charges under MCL 333.7410(3). Both defendants contended that the trial court must dismiss their charges because the statute requires the prosecution to show that they intended to deliver the drugs within the school zone. According to English and Smith, there was no indication that either defendant delivered the drugs from their homes or that they intended to deliver the drugs within the school zone. In each case, the trial court agreed that MCL 333.7410(3) required the prosecution to show that the defendant intended to deliver the

drugs within the school zone and dismissed the charge brought under MCL 333.7410(3).

II. STANDARDS OF REVIEW

This Court reviews de novo the interpretation and application of statutes. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). This Court also reviews de novo the constitutionality of a statute. *People v Douglas*, 295 Mich App 129, 134; 813 NW2d 337 (2011).

III. STANDARDS OF STATUTORY INTERPRETATION

When interpreting a statute, our goal is to give effect to the intent of the Legislature. *Williams*, 475 Mich at 250. The language of the statute itself is the best indication of the Legislature's intent. *Id*. We must read the statute as a whole and should not read statutory provisions in isolation. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.). To promote harmony and consistency, we must read subsections of cohesive statutory provisions together. *Id*.

If the language of the statute is unambiguous, we must enforce the statute as written. *Id*. Instances of truly ambiguous language are rare. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). But if the statutory language is ambiguous, judicial construction is appropriate. *Feezel*, 486 Mich at 205 (opinion by CAVANAGH, J.).

IV. ANALYSIS

The Public Health Code prohibits a wide range of conduct concerning, among other things, controlled substances. MCL 333.1101 *et seq*. The statute at issue is MCL 333.7410(3), which provides as follows:

> An individual 18 years of age or over who violates section 7401(2)(a)(*iv*)[2] *by possessing with intent to deliver to another person on or within 1,000 feet of school property or a library a controlled substance* . . . shall be punished . . . by a term of imprisonment of not less than 2 years or more than twice that authorized by section 7401(2)(a)(*iv*) . . . . [Emphasis added.]

This statute, which provides that the sentence is "twice that authorized" by its counterpart MCL 333.7401(2)(a)(*iv*), is an enhanced sentencing provision.

Because the only difference between MCL 333.7401(2)(a)(*iv*), which in part prohibits the possession of controlled substances with intent to deliver, and MCL 333.7410(3) is the location in which the drugs are possessed, I would conclude that the Legislature intended it to apply to defendants who possessed drugs within the school zone, regardless of where they intended to deliver them. MCL 333.7410(3) applies when a defendant possesses with intent to deliver a controlled substance within 1,000 feet of a school or library, regardless of the location of the person to whom the defendant intends to deliver the substance.

English contends that two of the possible meanings of MCL 333.7410(3) are consistent with the trial court's dismissal of the charges—that the defendant intended to deliver to a person within 1,000 feet of a school or that the person to whom the defendant intended to deliver was within 1,000 feet of a school. The prosecution's construction is more reasonable to accomplish the purpose of the statute as an enhanced penalty provision.

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[2] MCL 333.7401(2)(a)(*iv*) prohibits a person from "possess[ing] with intent to . . . deliver a controlled substance" that is a narcotic drug in an amount less than 50 grams.

The Public Health Code is "intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency." MCL 333.1111. See also *Feezel*, 486 Mich at 208 (opinion by CAVANAGH, J.). Federal law, under 21 USC 860(a), prohibits "possessing with intent to distribute . . . a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school," and anyone who does so is guilty of a crime with an enhanced minimum sentence. This statute is analogous to MCL 333.7410(3). Both statutes provide enhanced sentencing provisions for persons who possess with the intent to distribute a drug within a school zone. While there are minor differences, such as the Michigan statute including requirements regarding the age of the offender, the types of conduct these statutes prohibit are substantially similar.

I also find federal caselaw on this point persuasive. Under 21 USC 860(a), it is the location of the drugs, not the intended location of distribution, that is pertinent to the crime. *United States v Rodriguez*, 961 F2d 1089, 1092 (CA 3, 1992); *United States v Harris*, 313 F3d 1228, 1239-1240 (CA 10, 2002).[3] Construing MCL 333.7410(3) consistently with applicable federal law, the phrase "within 1,000 feet of a school" describes the location where the defendant possesses the drugs, not the location of the other person or where the defendant intends to deliver the drugs.

[3] This is consistent with unpublished cases from this Court that have determined the same and with cases in which we have upheld convictions without any discussion of the location of the defendant's intended delivery. However, at least one unpublished case has ruled insufficient a jury instruction that did not specify that the defendant's intended deliveree was in the school zone.

Smith contends that this construction leads to supposedly absurd results because a defendant could be guilty under MCL 333.7410(3) for driving through a school zone while possessing a substance that he or she intends to deliver elsewhere. That a statute appears to be inconvenient or unwise is not a reason for this Court to avoid applying statutory language. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012). The purpose of the statute is to attempt to protect children from exposure to drugs. *People v McCrady*, 213 Mich App 474, 485; 540 NW2d 718 (1995). Given this purpose, requiring drug dealers to drive around school zones to avoid enhanced sentences appears consistent with the statute. I am less concerned with the resulting inconvenience to drug dealers than with interpreting the statute consistently with the Legislature's intent.

I would conclude that MCL 333.7410(3) prohibits a defendant from possessing drugs within a school zone with intent to deliver them regardless of the intended location of delivery. Accordingly, I would reverse and remand for reinstatement of the charges.

TRINITY HEALTH-WARDE LAB, LLC v PITTSFIELD CHARTER TOWNSHIP

Docket No. 328092. Submitted November 1, 2016, at Lansing. Decided November 3, 2016, at 9:00 a.m.

Trinity Health-Warde Lab, LLC (the Lab), a wholly owned subsidiary of Trinity Health Michigan (Trinity), petitioned the Michigan Tax Tribunal (the Tribunal) for an order reducing the taxable value of its real property and requiring Pittsfield Charter Township (the Township) to refund the property taxes it had paid, alleging that its real property was exempt from taxation because the Lab was wholly owned and operated by a charitable institution. The Township responded that the property was not eligible for tax-exempt status because the Lab was a for-profit entity. The Lab moved for summary disposition, asserting that Trinity had complete corporate control of the Lab and that, because Trinity was a charitable institution under MCL 211.7o, the Lab was also a charitable institution. The Tribunal granted summary disposition to the Lab, determining that the Lab was entitled to tax-exempt status under MCL 211.7o because Trinity so dominated the Lab's management and operation that it was proper to ignore the Lab's separate corporate entity. The Township appealed, arguing that the Tribunal made an error of law when it concluded that the Lab was entitled to a charitable-institution exception.

The Court of Appeals *held*:

MCL 211.1 provides that all real and personal property within the jurisdiction of the state shall be subject to taxation unless expressly exempted. MCL 211.7r provides an exemption for real property owned or operated by nonprofit trusts used for hospital or other public health purposes, and MCL 211.7o(1) provides an exemption for property owned by a nonprofit charitable institution. In this case, the plain language of the statutes precluded the Lab from claiming a property-tax exemption because the Lab was a for-profit limited liability company. Accordingly, the Lab was neither a nonprofit trust under MCL 211.7r nor owned or occupied by a nonprofit charitable institution under MCL 211.7o. The Tribunal's reliance on two Michigan

cases to support its conclusion that Trinity's tax-exempt status could be extended to include the Lab was misplaced. The Supreme Court's decision in *Ann Arbor v Univ Cellar, Inc*, 401 Mich 279 (1977) (holding that a tax-exempt university could not extend its tax-exempt status to a related nonprofit bookstore because the Legislature would only have intended to permit such an extension with retention of managerial and operational control of the nonexempt organization) did not establish that a subsidiary corporation is entitled to a tax exemption when it is a nonexempt organization and the parent company is exempt. Because the *Ann Arbor* Court specifically did not decide whether a tax-exempt organization may extend its exemption to a separate corporation, albeit one organized to carry out the exempt organization's purpose, the Tribunal made an error of law in concluding that *Ann Arbor* stood for the proposition that a tax-exempt parent corporation could extend its tax-exempt status to a related entity. The Court of Appeals' decision in *Nat'l Music Camp v Green Lake Twp*, 76 Mich App 608 (1977) (holding that the Tribunal should have granted tax-exempt status to the property at issue because four separate tax-exempt corporations were one corporation for all practical purposes) did not apply to this case because the corporations in *Nat'l Music Camp* were all tax-exempt, whereas the Lab was not a tax-exempt corporation. Accordingly, the Tribunal adopted a wrong principle when it allowed the Lab to use the tax-exempt status of its parent corporation when it was not itself a nonprofit entity.

Reversed and remanded.

TAXATION — CORPORATIONS — PROPERTY EXEMPTIONS — NONPROFIT CHARITABLE INSTITUTIONS.

MCL 211.7o(1) provides that real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under the General Property Tax Act, MCL 211.1 *et seq*.; a charitable institution must be a nonprofit institution; a for-profit entity may not use a nonprofit parent corporation's tax-exempt status.

Honigman Miller Schwartz and Cohn LLP (by *Jason Conti*) for Trinity Health-Warde Lab, LLC.

Secrest Wardle (by *Derk W. Beckerleg*) for Pittsfield Charter Township.

Amici Curiae:

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

Before: RONAYNE KRAUSE, P.J., and O'CONNELL and GLEICHER, JJ.

O'CONNELL, J. Respondent, Charter Township of Pittsfield (the Township), appeals as of right the Michigan Tax Tribunal's order granting a charitable-institution exemption to petitioner, Trinity Health-Warde Lab, LLC (the Lab), because the Lab is wholly owned by a charitable institution even though it is organized as a for-profit institution. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to Craig Killingbeck, vice president of lab services for Trinity Health Michigan (Trinity), the Lab is a wholly owned subsidiary of Trinity. Trinity appoints the Lab's board of directors, who manage the Lab's business and affairs. Trinity created the Lab for the purpose of acquiring, owning, and operating the Lab's real property, a 57,000 square foot building used solely as a medical laboratory. Trinity and other nonprofit hospitals use the Lab's facilities under a cotenancy laboratory agreement.[1]

In May 2013, the Lab filed a petition with the Tax Tribunal, alleging that its real property was exempt

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[1] The equipment within the laboratory is exempt from taxation under MCL 211.7o because Trinity and other nonprofit charitable institutions own the equipment. *Mich Co-Tenancy Laboratory v Pittsfield Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 2013 (Docket No. 310376), p 7.

from taxation. The Township responded that the property was not eligible for tax-exempt status because the Lab is a for-profit entity. The Lab moved for summary disposition under MCR 2.116(C)(10), asserting that Trinity has complete corporate control of the Lab and that, because Trinity is a charitable institution under MCL 211.7o, the Lab is also a charitable institution. The Township responded that summary disposition was inappropriate because the Lab, as a for-profit entity, does not meet several of the requirements of a charitable institution.

The Tribunal granted summary disposition to the Lab. The Tribunal concluded that Trinity so dominated the Lab's management and operation that it was proper to ignore the Lab's separate corporate entity. Concluding that the Lab and Trinity were essentially the same entity, the Tribunal determined that the Lab was entitled to tax-exempt status under MCL 211.7o. The Township now appeals.

II. STANDARD OF REVIEW

This Court's review of a decision by the Tax Tribunal is limited. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). When a party does not dispute the facts or allege fraud, we review whether the Tribunal "made an error of law or adopted a wrong principle." *Id*. at 527-528. This Court reviews de novo the interpretation and application of tax statutes. *Id*. at 528. We construe exemption statutes in favor of the taxing authority. *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 222; 668 NW2d 181 (2003). If an exemption exists, statutory construction may not enlarge it. *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 475; 838 NW2d 736 (2013).

III. ANALYSIS

The Township argues that the Tribunal made an error of law when it concluded that, because Trinity wholly owns the Lab, the Lab was entitled to a charitable-institution exemption even though it did not meet the exemption's requirements. We agree.

The General Property Tax Act (the Act) provides that "all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." MCL 211.1. The petitioner bears the burden of proving that it is entitled to an exemption. *ProMed Healthcare v Kalamazoo*, 249 Mich App 490, 492-493; 644 NW2d 47 (2002).

MCL 211.7r provides an exemption for real property owned or operated by nonprofit trusts used for hospital or other public health purposes:

> The real estate and building of a clinic erected, financed, occupied, and operated by a nonprofit corporation or by the trustees of health and welfare funds is exempt from taxation under this act, if the funds of the corporation or the trustees are derived solely from payments and contributions under the terms of collective bargaining agreements between employers and representatives of employees for whose use the clinic is maintained. The real estate with the buildings and other property located on the real estate on that acreage, owned and occupied by a nonprofit trust and used for hospital or public health purposes is exempt from taxation under this act . . . .

And MCL 211.7o(1) provides an exemption for property owned by a charitable institution:

> Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

"A charitable institution must be a nonprofit institution." *Wexford Med Group v City of Cadillac*, 474 Mich 192, 215; 713 NW2d 734 (2006) (quotation marks omitted).

The plain language of these statutes precludes the Lab from claiming a property-tax exemption because the Lab is a for-profit limited liability company. Accordingly, it is neither a nonprofit trust under MCL 211.7r nor owned or occupied by a nonprofit charitable institution under MCL 211.7o.

However, the Tribunal concluded that because the Lab is a wholly owned subsidiary of Trinity—which is a nonprofit charitable institution—it was proper to extend Trinity's tax-exempt status to the Lab. In doing so, the Tribunal relied on caselaw from this Court and the Michigan Supreme Court. Reviewing the caselaw, we conclude that the Tribunal's reliance was misplaced.

In *Ann Arbor v Univ Cellar, Inc*, 401 Mich 279, 284; 258 NW2d 1 (1977), the Michigan Supreme Court considered whether a tax-exempt university could extend its tax-exempt status to a related nonprofit bookstore. *Id*. at 284. The Court concluded that the Legislature would only have intended to permit such an extension with retention of managerial and operational control of the nonexempt corporation. In that case, the exempt organization did not control the nonexempt organization, so it was not entitled to a property-tax exemption. *Id*. at 286-287.

However, this decision does not establish that a subsidiary corporation is, in fact, entitled to a tax exemption when it is a nonexempt organization and the parent company is exempt. The Supreme Court specifically did not decide "whether a tax exempt organization may extend its exemption to a separate

corporation, albeit one organized to carry out the exempt purpose." *Id*. at 285. Our Supreme Court explicitly assumed, without deciding, that the Legislature intended to permit an exempt organization to extend its exemption to a nonexempt organization. *Id*. at 293. However, the *Ann Arbor* Court expressed caution on that issue:

> To disregard the corporate entity and treat the Cellar as the alter ego of the University for tax exemption purposes, and yet regard it as a separate entity for purposes of determining whether the University is subject to liability to unpaid suppliers or to customers who are injured on the premises or by defective products would be to run with the hare and hunt with the hounds. [*Id*. at 291-292.]

It is axiomatic that a court is not bound on a point of law that a previous court did not actually consider or decide. *Andrews v Booth*, 148 Mich 333, 335; 111 NW 1059 (1907). The *Ann Arbor* Court expressly declined to decide the question, and we conclude that the Tribunal made an error of law in concluding that *Ann Arbor* stood for the proposition that a tax-exempt parent corporation could extend its tax-exempt status to a related entity.

The Tribunal also relied on *Nat'l Music Camp v Green Lake Twp*, 76 Mich App 608; 257 NW2d 188 (1977). In *Nat'l Music Camp*, the tribunal denied tax-exempt status to the property at issue because the petitioner, which owned the property, did not exclusively use the property. *Id*. at 613. Petitioner and the related entity were two of four separate tax-exempt corporate entities that formed the Interlochen Educational Complex. *Id*. at 609. Petitioner used the property during the school year, while another related entity used the property during the summer. *Id*. at 610.

This Court concluded that because the four educational corporations were one corporation for all practical purposes, the Tribunal should grant tax-exempt status. *Id*. at 614-615.

Nat'l Music Camp is distinguishable because the corporations in that case were all tax-exempt. In this case, the Lab is not a tax-exempt corporation. Accordingly, *Nat'l Music Camp* does not apply.

We conclude that the Tribunal adopted a wrong principle when the Tribunal allowed the Lab to use the tax-exempt status of its parent corporation when it is not itself a nonprofit entity. The Lab does not meet the statutory requirements for exemption under MCL 211.7r or MCL 211.7o, and caselaw does not provide that a for-profit entity may use a nonprofit parent corporation's tax-exempt status. Allowing it to do so would be contrary to the plain language of the statutes, which require the property to be owned by the nonprofit organization seeking exemption.

We reverse and remand. No costs because the case involves an issue of public significance. MCR 7.219(A). We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and GLEICHER, J., concurred with O'CONNELL, J.

PEOPLE v KELLY

Docket No. 331731. Submitted September 8, 2016, at Grand Rapids. Decided September 22, 2016. Approved for publication November 8, 2016, at 9:00 a.m.

Calvin R. Kelly was charged in the Kalamazoo Circuit Court with kidnapping, MCL 750.349, assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g, and three counts of first-degree criminal sexual conduct, MCL 750.520b, in connection with his alleged sexual assault of the complainant in April 2008. DNA evidence that was collected during the complainant's sexual-assault examination was later determined to match defendant's DNA profile. Defendant did not dispute that the 2008 sexual contact and penetration with the complainant occurred but argued that the encounter was consensual in that the complainant was a prostitute and agreed to the contact and penetration in exchange for compensation. To negate defendant's consent defense, the prosecution sought to introduce other-acts evidence under MRE 404(b) of seven other sexual assaults that had occurred from 1985 through 2010; the assaults occurred in three other states—Missouri, Tennessee, and Virginia. In each of the cases, it was alleged that defendant isolated the victim by either selecting a woman who was alone or driving the selected woman to a more secluded location, forced her to engage in vaginal-penile penetration, used weapons and physical violence to compel her compliance, and did not use a condom, which frequently resulted in the retrieval of DNA evidence. Defendant was linked to four of the other cases through DNA evidence, and he admitted in two other cases that he had sexual contact and penetration with those two victims. Defendant was never tried or convicted of any charges in the seven other cases. Like he did in this case, when he was questioned by the police in several of the other cases, defendant claimed that the sexual interaction had been consensual and disparaged the victim, claiming that the victim was a disgruntled prostitute who had fabricated her claim when he refused to pay for her services. The prosecution moved to admit the other-acts evidence, arguing that it was relevant and admissible for a proper purpose under MRE 404(b) to establish defendant's intent and to demonstrate a common

scheme, plan, or system when committing the other alleged sexual acts. The court, Alexander C. Lipsey, J., denied the prosecution's motion, concluding that the other-acts evidence was not admissible under MRE 404(b) because the acts had not resulted in any convictions and because there was a credibility contest regarding consent between defendant and the other victims. The court did not discuss the probative value of the other-acts evidence in relation to the purposes for which it was offered but determined under MRE 403 that it would be unfairly prejudicial to defendant to admit the evidence because it would require the jury to determine defendant's guilt of the other crimes while determining the same issue in this case. The court granted defendant's motion to stay the proceedings, and the Court of Appeals granted the prosecution's application for leave to appeal the trial court's order.

The Court of Appeals *held*:

1. In general, evidence of other crimes, wrongs, or acts of an individual is not admissible to prove propensity to commit those acts. In this regard, MRE 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. However, such evidence may be admissible for other purposes, including proof of notice, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

2. When seeking to introduce other-acts evidence, the prosecution must first show that the proffered evidence is relevant to a proper purpose under the nonexclusive MRE 404(b)(1) list or is otherwise probative of a fact other than the defendant's character or criminal propensity. As explained in *People v VanderVliet*, 444 Mich 52 (1993), a trial court may only admit other-acts evidence if it finds that (1) the evidence is offered for a proper purpose under MRE 404(b), (2) the evidence is relevant under MRE 402 as enforced through MRE 104(b), and (3) the probative value of the evidence is not substantially outweighed by unfair prejudice; further, and (4) the trial court may offer a limiting instruction to the jury regarding the proffered evidence if requested. For purposes of MRE 404(b), when considering the relevancy of evidence under MRE 402 and the relevancy is conditioned on fact, a trial court may not weigh credibility or make a finding that the prosecution has proved the conditional fact by a preponderance of the evidence. Instead, the trial court must examine all the evidence

in the case and decide whether a jury could reasonably find the conditional fact by a preponderance of the evidence. Moreover, the trial court must evaluate the testimony of each proposed other-acts witness individually, not as group, to determine whether each witness's individual testimony passes the *VanderVliet* four-factor test and is therefore admissible under MRE 404(b).

3. The trial court abused its discretion by denying the prosecution's motion to admit other-acts testimony under MRE 404(b) because it failed to evaluate the proffered testimony under the *VanderVliet* four-factor test when it denied the motion. Specifically, the trial court failed to determine whether the prosecution offered the evidence for a proper purpose, and it failed to consider the legal relevance of the evidence in light of the asserted proper purpose. For this reason, the trial court did not reasonably engage in the balancing test required by MRE 403 because it never considered the purpose of the proffered evidence or its legal relevance under MRE 404(b). The trial court also erred by considering the credibility of the other-acts witnesses in relation to its relevance and by failing to consider the relevance of the testimony of each other-acts witness individually, rather than viewing those witnesses' testimony as a whole, when denying the prosecution's motion.

Order precluding admission of the other-acts evidence vacated, case remanded for reconsideration regarding the admissibility of the other-acts evidence, and jurisdiction retained by the Court of Appeals.

1. EVIDENCE — OTHER-ACTS EVIDENCE — ADMISSIBILITY — RELEVANCY OF EVIDENCE — TRIAL COURT MAY NOT WEIGH CREDIBILITY.

For purposes of MRE 404(b), a trial court may not evaluate the credibility of other-acts witnesses when considering the relevancy of their proposed testimony; a trial court must consider the testimony of each proposed other-acts witness individually, not as group, to determine whether the witness's individual testimony is admissible.

2. EVIDENCE — OTHER-ACTS EVIDENCE — ADMISSIBILITY — FOUR-FACTOR TEST.

A trial court may only admit other-acts evidence if it finds that the evidence is offered for a proper purpose under MRE 404(b), it is relevant under MRE 402 as enforced through MRE 104(b), and its probative value is not substantially outweighed by unfair prejudice; upon request, a trial court may provide a limiting instruction.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Christopher M. Allen*, Assistant Attorney General, for the people.

Levine & Levine (by *Anastase Markou*) for defendant.

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM. In this interlocutory appeal, the prosecution appeals by leave granted[1] the trial court's order denying its motion to admit other-acts evidence. For the reasons explained in this opinion, we vacate the trial court's MRE 404(b) analysis and remand for further proceedings not inconsistent with this opinion.

In the present case, defendant has been charged with kidnapping, MCL 750.349, three counts of first-degree criminal sexual conduct, MCL 750.520b, and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g. These charges arise from the alleged sexual assault of SH in April 2008. DNA collected during SH's sexual-assault examination matches defendant's DNA profile. Indeed, defendant does not dispute that a sexual encounter with SH occurred on the date in question. Rather, the defense's theory of the case, as set forth in lower court documents, is that SH "did in fact consent to the sexual contact or penetration with" defendant. According to defendant, SH consented to sex that evening as a prostitute in exchange for compensation.

In contrast, according to the prosecution's theory of the case, this 2008 attack on SH is just one of eight

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[1] *People v Kelly*, unpublished order of the Court of Appeals, entered May 16, 2016 (Docket No. 331731).

sexual assaults committed by defendant. These eight sexual assault cases date from 1985 through 2010 and span four different states—Missouri, Tennessee, Michigan, and Virginia. In each case, it is alleged that defendant isolated the victim by selecting a woman who was alone, by driving the woman to a more secluded location, or both. Once the victim had been isolated, defendant forced her to engage in vaginal-penile penetration. To compel the victims' compliance, defendant used weapons, most commonly a knife, and physical violence, including punching and choking his victims. He did not use a condom and he ejaculated, frequently leaving behind DNA evidence. DNA evidence links defendant to five of these cases, including SH's case; and, in two of the cases without DNA evidence, defendant acknowledged to the police that he had sex with the victims at the times in question. While defendant was interviewed by the police in several of the other cases, he was never brought to trial, and there are no convictions relating to these other cases. If confronted by the police, as in the present case, defendant claimed that the sex was consensual, and he disparaged the victims, typically claiming that the individual victim was a disgruntled prostitute who had fabricated claims of sexual assault after he had refused to pay for her services.

In this case, the prosecution filed a notice of intent under MRE 404(b)(2), indicating that it intended to introduce evidence of defendant's other acts related to those seven other reported sexual assaults. Given the similarities between the other acts and the alleged assault on SH, the prosecution argued that the other-acts evidence was relevant and admissible under MRE 404(b) for proper purposes, namely: to establish defendant's intent and to demonstrate a common scheme,

plan, or system in doing an act.[2] In contrast, defendant took the position that "[r]elevancy means believability," and because the other conduct involved mere "allegations" of sexual assault and the previous victims were not credible, the evidence lacked probative value and amounted to mere propensity evidence. According to defendant, allowing the prosecution to present proof of these other acts would turn the trial into a "sordidly long affair," and any probative value was substantially outweighed by the danger of unfair prejudice.

Ultimately, the trial court ruled in defendant's favor, concluding that the evidence was inadmissible under MRE 404(b). However, when making this ruling, the trial court did not consider whether the prosecution identified a proper purpose for the evidence, and the court failed to address whether the evidence was legally relevant to the proper purposes identified. Instead, the trial court observed that *if* defendant's conduct in relation to the other acts was not criminal, then the other-acts evidence would not be "of any use" in the present case. In this respect, the trial court emphasized that there were no actual convictions related to that conduct and that there was a credibility contest between defendant and the victims in terms of consent. In these circumstances, the trial court concluded that it could not "take a leap" to find that defendant had engaged in a pattern of criminal conduct. Without discussing the evidence's probative value in relation to the prosecution's proper purposes, the trial court nonetheless conducted a balancing test under MRE 403, determining that it would be unfairly

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[2] In the trial court, the prosecution also initially stated that the evidence was relevant to show defendant's identity and also to establish his motive, but the prosecution does not pursue these arguments on appeal, and we consider them abandoned. See *People v Bosca*, 310 Mich App 1, 48; 871 NW2d 307 (2015).

prejudicial to defendant to require the jury to determine defendant's guilt of the other crimes in addition to the crimes charged in this case, particularly given the age of some of the other acts.

Following the trial court's ruling, the prosecution moved for a stay of proceedings pending an application for leave to appeal. The trial court granted the stay, and the prosecution filed an interlocutory application for leave to appeal, which this Court granted.

On appeal, the sole issue before this Court is whether the trial court abused its discretion by excluding evidence of the seven other instances of alleged criminal sexual conduct by defendant. We conclude that the trial court failed to operate within the MRE 404(b) legal framework and thus abused its discretion. For this reason, we vacate the trial court's MRE 404(b) analysis and remand for reconsideration of this issue.

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). A trial court's decision is an abuse of discretion "when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id*. at 670. "When the decision involves a preliminary question of law, however, such as whether a rule of evidence precludes admission," this Court reviews the question de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). An abuse of discretion may occur when "the trial court operates within an incorrect legal framework." *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002).

As a general rule, "evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Crawford*,

458 Mich 376, 383; 582 NW2d 785 (1998). Although such evidence is inadmissible for propensity purposes, it may be admitted for other purposes under MRE 404(b)(1), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

A prosecutor seeking to introduce other-acts evidence under this rule "bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity." *Mardlin*, 487 Mich at 615. More fully, to determine whether other-acts evidence may be admitted under MRE 404(b) requires evaluation under a four-pronged standard.

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

In this case, the trial court failed to follow this legal framework and thus abused its discretion. See *Hine*, 467 Mich at 250-251. First, the trial court failed to determine whether the prosecution offered the evidence for a proper purpose and failed to consider the legal relevance of the evidence in light of this purpose.

Without considering the evidence's purpose and legal relevance under MRE 404(b), the trial court could not have reasonably engaged in the balancing test required by MRE 403. See *Rock v Crocker*, 499 Mich 247, 258-259; 884 NW2d 227 (2016). On this basis alone, we find it appropriate to vacate the trial court's decision and remand for consideration of the issue within the proper MRE 404(b) framework.

Second, we note also that the trial court appears to have abdicated the necessary relevancy analysis on the basis of impermissible credibility concerns. In other words, the trial court allowed defendant's protestations of "consent" in respect to the other acts to control the MRE 404(b) analysis. This too was improper. See *Mardlin*, 487 Mich at 625 ("Although defendant . . . emphasize[s] that he offered innocent explanations for the past [conduct], his innocent explanations do not control the admissibility analysis.").

For purposes of MRE 404(b), when considering the relevancy of evidence under MRE 402 and the relevancy is conditioned on fact, as enforced through MRE 104(b), "the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." *VanderVliet*, 444 Mich at 68 n 20, quoting *Huddleston v United States*, 485 US 681, 690; 108 S Ct 1496; 99 L Ed 2d 771 (1988). "The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." *VanderVliet*, 444 Mich at 68 n 20, quoting *Huddleston*, 485 US at 690.

Defendant does not dispute the occurrence of the other acts of sexual conduct that are at issue in this case. Plainly, there is considerable evidence that the

sexual acts in question occurred and that defendant was the actor.[3] The only issue is whether that conduct was consensual as claimed by defendant or constituted criminal sexual conduct as asserted by the alleged victims. This clearly is a question of credibility, and the trial court should not have dismissed the evidence as being without "any use" merely because there was a credibility dispute.

> [A] jury may generally decide whether a defendant's claim of innocence [regarding other alleged acts of misconduct] . . . is more credible or likely than the prosecution's claim of guilt. The jury is the sole judge of the facts; its role includes listening to testimony, weighing evidence, and making credibility determinations. Indeed, "a basic premise of our judicial system [is that] providing more, rather than less, information will generally assist the jury in discovering the truth." The weight to be given to admitted evidence is left to a properly instructed jury's common sense and judgment. [*Mardlin*, 487 Mich at 626 (second alteration in original).]

Indeed, given defendant's proposed consent defense in this case, defendant's similar protestations of consent in numerous other cases underscores, rather than obviates, the relevancy of the other-acts evidence.[4] See *id*. at 624. See also *People v Oliphant*, 399 Mich 472, 488; 250 NW2d 443 (1976) (concluding that evidence of the defendant's common plan in other alleged assaults

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[3] Given the trial court's emphasis on the lack of convictions arising from the other acts, we note briefly that under MRE 404(b), the other acts may be uncharged conduct and even conduct for which a defendant was acquitted. See, e.g., *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998); *People v Gibson*, 219 Mich App 530, 533; 557 NW2d 141 (1996).

[4] In other words, employing the doctrine of chances, it strikes us as extraordinarily improbable that eight unrelated women in four different states would fabricate reports of sexual assault after engaging in consensual sex with defendant. See *Mardlin*, 487 Mich at 617.

to make it appear that those victims had consented to sexual assaults was both material and relevant to refute his defense of consent in that case). In short, at this stage of the proceedings, defendant's differing version of events does not mandate exclusion of the other-acts evidence, and by allowing defendant's credibility arguments to control, the trial court failed to conduct the proper relevancy analysis.[5] Cf. *Mardlin*, 487 Mich at 625-626.

In sum, the trial court failed to consider the relevance of the evidence in relation to the purposes for which it was offered under MRE 404(b). Without considering the evidence's legal relevance for a proper purpose, the trial court could not conclude that the evidence's probative value was substantially outweighed by unfair prejudice or any of the other concerns identified in MRE 403.[6] See *Rock*, 499 Mich at 258-259. By failing to follow the proper legal framework, the trial court neglected a fundamental respon-

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[5] A defendant's claims of innocence may be considered under MRE 403 in balancing prejudice with probative value, *Mardlin*, 487 Mich at 626-627; but, as noted, the first inquiry under MRE 404(b) is relevancy in regard to a proper purpose, and defendant's claims of innocence cannot control this necessary inquiry.

[6] Related to MRE 403, in response to arguments by the prosecution on appeal, we note briefly that on remand the trial court should consider whether all, some, or none of the proposed testimony is admissible. See generally *People v Watkins*, 491 Mich 450, 493 & n 93; 818 NW2d 296 (2012) (holding that in the context of MCL 768.27a and MRE 403, the trial court erred by failing to review each alleged act separately "and instead lumped all of the evidence together"). For example, the trial court repeatedly emphasized the age of some of the acts involved as a reason why the evidence should not be admitted. But this concern does not apply to *all* of the acts in question, some of which occurred more recently than the conduct charged in this case. With regard to the age of some of the conduct at issue, we note also that age is not dispositive because "there is no time limit applicable to the admissibility of other acts evidence . . . ." *People v Yost*, 278 Mich App 341, 405; 749 NW2d 753 (2008).

sibility in its MRE 404(b) evidentiary analysis, and the trial court therefore abused its discretion by excluding the proposed testimony. See *People v Uribe*, 499 Mich 921 (2016). Accordingly, we vacate the trial court's analysis and remand for reconsideration regarding the admission of the other-acts evidence.

Vacated and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

MURRAY, P.J., and HOEKSTRA and BECKERING, JJ., concurred.

PEOPLE v NORFLEET

Docket No. 328968. Submitted October 5, 2016, at Grand Rapids. Decided November 8, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 1009.

Ronald K. Norfleet was convicted following a jury trial in the Grand Traverse Circuit Court of three counts of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); one count of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); one count of conspiracy to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*) and MCL 750.157a; one count of maintaining a drug house, MCL 333.7405(d); and one count of maintaining a drug vehicle, MCL 333.7405(d). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to five terms of 134 months to 40 years' imprisonment: one term for each of the three counts of delivery of less than 50 grams of heroin, one term for the count of possession with intent to deliver less than 50 grams of heroin, and one term for conspiracy to deliver less than 50 grams of heroin. He was also sentenced to two terms of 46 months to 15 years' imprisonment: one term for maintaining a drug house and one term for maintaining a drug vehicle. The court, Richard M. Pajtas, J., directed that each of the sentences for the first five counts be served consecutively. Defendant appealed.

The Court of Appeals *held*:

1. There was no indication on the record that a portion of an audio recording of a phone call in which defendant allegedly referred to his prior murder conviction and violent past was ever played to the jury. Because no *Ginther*[1] hearing was held, review was limited to mistakes apparent on the record, and because no mistake on the part of trial counsel was apparent on the record, defendant was not entitled to relief on his claim of ineffective assistance of counsel.

2. Jury instructions that were 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 instruc-

[1] *People v Ginther*, 390 Mich 436 (1973).

tional error. In this case, with regard to the charges of keeping and maintaining a drug house and keeping and maintaining a drug vehicle, while defendant was correct that the jury was not instructed on the definition of "keep or maintain" or on the requirement of continuous use, there was no error because the jury would have convicted defendant on the basis of the evidence at trial even if the jury had been more fully instructed on the intricacies of the "keep or maintain" element. While defendant alleged a lack of evidence because police did not find heroin in his home or vehicle, even if that evidence had been found and presented, it would not have been direct evidence that the keeping or selling was continuous or that the keeping or selling was a substantial purpose of the home or vehicle. Several witnesses testified regarding evidence of continuous use of defendant's home and vehicle to keep and sell heroin and evidence that a substantial purpose of his home and vehicle was to keep and sell heroin. Therefore, defendant could not show that the alleged instructional error prejudiced him in any way because the alleged lack of evidence did not correspond to the alleged instructional omission; he would have been convicted on the basis of the evidence admitted regardless of the instructional error.

3. A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession is a term that signifies dominion or right of control over the drug with knowledge of its presence and character. In this case, several witnesses provided corroborated testimony that defendant had control over the heroin because he was the one who directed the delivery of the heroin to its intended recipients. There was clear evidence of a sufficient nexus between defendant and the contraband for the jury to conclude that, under the totality of the circumstances, defendant had constructive possession of the heroin.

4. MCL 769.13(2) states that notice of intent to seek a sentencing enhancement may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense. Defendant had notice of the prosecution's intent to seek sentencing enhancement at his arraignment; therefore, defendant's argument that the prosecution did not timely serve defendant with notice of its intent to enhance defendant's sentence was without merit.

5. As a rule, courts are not impressed by the recanting affidavits of witnesses who attempt to show that they perjured themselves at the trial. Defendant's argument that the prosecution knowingly used the false testimony of his ex-girlfriend was

not raised in the trial court; therefore, it was unpreserved. Moreover, the testimony of numerous other witnesses as well as physical evidence in the form of the recovered controlled-buy funds supported defendant's conviction.

6. Defendant was not entitled to reversal on the basis of the trial court's failure to suppress documents seized during a search of defendant's jail cell, which defendant claimed included notations concerning trial strategy that he drafted at the direction of his attorney. A hearing revealed that most of the documents had not been seized and that only a few pages had been transmitted to the prosecution. Additionally, there was no indication on the documents that they were prepared for counsel, and the prosecution agreed on the record that the seized materials would not be used at trial.

7. Appellate review of sentences imposed by the trial court must ensure that the sentences imposed comply with the principle of proportionality. The principle of proportionality requires that sentences imposed by the trial court be proportionate to the seriousness of the circumstances surrounding the offense and the offender. Discretionary sentencing decisions are subject to review by the appellate courts to ensure that the exercise of that discretion has not been abused, and each sentence is to be reviewed on its own merits. A proportionality challenge to a given sentence must be based on the individual term imposed and not on the cumulative effect of multiple sentences. The decision of a sentencing court to impose a consecutive sentence under MCL 333.7401(3), the statute under which the consecutive sentences were imposed in this case, is discretionary. Although the combined term is not itself subject to a proportionality review, the decision to impose a consecutive sentence when not mandated by statute is reviewable for an abuse of discretion. Therefore, when a statute grants a trial court discretion to impose a consecutive sentence, the trial court's decision to do so is reviewed for an abuse of discretion, i.e., whether the trial court's decision was outside the range of reasonable and principled outcomes, and trial courts imposing one or more discretionary sentences are required to articulate on the record the reasons for each consecutive sentence imposed. A trial court may not impose multiple consecutive sentences as a single act of discretion nor explain them as such; the decision regarding each consecutive sentence is its own discretionary act and must be separately justified on the record. While imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each

such sentence so as to allow appellate review. The Michigan Supreme Court has stated that Michigan has a clear preference for concurrent sentencing and that the imposition of a consecutive sentence is strong medicine; therefore, requiring trial courts to justify each consecutive sentence imposed will help ensure that the strong medicine of consecutive sentences is reserved for those situations in which so drastic a deviation from the norm is justified. In this case, the trial court spoke only in general terms, stating that it took into account defendant's "background, his history, [and] the nature of the offenses involved"; the court did not separately justify each consecutive sentence, each of which represented a separate exercise of discretion. Therefore, the trial court did not give particularized reasons—with reference to the specific offenses and the defendant—to impose each sentence under MCL 333.7401(2)(a)(*iv*) consecutively to the others. Remand was necessary so that the trial court could fully articulate its rationale for each consecutive sentence imposed. Jurisdiction was retained so that, after being apprised of the trial court's rationales, the trial court's decisions could be reviewed for an abuse of discretion.

8. To determine whether a defendant is entitled to relief under *People v Lockridge*, 498 Mich 358 (2015), it is necessary to determine whether facts admitted by the defendant and facts found by the jury were sufficient to assess the minimum number of offense variable (OV) points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. If the facts that the defendant admitted and the facts found by the jury were insufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced, then the defendant is entitled to have the case remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error. OV 12, MCL 777.42(1)(c), provides that 10 points should be assessed if three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(g) provides that zero points should be assessed for OV 12 if no contemporaneous felonious criminal acts were committed, and MCL 777.42(2)(a) defines a felonious criminal act as contemporaneous if the act occurred within 24 hours of the sentencing offense and if the act has not and will not result in a separate conviction. In this case, defendant received a total of 50 OV points, which placed him in OV Level V, MCL 777.65. While there was sufficient evidence to support the trial court's scoring of OV 12, because OV 12 specifically states that it cannot be scored

for criminal acts for which there was a conviction, MCL 777.42(2)(a)(*ii*), any criminal act scored under OV 12 is not a criminal act found by the jury. Defendant had been assessed 10 points for OV 12, and removal of those 10 points placed defendant in OV Level IV; therefore, the facts admitted by defendant and found by the jury were insufficient for his score to fall in the cell of the sentencing grid under which he was sentenced. Defendant was entitled to a *Crosby* remand[2] for the trial court to determine whether it would have imposed a materially different sentence but for the constitutional error.

9. The Presentence Investigation Report (PSIR) is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information. The prosecution has the burden to prove the challenged fact by a preponderance of the evidence upon an effective challenge by a defendant. In this case, defendant's PSIR stated that defendant was affiliated with a street gang, and defendant had asked at sentencing that the gang reference be struck from the PSIR. Even assuming the truth of the prosecution's assertions, the assertions at most established that defendant was, at one time, affiliated with the gang; those assertions did not establish that defendant was affiliated with the gang at the time of the alleged crimes or thereafter. The trial court abused its discretion by holding that the prosecution met its burden to prove the challenged statement in the PSIR. On remand, the trial court was directed to remove those statements in the PSIR unless a preponderance of the evidence supported their accuracy.

Affirmed in part; case remanded for further proceedings; jurisdiction retained.

SENTENCES — DISCRETIONARY CONSECUTIVE SENTENCES — APPELLATE REVIEW — STANDARD OF REVIEW.

When a statute grants a trial court discretion to impose a consecutive sentence, the trial court's decision to do so is reviewed for an abuse of discretion, i.e., whether the trial court's decision was outside the range of reasonable and principled outcomes; trial courts imposing one or more discretionary consecutive sentences are required to articulate on the record the reasons for each consecutive sentence imposed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Robert Cooney*, Prosecuting

[2] *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

Attorney, and *Christopher J. Forsyth*, Assistant Prosecuting Attorney, for the people.

Ronald K. Norfleet, *in propria persona*, and *Laurel K. Young* for defendant.

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

PER CURIAM. Defendant was convicted of multiple drug offenses and sentenced to five consecutive sentences. We affirm his convictions but remand for further sentencing proceedings.

This case presents an issue of first impression regarding appellate review of a trial court's decision to impose consecutive sentences when imposition of consecutive sentences was not mandatory. We hold that when a statute grants a trial court discretion to impose a consecutive sentence, the trial court's decision to do so is reviewed for an abuse of discretion, i.e., whether the trial court's decision was outside the range of reasonable and principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Accordingly, trial courts imposing one or more discretionary consecutive sentences are required to articulate on the record the reasons for each consecutive sentence imposed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with and convicted of seven drug-related offenses. The charges were based on activities conducted by defendant in concert with two other individuals, Bryan and Alysha Nerg, and several of the sales involved Angela Bembeneck. Officers observed Alysha delivering what they believed to be

heroin to Bembeneck on February 13, 2015. Bembeneck and Alysha both testified at trial that Bembeneck had ordered the heroin by calling defendant, who in turn called Alysha and told her to make the delivery. Officers conducted a traffic stop on Bembeneck shortly after the suspected exchange.[3] Bembeneck consented to a search and admitted to the officer who pulled her over that she had heroin in her possession. Bembeneck then agreed to serve as a confidential informant and, on police direction, called defendant to order more heroin. Alysha testified that defendant called her to have her deliver more heroin to Bembeneck. Bembeneck made the purchase with "controlled buy funds" provided by the police and received heroin from Alysha in exchange for those funds. In addition to these two exchanges, Bryan testified that, on the same date, he delivered cash to defendant, who was in his Jeep, in exchange for heroin.

Following the controlled buy, search warrants were executed at both defendant's residence and the motel where Bryan and Alysha Nerg were residing. Heroin was found in the Nergs' motel room, but no heroin was found at defendant's residence or in his Jeep. Police testified that a search of defendant's residence revealed large amounts of cash, including the "controlled buy funds" that Bembeneck used in the exchange with Alysha, keys for a safe-deposit box, two BB gun pistols, and baggies. Officers testified that, while no heroin was found in defendant's home, a drug dog did alert to drugs at several locations in the house and that the drug dog was not able to search defendant's kitchen because an evidence tabulation station had been set up there.

[3] The officer who conducted the traffic stop testified that the stop was predicated on her observance that Bembeneck was not wearing a seat belt and was driving with her license plate partially covered.

Defendant's ex-girlfriend, Desseray Richey, testified that, after learning that officers had searched defendant's home, she went there and took what she "suspected could have been drugs" out of the kitchen and flushed them down the toilet. Richey also testified that she had previously picked up cash and made deliveries for defendant, including deliveries to the Nergs. Richey testified that defendant told her the deliveries were "protein powder," which he claimed to sell as part of his business as a personal trainer.[4]

Defendant was charged with three counts of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), on the basis of the two deliveries to Bembeneck by Alysha Nerg—as to which the prosecution alleged that defendant acted as an aider and abettor—and his direct delivery in his Jeep to Bryan Nerg on the same day. He was also charged with one count of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), on the basis of his control over the heroin found in the Nergs' motel room; one count of conspiracy to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*) and MCL 750.157a; one count of maintaining a drug house, MCL 333.7405(d); and one count of maintaining a drug vehicle, MCL 333.7405(d).

Defendant was convicted on all charges and was sentenced as a fourth-offense habitual offender, MCL 769.12, at the top of the recommended sentencing guidelines range on each charge. He was sentenced to five terms of 134 months to 40 years' imprisonment:

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[4] Richey testified that at one point she thought the substance was crack cocaine but that when she asked defendant, he got upset and told her it was "dope." The parties vigorously dispute whether Richey ever identified the substance as heroin before being told to use that word by the police and prosecution.

one term for each of the three counts of delivery of less than 50 grams of heroin, one term for the count of possession with intent to deliver less than 50 grams of heroin and one term for conspiracy to deliver less than 50 grams of heroin. He was also sentenced to two terms of 46 months to 15 years' imprisonment: one term for maintaining a drug house, and one term for maintaining a drug vehicle. The trial court directed that each of the sentences for the first five counts be served consecutively. Therefore, defendant will first become eligible for parole consideration after 55 years.

II. DEFENDANT'S CHALLENGES TO HIS CONVICTIONS

Defendant raises several issues that he claims merit reversal of some or all of his convictions. The first three arguments were raised in the brief submitted by appellate counsel, and the final three were raised in defendant's Standard 4 brief.[5] Defendant is not entitled to relief on any of these grounds.

First, defendant argues that his trial counsel was ineffective for failing to move for a mistrial when the jury heard an audio recording of a phone call in which defendant allegedly referred to his prior murder conviction and violent past. Allowing the jury to hear those references could have had a prejudicial effect. However, contrary to defendant's claim, there is no indication in the record that this portion of the audio recording was ever played to the jury. Defendant offers no evidence, other than his own affidavit, to support his claim that the statements were, in fact, played to the jury. In his affidavit, defendant states that the entire recording of this phone call was played for the jury, a

[5] See Administrative Order No. 2004-6, 471 Mich c, cii (2004).

contention the record clearly rebuts. The record shows that differing portions of this phone call were played to the jury, not that the tape was played in its entirety. Additionally, because no *Ginther*[6] hearing was held, "review is limited to mistakes apparent on the record." *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Because we find no mistake on the part of trial counsel apparent on the record, we conclude that defendant is not entitled to relief on his claim of ineffective assistance of counsel.

Second, defendant argues that the trial court erred in instructing the jury on the elements of the charges for keeping and maintaining a drug house and keeping and maintaining a drug vehicle. Specifically, defendant argues that the jury was not instructed on the Supreme Court's construction of the phrase "keep or maintain" as requiring controlled-substance use to be both continuous and a substantial purpose for which the house or vehicle was used. *People v Thompson*, 477 Mich 146, 156-157; 730 NW2d 708 (2007). However, the Supreme Court has held that "jury instructions that were 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." *People v Kowalski*, 489 Mich 488, 506; 803 NW2d 200 (2011).

While defendant is correct that the jury was not instructed on the definition of "keep or maintain" or on the requirement of continuous use, there is no error because the jury would have convicted defendant on the basis of the evidence at trial even if the jury had been more fully instructed on the intricacies of the "keep or maintain" element. Defendant relies on the

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

fact that the police found no heroin in either his home or his Jeep. However, had such evidence been found and presented, it would not be direct evidence that the keeping or selling was continuous or that the keeping or selling was a substantial purpose of the home or Jeep. The evidence of continuous use of his home and Jeep to keep and sell heroin and the evidence that a substantial purpose of his home and Jeep was to keep and sell heroin was the testimony of various witnesses, which indicated that the Jeep was used to make heroin deliveries and that the home was used to store both the heroin and the proceeds of the heroin's sale. Therefore, defendant cannot show that the alleged instructional error prejudiced him in any way because the alleged lack of evidence does not correspond to the alleged instructional omission; he would have been convicted on the basis of the evidence admitted regardless of the instructional error. See *Kowalski*, 489 Mich at 504-506.

Third, defendant argues that there was insufficient evidence to support his conviction of possession with the intent to deliver less than 50 grams of heroin. Defendant argues that there was insufficient evidence to convict him of possession with intent to deliver because there was no evidence that he possessed the heroin recovered in the Nergs' motel room. However, "[a] person need not have actual physical possession of a controlled substance to be guilty of possessing it." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). "Possession is a term that signifies dominion or right of control over the drug with knowledge of its presence and character." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000) (citations and quotation marks omitted). Both Bryan and Alysha testified that the substance the police recovered from their motel room was heroin and that defendant had control

over it at the time because he was the one who directed them to deliver the heroin to its intended recipients. This testimony was corroborated by Bembeneck, who testified that defendant was the one whom she would call to request the heroin and that Bryan and Alysha simply delivered it. There was clear evidence of a sufficient nexus between defendant and the contraband for the jury to conclude that, under the totality of the circumstances, defendant had constructive possession of the heroin.

Fourth, defendant argues that the prosecution did not timely serve defendant with notice of its intent to enhance defendant's sentence. The felony information in this case, dated March 24, 2015, contains a Fourth Habitual Offender Notice listing the prior convictions that would be relied on for purposes of sentence enhancement. The arraignment took place on March 26, 2015. MCL 769.13(2) states that notice of intent to seek a sentencing enhancement "may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense." Defendant had notice of the prosecution's intent to seek sentencing enhancement at his arraignment; therefore, this argument is without merit.

Fifth, defendant argues that the prosecution knowingly used the testimony of his ex-girlfriend, Richey, which he alleges was false and perjured. Defendant did not raise this issue in the trial court; therefore, it is unpreserved.[7] Attached to defendant's Standard 4 brief is an affidavit of Richey signed several days after trial in which she attests that she lied in her trial testimony and that she was told to stress certain alleged false-

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[7] Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

hoods, including that defendant told her he sold heroin and that she flushed drugs down the toilet. "As a rule the court is not impressed by the recanting affidavits of witnesses who attempt to show that they perjured themselves at the trial." *People v Smallwood*, 306 Mich 49, 55; 10 NW2d 303 (1943). Moreover, Richey's trial testimony did not stand alone; defendant's guilt was demonstrated by the testimony of numerous other witnesses, including the Nergs, Bembeneck, and police officers. Additionally, physical evidence in the form of the recovered controlled-buy funds supported defendant's conviction.

Sixth, defendant argues that he is entitled to reversal because the trial court failed to suppress documents seized during a search of his jail cell, which he claims included notations concerning trial strategy that he drafted at the direction of his attorney. We disagree. A hearing revealed that most of the documents with which defendant was concerned had not been seized and that only a few pages were transmitted to the prosecution. In addition, there is no indication on the documents that they were prepared for counsel, and there is no testimony or affidavit so asserting. Also, the prosecutor agreed on the record that the materials would not be used at trial as either substantive evidence or for purposes of impeachment, and there is no indication in the record that they were used in any fashion to aid the prosecution.[8] Finally, the court granted leave to defense counsel to schedule a further hearing if it appeared that additional documents had been reviewed, though not seized, and no further hearing was sought.

Defendant's convictions are affirmed.

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[8] See *Bishop v Rose*, 701 F2d 1150, 1151, 1154-1157 (CA 6, 1983).

III. DEFENDANT'S SENTENCING CHALLENGES

Defendant raises several issues regarding his sentencing. First, defendant argues that the trial court abused its discretion by ordering consecutive sentences for his conviction of conspiracy to deliver heroin, his conviction of possession with intent to deliver heroin, and his three convictions of delivery of heroin. Second, in his Standard 4 brief, defendant argues that his sentence violates his Sixth Amendment rights as articulated by the Supreme Court's decision in *People v Lockridge*, 498 Mich 358, 388-392; 870 NW2d 502 (2015). Finally, defendant argues that the trial court abused its discretion when it refused to strike from defendant's Presentence Investigation Report (PSIR) statements asserting that defendant is affiliated with a major Detroit street gang.

A. THE IMPOSITION OF CONSECUTIVE SENTENCES

In *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990),[9] the Supreme Court held that appellate review of sentences imposed by the trial court must ensure that the sentences imposed comply with the principle of proportionality. *Milbourn* held that the principle of proportionality requires that "sen-

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[9] *Milbourn* was overruled on other grounds by statute as recognized in *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011) (stating that it did not appear the "rule of *Milbourn* . . . survived the Legislature's enactment of the statutory sentencing guidelines"). However, the Supreme Court recently determined that the mandatory application of the statutory sentencing guidelines was in violation of the Sixth Amendment of the United States Constitution. *Lockridge*, 498 Mich at 364-365, 389, 391-392. Additionally, in *People v Steanhouse*, 313 Mich App 1, 47-48; 880 NW2d 297 (2015), lv gtd 499 Mich 934 (2016), this Court held that "a sentence that fulfills the principle of proportionality under *Milbourn*, and its progeny, constitutes a reasonable sentence under *Lockridge*."

tence[s] . . . imposed by the trial court . . . be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. at 636. A central proposition to the holding of *Milbourn* was that discretionary sentencing decisions are subject to review by the appellate courts to ensure that the exercise of that discretion has not been abused. *Id*. at 662, 664-665.[10]

We recognize that each sentence is to be reviewed on its own merits. We held in *People v Warner*, 190 Mich App 734, 735-736; 476 NW2d 660 (1991), that a proportionality challenge to a given sentence must be based on the individual term imposed and not on the cumulative effect of multiple sentences.

No case has held, however, that the decision to impose a consecutive sentence rather than a concurrent one is unreviewable. In *People v Miles*, 454 Mich 90, 92, 95; 559 NW2d 299 (1997), the Supreme Court rejected the defendant's proportionality challenge to the cumulative term resulting from a discretionary sentence and a consecutive two-year sentence for carrying a firearm during the commission of a felony (felony-firearm). However, the trial court in *Miles* could not and did not exercise any discretion regarding whether to impose a consecutive sentence because the Legislature has mandated that felony-firearm sentences be imposed consecutively to any other. MCL 750.227b(3). By contrast to the felony-firearm statute

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[10] In responding to the dissent, the *Milbourn* majority stated that "[t]he gravamen of the dissent is that the enormous sentencing discretion which the Legislature left to the judiciary is . . . in sharp contrast to every other discretionary sphere of judicial activity" and that, under the dissent's rationale, a sentencing court's discretion could "be exercised at will in the trial court to the extent that appellate courts may do nothing more than assure themselves that the trial court has not exceeded the statutory maximum." *Milbourn*, 435 Mich at 662.

at issue in *Miles*, the decision of a sentencing court to impose a consecutive sentence under MCL 333.7401(3), the statute under which the consecutive sentences were imposed in this case, is discretionary. *People v Doxey*, 263 Mich App 115, 117; 687 NW2d 360 (2004). Therefore, although the combined term is not itself subject to a proportionality review, the decision to impose a consecutive sentence when not mandated by statute is reviewable for an abuse of discretion.

In *Babcock*, 469 Mich at 269, the Supreme Court stated:

> At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes.

We find the standard for reviewing a trial court's decision for an abuse of discretion articulated in *Babcock* to be the appropriate vehicle by which to review a sentencing court's discretionary decision to impose consecutive sentences under MCL 333.7401(3). The Supreme Court has referred to the *Babcock* articulation as the "default abuse of discretion standard." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Review of a discretionary decision requires that the trial court set forth the reasons underlying its decision. See *People v Broden*, 428 Mich 343, 350-351; 408 NW2d 789 (1987) (holding that, in order to aid the appellate review of whether an abuse of discretion has occurred at sentencing, the trial court is required to articulate

on the record reasons for imposing a particular sentence). Further, MCL 333.7401(3) provides discretion to impose "[*a*] *term* of imprisonment . . . to run consecutively . . . ." (Emphasis added.) Therefore, a trial court may not impose multiple consecutive sentences as a single act of discretion nor explain them as such. The decision regarding each consecutive sentence is its own discretionary act and must be separately justified on the record. The statute clearly provides that a discretionary decision must be made as to each sentence and not to them all as a group. Moreover, this is in accordance with the Supreme Court's statements that Michigan has a "clear preference for concurrent sentencing" and that the "[i]mposition of a consecutive sentence is strong medicine." *People v Chambers*, 430 Mich 217, 229, 231; 421 NW2d 903 (1988) (quotation marks and citation omitted).[11] While imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each consecutive sentence so as to allow appellate review. As the *Milbourn* Court aptly stated, "Discretion, however, is a matter of degree, not an all or nothing proposition." *Milbourn*, 435 Mich at 664. Additionally, we believe that requiring trial courts to justify each consecutive sentence imposed will help ensure that the "strong medicine" of consecutive sentences is reserved for those situations in which so drastic a deviation from the norm is justified.

[11] *Chambers* concerned whether the statutory authorization of consecutive sentences for defendants who commit felonies while on bond for a prior felony, MCL 768.7b(2), allowed "the trial court first in time to render sentence" the authority to impose the consecutive sentence or whether that statute afforded the authority to impose the consecutive sentence "solely to the court last in time to impose sentence." *Chambers*, 430 Mich at 219. The Court held that the "first-in-time sentencing court lacked discretionary consecutive sentencing authority." *Id*. at 231-232.

In the instant case, the trial court spoke only in general terms, stating that it took into account defendant's "background, his history, [and] the nature of the offenses involved." Moreover, it did not speak separately regarding each consecutive sentence, each of which represents a separate exercise of discretion. Therefore, the trial court did not give particularized reasons—with reference to the specific offenses and the defendant—to impose each sentence under MCL 333.7401(2)(a)(*iv*) consecutively to the others. Remand is therefore necessary so that the trial court can fully articulate its rationale for each consecutive sentence imposed. We retain jurisdiction so that, after being apprised of the trial court's rationales, we may review its decisions for an abuse of discretion.

B. DEFENDANT'S *LOCKRIDGE* CHALLENGE

In order to determine whether defendant is entitled to relief under *Lockridge*, it is necessary to determine whether facts admitted by defendant and facts found by the jury were sufficient to assess the minimum number of offense variable (OV) points necessary for "defendant's score to fall in the cell of the sentencing grid under which he . . . was sentenced." *Lockridge*, 498 Mich at 394. If the facts defendant admitted and the facts found by the jury "were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," then defendant is entitled to have the case "remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error." *Id*. at 395, 397.

Defendant's sentencing information report shows that he received a total of 50 OV points, placing him in

OV Level V. Because 50 points is the minimum number of points in OV Level V, MCL 777.65, if any of the OV points were the result of judicial fact-finding as opposed to facts admitted by defendant or found by the jury, then defendant's guidelines minimum sentence range was impermissibly increased in violation of *Lockridge*. Defendant first alleges that the court relied on judicial fact-finding to assess points under OV 12.[12] OV 12 states that if "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed," then 10 points should be assessed. MCL 777.42(1)(c). Zero points are to be assessed if "[n]o contemporaneous felonious criminal acts were committed." MCL 777.42(1)(g). The statute defines a felonious criminal act as contemporaneous if "[t]he act occurred within 24 hours of the sentencing offense" and if "[t]he act has not and will not result in a separate conviction." MCL 777.42(2)(a). Defendant was assessed 10 points for OV 12.

The assignment of 10 points for OV 12 was supported by the testimony of Bryan Nerg, who stated that, on the evening of February 12, 2015, he received about 20 grams of heroin from defendant and that he packaged this heroin and sold it to approximately 10 to 12 people on February 13, 2015. This testimony was corroborated by police officers who testified to seeing Bryan's van coming and going from his motel room throughout the day. While this evidence was sufficient to support the trial court's scoring on OV 12,[13] because the variable specifically states that it

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[12] In addition to his *Lockridge* challenge, defendant argues on appeal that the trial court's assignment of 10 points for OV 12 was not supported by the record.

[13] This evidence is sufficient to defeat defendant's argument on appeal that the trial court erred by assessing 10 points for OV 12. "Under the sentencing guidelines, the circuit court's factual determinations are

cannot be scored for criminal acts for which there was a conviction, MCL 777.42(2)(a)(*ii*), it stands that any criminal act scored under OV 12 would not be a criminal act found by the jury. Additionally, there is no indication in the record that defendant has ever admitted to these other criminal acts about which Bryan and Alysha testified. Once the 10 points for OV 12 are removed from defendant's sentencing information report, he falls from OV Level V to OV Level IV. Therefore, the facts admitted by defendant and found by the jury are insufficient for his score to fall in the cell of the sentencing grid under which he was sentenced. Defendant is entitled to a *Crosby* remand[14] for "the trial court to determine whether [it] would have imposed a materially different sentence but for the constitutional error." *Lockridge*, 498 Mich at 395, 397.

C. REFERENCES TO GANG AFFILIATION IN THE PSIR

Defendant's PSIR states that defendant "is affiliated with the major street gang in Detroit, MI called Young Boys, Inc." At sentencing, defendant asked that this gang reference be stricken from the PSIR. The trial court found the reference to be accurate, relying solely on the prosecution's assertions that a PSIR from 1987 referred to an encounter defendant had with the De-

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reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.). Given that witness testimony supported the scoring, we are not left with a definite and firm conviction that the scoring was erroneous. Defendant's argument that trial counsel was ineffective for failing to raise this issue is also without merit. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that "[t]rial counsel is not required to advocate a meritless position").

[14] *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

troit police in which defendant was found with heroin in gang packaging, that Richey had stated during an interview with police that defendant told her he had been an enforcer for this Detroit gang while showing her the block that he had previously controlled, and that a cell phone seized from defendant's residence showed that defendant had viewed an entry to the gang's Wikipedia page.

The PSIR "is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). The prosecution "has the burden to prove the [challenged] fact by a preponderance of the evidence" upon an effective challenge by a defendant. *People v Waclawski*, 286 Mich App 634, 690; 780 NW2d 321 (2009). We conclude that the trial court abused its discretion by holding that the prosecution met its burden to prove the challenged statement in the PSIR. No evidence was submitted to support the allegations. Even assuming the truth of the prosecution's assertions,[15] the assertions at most established that defendant was, at one time, affiliated with this gang. The assertions do not establish that defendant *was affiliated* with the gang at the time of the alleged crimes or thereafter, as the PSIR suggests. Accepting the conclusion in the PSIR solely on the basis of the prosecution's statements suggesting that defendant had past gang affiliations was an abuse of discretion. On remand, we direct the trial court to remove these statements in the PSIR unless a preponderance of the evidence supports their accuracy.

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[15] While we note that the rules of evidence are not applicable at sentencing, *Waclawski*, 286 Mich App at 690, it cannot go unnoticed that the prosecution's statements contained multiple levels of hearsay and that the prosecution did not provide any independent verification for the truth of its assertions.

IV. CONCLUSION

We remand this case to the trial court for a *Crosby* hearing to determine whether the trial court would have imposed a materially different sentence had the court not been bound by the sentencing guidelines. If the trial court concludes that it would not have imposed a materially different sentence, then we direct the trial court to articulate its rationale for imposing each of the five consecutive sentences that it ordered in this case. However, if the trial court concludes that it would have imposed a materially different sentence had it not been bound by the guidelines, then it should resentence defendant. If the trial court does resentence defendant, it must provide a rationale for each sentence that it, in its discretion, determines should be served consecutively. We also direct the trial court to remove allegations in defendant's PSIR that are not supported by a preponderance of the evidence. In all other respects, we affirm.

Affirmed in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

SHAPIRO, P.J., and HOEKSTRA and SERVITTO, JJ., concurred.

WEAVER v GIFFELS

Docket No. 327844. Submitted September 8, 2016, at Grand Rapids. Decided November 10, 2016, at 9:00 a.m.

Defendant, James M. Giffels, moved for an order terminating his child support obligation in the Kalamazoo Circuit Court, Family Division, alleging that—under the pertinent portion of the Uniform Child Support Order providing that his support obligation for his daughter KG ended either (1) at the end of the month of KG's eighteenth birthday or (2) at the end of the month in which KG no longer attended high school full-time while residing on a full-time basis with plaintiff, Lisa A. Weaver—his support obligation ended at the end of the month of KG's eighteenth birthday because KG did not live and had never lived with plaintiff on a full-time basis pursuant to the parents' shared custody arrangement under which KG spent three days per week with defendant. A referee held a hearing on defendant's motion and submitted a recommended order granting defendant's motion. Plaintiff filed a written objection to the recommended order, and, following a hearing, the court, Stephen D. Gorsalitz, J., denied defendant's motion, holding that defendant's support obligation extended beyond KG's eighteenth birthday because KG resided with plaintiff in full compliance with the custody order. Defendant appealed.

The Court of Appeals *held*:

When a child turns 18 years old, the child is no longer subject to custody orders but could be subject to child support orders. MCL 552.605b(2) provides, in pertinent part, that the court may order postmajority child support for the time a child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the recipient of support or at an institution, but in no case after the child reaches 19 years and 6 months of age. Residing on a full-time basis means that a child must completely reside with the child support recipient for the duration of high school; in other words, for support to continue, the child must reside only with the support recipient while completing high school. In this case, once KG

turned 18 years old, she was no longer subject to the custody order and was free to live with defendant, plaintiff, both (as she did when she was subject to the custody order), or somewhere else, but because of MCL 552.605b, she was still a "child" for purposes of the child support order as long as the requirements of that statute were met. Because plaintiff and defendant did not have an agreement in their judgment of divorce that obligated defendant to pay postmajority child support for KG, defendant's continuing obligation to pay child support depended on MCL 552.605b(2), and the only dispute was whether KG was residing with plaintiff on a full-time basis. The trial court erred in concluding that KG resided with plaintiff on a full-time basis solely because after KG turned 18, she continued living in accordance with the arrangements set forth in the now-inapplicable parenting-time order. Furthermore, under the legal definition of "reside," which contains both a physical-presence and an intent element, it was quite possible that KG could reside full-time with the payee based on KG's intent to make plaintiff's home her permanent residence—while still spending some overnights with defendant—as long as her intent was to reside full-time with plaintiff; that issue had to be decided by the trier of fact to properly resolve defendant's motion. On remand, the trial court was directed to consider, when relevant, factors historically considered in determining where an individual resides or has his or her domicile.

Reversed and remanded for further proceedings.

BECKERING, J., concurred in the result only.

PARENT AND CHILD — CHILD SUPPORT — POSTMAJORITY CHILD SUPPORT — RESIDING ON A FULL-TIME BASIS WITH THE RECIPIENT OF SUPPORT.

MCL 552.605b(2) provides that the court may order postmajority child support for the time a child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the recipient of support or at an institution, but in no case after the child reaches 19 years and 6 months of age; residing on a full-time basis means that a child must completely reside with the child support recipient for the duration of high school; in other words, for support to continue, the child must reside only with the support recipient while completing high school; the legal definition of "reside," which contains both a physical-presence and an intent element, must be used in determining where a child resides for purposes of MCL 552.605b(2).

Miller Johnson (by *Julie A. Sullivan* and *Richard E. Hillary, II*) for Lisa A. Weaver.

James M. Giffels *in propria persona*.

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

MURRAY, P.J. Typically a divorced parent's child support obligation ends when the child turns 18 years old, i.e., is no longer a minor. An exception to that rule exists, however, when the child turns 18 but is still attending high school and is residing on a "full-time basis" with the child support recipient. MCL 552.605b(2). This case presents the question of what is meant by residing on a "full-time basis" with the child support recipient. The circuit court, focusing on the parties' argument over the meaning of "full-time basis," concluded that residing on a full-time basis meant that the child must still be residing with the support recipient in full compliance with the child custody or parenting-time order. We hold that the support order is irrelevant to the analysis and that an 18-year-old child is residing on a "full-time basis" with the support recipient when the child is *residing* only with that parent. As a result, we reverse the circuit court order to the extent it ruled that compliance with the parenting-time order constituted "full-time," and we remand for the trial court to determine whether the 18-year-old resided with her mother on a full-time basis.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were married on August 3, 1991, and had two children, KG and MG, during the marriage. Plaintiff filed for divorce, and the judgment of divorce eventually entered provided, among other

things, that the parties would share joint legal and physical custody of the children. Specifically, the judgment provided that the children would reside primarily with plaintiff while defendant would have parenting time in an amount agreed to by the parties or, if no agreement could be reached, according to the schedule set forth in the judgment. Pursuant to the Uniform Child Support Order, incorporated by reference into the judgment of divorce, defendant was ordered to pay a total of $2,000 per month in child support.[1] The Uniform Child Support Order provided that defendant's support obligation for each child would continue

> through the end of the month of the latter: 1) the child's 18th birthday, or 2) the last day of regularly attending high school full-time with the reasonable expectation of graduating, as long as the child is residing full-time with the recipient of support, or at an institution, but under no circumstances shall the support obligation continue after the month the child reaches [age] 19 and 1/2.[2]

According to defendant, following entry of the judgment, the parties informally agreed to a parenting-time arrangement that allowed the children to reside with plaintiff four days per week and with defendant three days per week. That arrangement continued for all times relevant to these proceedings.

KG turned 18 years old on November 26, 2014. At that time, she was still enrolled in high school, with an expected graduation date in the spring of 2015. After she turned 18, defendant filed a motion in the Family Division of the Kalamazoo Circuit Court praying for an order terminating his support obligation as to KG, retroactive to November 26, 2014. In support, defen-

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[1] Specifically, defendant was ordered to pay $1,350 for one child and an additional $650 for the second child.

[2] The Uniform Child Support Order comports with MCL 552.605b.

dant recited the pertinent portion of the Uniform Child Support Order providing that defendant's support obligation ended either (1) at the end of the month of KG's eighteenth birthday or (2) at the end of the month in which KG no longer attended high school full-time while residing on a "full-time basis" with plaintiff. Defendant argued that the latter provision was inapplicable—and therefore his support obligation ended upon KG's eighteenth birthday—because while KG was still enrolled full-time in high school, she did not live, nor had she ever lived, with plaintiff on a full-time basis; instead, the parents shared physical custody, with KG spending three days per week with defendant.

A hearing on defendant's motion was held before a family division referee, who agreed with defendant, concluding that "[t]he statute [MCL 552.605b] is really quite clear": it allows for postmajority child support only where the child is "regularly attending high school on a full-time basis, with a reasonable expectation of completing sufficient credits to graduate" and is living with the recipient of support on a full-time basis. With regard to the term "full-time basis," the referee opined that the term "means what it says," i.e., that the child must be living full-time with the recipient of support, not simply the full amount of time allotted to the recipient under the custody agreement. On the basis of these conclusions, a recommended order was submitted granting defendant's motion to terminate his support obligation to KG effective November 26, 2014.

Plaintiff filed a written objection to the referee's recommended order, asserting that the referee's definition of "full-time basis," effectively requiring KG to reside with plaintiff at all times rather than merely the time allotted to her under the parenting-time arrangement, was erroneous. Plaintiff asserted that "it would be

unlikely that any child for whom child support is presently being ordered in the State of Michigan resides 'full-time' with either parent given the progression of shared parenting time, joint custody, etc." Thus, she argued, to define the term "full-time basis" in such a way as to require that the child live with the recipient of child support at all times, irrespective of a parenting-time arrangement, would lead to an "inequitable" result, i.e., that almost no parent supporting a postmajority child in high school would receive support.

After a hearing on plaintiff's objection, the circuit court entered an order denying defendant's motion to terminate his support obligation to KG as of her eighteenth birthday, holding that defendant's support obligation extended beyond KG's eighteenth birthday because she resided with plaintiff in full compliance with the custody order:

> The general rule is and has been that child support terminates after the child reaches 18 years of age. MCL 552.605B [sic] states an exception to the general rule; that is, if a child is regularly attending high school on a full-time basis with the reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the recipient of support or an institution, [but in] no case after the child reaches 19 years and sixth months of age, child support may be ordered. This Court has dealt with many cases where the issue of whether the child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school [was in dispute]; however, this is the first case that this Court has considered where the issue of "residing on a full-time basis with the recipient of support" was at issue. No case law has been found that defines the term "residing full-time". If full-time means all the time as is suggested by the Defendant and a child resided part-time with the payor of support pursuant to parenting time which happens in most every case, child support for a child over 18

> would hardly ever be ordered. If it is analogous to full-time employment, an individual does not work all of the time, but only involving a standard number of hours of working time, or for the entire time appropriate to an activity. It makes more sense that "full-time with the recipient of support" means spending all of the time with the recipient of support that she is ordered to be with, and not somewhere else like a girlfriend's, a boyfriend's, or someone else's place, and not either parent. For example, in the present case, [where] the child spends four days with the mother and three days with the father, residing full time with the recipient means that the child is residing the full four days with her mother.
>
> Clearly, MCL 552.605(2) [sic] requires courts to use the Michigan Child Support Formula which accounts for the parenting time split between the parties. 2013 MCSF 3.03(B) says, *"An offset for parenting time generally applies to every support determination whether in an initial determination or subsequent modification, whether or not previously given."* This Court does not read MCL 552.605b(2) as conflicting with [the MCSF], otherwise we would have to consider whether any overnights with the payor renders the recipient's residence a "part-time" residence, and thereby undermine the intent of the statute and the policies embodied in the Michigan Child Support Formula.
>
> . . . Therefore, the Defendant would be required to continue to pay child support at the ordered rate until the child graduates from high school as long as the child is residing with the mother the four days per week which the child support was based upon.

Following entry of the trial court's order, we ultimately granted defendant's delayed application for leave to appeal, *Weaver v Giffels*, unpublished order of the Court of Appeals, entered October 15, 2015 (Docket No. 327844). We now reverse and remand for further proceedings.[3]

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[3] At oral argument before this Court, defendant argued that because plaintiff had paid the child support as required by the contested order,

II. ANALYSIS

This Court reviews a trial court's decision to modify child support for an abuse of discretion. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000). However, we review de novo any attendant questions of law, which of course include the trial court's interpretation of court rules and statutes. *Id.*; *Neville v Neville (On Remand)*, 295 Mich App 460, 466; 812 NW2d 816 (2012). As we observed in *Lee v Smith*, 310 Mich App 507, 509; 871 NW2d 873 (2015), in determining the meaning of a statute,

> [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. [Citations omitted.]

If a word or phrase is defined in the statute itself, then it must be applied as expressly defined. *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 662; 658 NW2d 510 (2003). "However, where a statute does not define a term, resort to a dictionary for a definition is appropriate." *Id.*

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this appeal was moot. We have specifically held to the contrary, *Dean v Dean*, 175 Mich App 714, 722; 438 NW2d 355 (1989), so we must resolve the merits of this appeal.

It is well settled that "[t]he parents of a minor child have a duty to support that child." *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002), citing *Macomb Co Dep't of Social Servs v Westerman*, 250 Mich App 372, 377; 645 NW2d 710 (2002). Historically speaking, absent an agreement by the parties, a parent's obligation to pay child support ended when the child reached 18 years of age, i.e., the age of majority. *Lee*, 310 Mich App at 509-510. In fact, before 1990, courts were without authority to independently order a parent to pay postmajority child support. *Smith v Smith*, 433 Mich 606, 632-633; 447 NW2d 715 (1989), superseded by statute as explained in *Lee*, 310 Mich App at 509-510. In 1990, however, the Legislature enacted MCL 552.16a, which provided a narrow exception to the general rule that support obligations end at the age of majority. See 1990 PA 243; *Rowley v Garvin*, 221 Mich App 699, 706; 562 NW2d 262 (1997); *Lee*, 310 Mich App at 510. Specifically, MCL 552.16a, as enacted by 1990 PA 243, provided, in pertinent part:

> (2) Beginning on the effective date of this section, the court may order support for the time a child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the payee of support or at an institution, but in no case after the child reaches 19 years and 6 months of age. [See *Lee*, 310 Mich App at 510; *Rowley*, 221 Mich App at 705.]

In 2001, the Legislature repealed MCL 552.16a and replaced it with the current statute, MCL 552.605b, which essentially mirrors the old version. See 2001 PA 106; 2001 PA 107; *Lee*, 310 Mich App at 511. Specifically, in its current form, MCL 552.605b provides, in pertinent part:

> (1) A court that orders child support may order support for a child after the child reaches 18 years of age as provided in this section.
>
> (2) The court may order child support for the time a child is regularly attending high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on a full-time basis with the recipient of support or at an institution, but in no case after the child reaches 19 years and 6 months of age. A complaint or motion requesting support as provided in this section may be filed at any time before the child reaches 19 years and 6 months of age.
>
> (3) A support order entered under this section shall include a provision that the support terminates on the last day of a specified month, regardless of the actual graduation date.
>
> * * *
>
> (5) A provision contained in a judgment or an order entered under this act before, on, or after September 30, 2001 [the date the statute took effect] that provides for the support of a child after the child reaches 18 years of age is valid and enforceable if 1 or more of the following apply:
>
> (a) The provision is contained in the judgment or order by agreement of the parties as stated in the judgment or order.
>
> (b) The provision is contained in the judgment or order by agreement of the parties as evidenced by the approval of the substance of the judgment or order by the parties or their attorneys.
>
> (c) The provision is contained in the judgment or order by written agreement signed by the parties.
>
> (d) The provision is contained in the judgment or order by oral agreement of the parties as stated on the record by the parties or their attorneys.

MCL 552.605b thus contains two mechanisms for continuing a parent's obligation to pay postmajority sup-

port for a child over the age of 18. First, under Subsection (5), the parties may—as they always could—expressly agree that the parent will continue paying support for the child past the age of 18, regardless of whether the child satisfies the requirements for support in Subsection (2). See *Lee*, 310 Mich App at 513. Second, under Subsection (2), the trial court has "limited authority" to order postmajority support for children between the ages of 18 years and 19 years and 6 months who meet the requirements set forth in that subsection. *Id*.

The term "full-time basis" is not defined in MCL 552.605b or anywhere else in the relevant statutes, and neither this Court nor our Supreme Court has previously construed the term as it pertains to the residency requirement. Because the term is undefined, we resort to the dictionary. *Sanchez*, 254 Mich App at 662. The most closely related definition from *Merriam-Webster's Collegiate Dictionary* (11th ed) is that "full-time" means "devoting one's full attention and energies to something." "Full," however, is defined, in relevant part, as "complete esp. in detail, number, or duration." *Id*. Together, these definitions reveal that, in this context, residing on a "full-time basis" means a child must completely *reside* with the child support recipient for the duration of high school. In other words, for support to continue, the child must *reside*[4] only with the support recipient while completing high school.

Aside from the dictionary definitions, the provisions of several related statutes support—if not compel—the conclusion that compliance with the parenting-time order is not a factor in deciding what "full-time" means. Initially, MCL 552.17a(1) provides that a circuit court

[4] We emphasize "reside" because, as discussed later in this opinion, that word is of equal importance in resolving this matter.

has jurisdiction over the *custody* of a child only until that child reaches the age of 18, while child support generally ends at 18 but with two exceptions:

> *The court has jurisdiction* to make an order or judgment relative to the minor children of the parties as authorized in this chapter *to award custody of each child to 1 of the parties* or a third person *until each child has attained the age of 18 years* and may require either parent to pay for the support of each child until each child attains that age. Subject to section 5b of the support and parenting time and enforcement act, 1982 PA 295, MCL 552.605b, the court may also order support as authorized in this chapter for a child of the parties to provide support for the child after the child reaches 18 years of age. [Emphasis added.]

Likewise, MCL 722.27(1)(a) provides that custody can only be awarded until the child reaches the age of 18:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) *Award the custody of the child* to 1 or more of the parties involved or to others and provide for payment of support for the child, *until the child reaches 18 years of age*. [Emphasis added.]

Hence, these statutes allow a circuit court to exercise jurisdiction over the *custody* of a child until she reaches the age of 18, the age of majority, *Bowie v Arder*, 441 Mich 23, 53; 490 NW2d 568 (1992); *Heltzel v Heltzel*, 248 Mich App 1, 30; 638 NW2d 123 (2001), but in limited circumstances a court can order child support beyond the child turning 18 years of age.

Our Court has recognized these important but differing implications under the child custody and sup-

port laws when a child turns 18 years of age. In *Hayford v Hayford*, 279 Mich App 324, 327; 760 NW2d 503 (2008), we pointed out that an 18-year-old is no longer subject to custody orders but could be subject to child support orders:

> *Because petitioner reached majority age before seeking the PPO, the Child Custody Act was inapplicable with respect to custody issues, although it was still applicable regarding child support*. The Child Custody Act defines "child" as "minor child and children. Subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, for purposes of providing support, child includes a child and children who have reached 18 years of age." MCL 722.22(d). MCL 552.605b permits the entry of a child-support order in certain circumstances for a child who has reached 18 years of age. If the child is still in high school, MCL 552.605b provides that support may be ordered until he or she reaches 19 years and 6 months of age. Otherwise, as used in the Child Custody Act, "child" means a minor. [Emphasis added.]

Reaching the age of majority is significant because, as we said some time ago, "the Age of Majority Act provides that a person who attains eighteen years of age 'is deemed to be an adult of legal age for all purposes whatsoever and shall have the same duties, liabilities, responsibilities, rights and legal capacity as persons heretofore acquired at 21 years of age.' " *Adkins v Adkins*, 181 Mich App 81, 83; 448 NW2d 741 (1989), quoting MCL 722.52. See also *Smith*, 433 Mich at 614. Once KG turned 18, she was no longer subject to the custody order and was free to live with defendant, plaintiff, both (as she did when she was subject to the custody order), or somewhere else. But because of MCL 552.605b, she was still a "child" for purposes of the child support order as long as the requirements of that statute were met.

Turning to the facts, there was no agreement in the parties' judgment of divorce obligating defendant, without qualification, to pay child support for KG until she obtained 19 years and 6 months of age. Therefore, defendant's continuing obligation to pay child support for KG depended on whether KG satisfied the requirements of MCL 552.605b(2) and the Uniform Child Support Order incorporated into the divorce judgment, i.e., whether she was regularly attending high school on a full-time basis with the reasonable expectation of graduating while residing with plaintiff on a full-time basis. As to the first requirement, the record reflects—and defendant does not dispute—that KG was still attending high school on a full-time basis when she turned 18 on November 26, 2014,[5] and that she expected to graduate the following spring. Thus, the only dispute was whether KG was residing on a full-time basis with plaintiff. Based on the law set forth above, the trial court erred in concluding that KG resided with plaintiff on a full-time basis solely on the exclusive basis that, after KG turned 18, she continued living in accordance with the arrangements set forth in the now-inapplicable parenting-time order.

However, this does not end the inquiry. Although the parties argue exclusively over the meaning of "full-time basis," equally important—if not more so—is whether KG had the intent to "reside" full-time with the payee. In *Kubiak v Steen*, 51 Mich App 408, 413-414; 215 NW2d 195 (1974), we set forth both the legal and popular definitions of "reside":

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[5] With regard to the "regularly attending high school on a full-time basis" provision in MCL 552.605b(2), this Court previously construed the term "full-time" consistent with the State School Aid Act of 1979, MCL 388.1601 *et seq.*, which provides that "students who take nine hundred hours of instruction over the course of a school year are considered 'full-time' equivalent pupils." *Rowley*, 221 Mich App at 708-709, citing MCL 388.1606(4)(t).

> The Legislature did not use the word "residence" or "domicile" but "resides." That the term "resides" may have a different connotation than the term "residence" is without doubt.
>
> > It has been said that the word "reside" has two distinct meanings, and that it may be employed in two senses, and, in what is sometimes referred to as *the strict, legal, or technical sense, it means legal domicile as distinguished from mere residence or place of actual abode*. *In this sense the word "reside" means legal residence; legal domicile*, or the home of a person in contemplation of law; the place where a person is deemed in law to live, which may not always be the place of his actual dwelling, and thus the term may mean something different from being bodily present, and does not necessarily refer to the place of actual abode. When employed in this sense, the word "reside" includes not only physical presence in a place, but *also the accompanying intent* of choosing that place as a permanent residence.
> >
> > In what is sometimes referred to as its popular sense, the word 'reside' means the personal, actual, or physical habitation of a person; actual residence or place of abode; and it signifies being physically present in a place and actually staying there. In this sense the term means merely residence, that is, personal residence, and it does not mean legal residence or domicile. (Emphasis supplied.) 77 CJS "Reside," pp 285-286.

Utilizing the legal definition of "reside,"[6] which contains both a physical-presence and an intent element, it is quite possible that KG could reside full-time with the payee based on her intent to make her mother's

[6] The Child Custody Act refers to the legal connotation of reside when referring to a child's legal residence under a custody order. MCL 722.31. See also *McGrath v Allstate Ins Co*, 290 Mich App 434, 443; 802 NW2d 619 (2010) (stating that "reside" may have a legal or technical meaning under the Child Custody Act as recognized in *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 163; 534 NW2d 502 (1995)). Although the

home her permanent residence—while still spending some overnights with her father—as long as her intent was to reside full-time with her mother. Because this issue was not raised before this Court or the trial court, there are no factual findings or decisions to review. However, that issue must be decided by the trier of fact to properly resolve defendant's motion. In doing so, the trial court should consider, when relevant, the factors historically considered in determining where an individual resides or has his or her domicile:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household. [*Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 496-497; 274 NW2d 373 (1979) (citations omitted).]

" 'In considering these factors, no one factor is, in itself, determinative; instead, each factor must be balanced and weighed with the others.' " *Tienda v Integon Nat'l Ins Co*, 300 Mich App 605, 615; 834 NW2d 908 (2013), quoting *Workman*, 404 Mich at 496.[7] The trial court

custody order is no longer applicable to KG, the fact that the Legislature utilized that connotation is relevant to how we construe that term in a related statute.

[7] The *Workman* factors are relevant to the determination of where KG resides, even though *Workman* dealt with deciding one's domicile, a term not specifically referenced in the statute. This is so because (1) the legal definition of "reside" relates that term to domicile, *Kubiak*, 51 Mich App at 413-414, and (2) domicile and residence are sometimes treated as having the equivalent meaning under Michigan law, *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 498-499; 835 NW2d 363 (2013), which

must make this fact-intensive determination, and only after doing so can it decide whether KG resided on a full-time basis with her mother. Consequently, we remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings. We do not retain jurisdiction. No costs, an issue of first impression being involved. MCR 7.219(A).

HOEKSTRA, J., concurred with MURRAY, P.J.

BECKERING, J. (*concurring*). I concur in the result only.

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is the case with MCL 552.605b(2), as it denotes a more permanent, singular residence by associating "reside" with "full-time basis." See *Tienda*, 300 Mich App at 615 (noting that "[t]he *Workman* Court set forth the following nonexhaustive list of factors to determine whether a person resides or is domiciled in an insured's household").

In re PETITION OF TUSCOLA COUNTY TREASURER FOR FORECLOSURE

Docket No. 328847. Submitted November 8, 2016, at Detroit. Decided November 10, 2016, at 9:05 a.m. Leave to appeal denied 501 Mich 859.

The Tuscola County Treasurer filed a petition in the Tuscola Circuit Court, seeking the tax foreclosure of a parcel owned by Jennifer A. Dupuis. On January 23, 2014, the treasurer granted Dupuis a financial-hardship deferral of her 2011 and 2012 property taxes; the deferral required Dupuis to pay the 2011 taxes by June 1, 2014, and pay the 2012 taxes on a monthly repayment plan. Dupuis did not pay the 2011 and 2012 property taxes in accordance with the deferral plan, and the treasurer filed a petition to foreclose on Dupuis's property; the treasurer sent the statutorily required notice of the show-cause and foreclosure hearings to Dupuis. The court, Amy Gierhart, J., entered a final judgment of foreclosure on the property on February 2, 2015. The judgment provided that fee simple title would vest in the treasurer on March 31, 2015, and that Dupuis would lose all right of redemption, unless the delinquent taxes were paid before that date. The order further provided that the judgment was final with respect to the property and could not be modified, stayed, or held invalid after March 31, 2015, except as provided in MCL 211.78k(7). The treasurer sent Dupuis a notice, informing her that she had to pay the delinquent taxes by March 31, 2015, to redeem the property, but she did not pay the taxes. Dupuis submitted $6,000 to the treasurer in May 2015, and the treasurer returned the money in June 2015. In August 2015, 23 days before the scheduled auction of the property, Dupuis moved under MCR 2.612(C)(1)(f) to conditionally set aside the judgment of foreclosure. In an affidavit, Dupuis stated that the foreclosure was the result of personal financial issues that resulted from her husband's back injury and incorrect information from a Tuscola Township board member that the taxes were due by May 2015, not March 31, 2015. The circuit court granted Dupuis's motion and ordered the treasurer to convey the property back to Dupuis conditioned on her payment of delinquent taxes, concluding that it had equitable jurisdiction and that it was the appropriate thing to grant the motion and

allow Dupuis to redeem the property. Dupuis paid the delinquent property taxes. The treasurer appealed, and Dupuis cross-appealed.

The Court of Appeals *held*:

1. Jurisdiction is a court's power to act and its authority to hear and decide a case. MCL 600.605 provides that a circuit court has original jurisdiction to hear and determine all civil claims and remedies except when jurisdiction is expressly prohibited or given to another court by constitution or statute.

2. MCL 211.78k(5) of the General Property Tax Act (GPTA), MCL 211.1 *et seq*., provides that the circuit court must enter final judgment on a foreclosure petition filed under MCL 211.78h at any time after a foreclosure petition hearing but no later than March 30 immediately succeeding the hearing—with the judgment effective on the March 31 immediately succeeding the hearing; with limited exceptions, the foreclosed property owner's redemption rights expire on the March 31 immediately succeeding the entry of a foreclosure judgment on the property. MCL 211.78k(5)(b) requires that a circuit court specify in a foreclosure judgment that fee simple title to the property will vest absolutely in the foreclosing governmental unit, with certain exceptions, without any further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 date. MCL 211.78k(5)(g) provides that a foreclosure judgment entered under MCL 211.78k is a final order with respect to the property affected by the judgment and, except as provided in MCL 211.78k(7), the judgment may not be modified, stayed, or held invalid after the March 31 immediately succeeding the entry of judgment foreclosing the property. Similarly, MCL 211.78k(6)—which reflects a legislative effort to limit the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA—provides that fee simple title to property set forth in a foreclosure petition vests absolutely in the foreclosing governmental unit if the forfeited taxes, interest, penalties, and fees are not paid on or before the March 31 date. Subsection (6) also provides that because a circuit court does not have jurisdiction to alter a foreclosure judgment when the property owner fails to redeem the property or appeal the judgment within the parameters of the MCL 211.78k(7) appeal process, the court may not stay or hold invalid the judgment in that circumstance; the limit on jurisdiction does not apply if the property owner's due-process rights were not protected by constitutionally adequate notice of the foreclosure proceedings.

3. The foreclosing governmental unit's title may not be stayed or held invalid except as provided by MCL 211.78k(7) or (9), and MCL 211.78k(7) provides that a foreclosing governmental unit or a person claiming to have a property interest in foreclosed property may appeal the circuit court's order or the circuit court's foreclosure judgment to the Court of Appeals; under MCL 211.78k(7), the circuit court's foreclosure judgment is stayed until the Court of Appeals has reversed, modified, or affirmed the judgment.

4. The circuit court erred by granting Dupuis conditional relief from the foreclosure judgment. Although MCR 2.612(C)(1)(f) authorizes a circuit court to relieve a party from a final judgment for any reason justifying relief, the circuit court lacked jurisdiction to modify the foreclosure judgment because of the MCL 211.78k(6) prohibition that limits modification of such an order to procedures provided in the GPTA. Dupuis did not appeal the foreclosure judgment in the Court of Appeals in accordance with MCL 211.78k(7) or pay the delinquent taxes, interest, penalties, and fees on or before the March 31, 2015 redemption deadline, and the circuit court's jurisdiction to modify the foreclosure judgment was accordingly extinguished when Dupuis failed to follow those procedures. The circuit court also did not retain jurisdiction to modify the foreclosure judgment on the basis of a due-process violation; Dupuis received the statutorily required notice of the foreclosure proceedings and was therefore not denied the right to due process.

5. The Separation of Powers Clause, Article 3, § 2 of Michigan's 1963 Constitution, provides that governmental powers are separated into three branches—legislative, executive, and judicial—and no person exercising the powers of one branch may exercise those powers properly belonging to another branch except as expressly provided in the Constitution. While Article 6, § 5 of Michigan's 1963 Constitution provides that the Supreme Court has authority to establish, modify, amend, and simplify through general rules the practice and procedure in all Michigan courts, issues of substantive law are left to the Legislature. A statute does not infringe the Supreme Court's rulemaking authority if the statute is grounded on policy considerations other than regulating the procedural operation of the judiciary.

6. MCL 211.78k(5)(g) and (6)—which provide that a foreclosure judgment entered under MCL 211.78k is a final order that vests fee simple title in the foreclosing governmental unit if the property owner does not redeem the property—do not infringe the Supreme Court's rulemaking authority over practice and

procedure. Subsections (5)(g) and (6) are substantive law in that they reflect a legislative effort to provide finality to foreclosure judgments by limiting the jurisdiction of courts to modify the judgments, not just a concern regarding the judicial dispatch of litigation. Accordingly, MCL 211.78k(5)(g) and (6) do not violate the separation-of-powers doctrine.

Trial court order granting motion to conditionally set aside foreclosure judgment reversed, and order conveying title of property to Dupuis vacated.

1. TAXATION — FORECLOSURES — JURISDICTION OF CIRCUIT COURT TO MODIFY JUDGMENTS.

MCR 2.612(C)(1)(f)—which authorizes a circuit court to relieve a party from a final judgment for any reason justifying relief—does not grant a circuit court jurisdiction to modify a foreclosure judgment when the property owner has failed to redeem the property or appeal the judgment of foreclosure within 21 days of its entry; MCL 211.78k(6) limits modification of such an order to the procedures provided in the General Property Tax Act, MCL 211.1 *et seq*.

2. TAXATION — CONSTITUTIONAL LAW — FORECLOSURES — JURISDICTION OF CIRCUIT COURT TO MODIFY JUDGMENTS — SEPARATION OF POWERS.

MCL 211.78k(5)(g) and (6) of the General Property Tax Act, MCL 211.1 *et seq*., are substantive laws that reflect a legislative effort to provide finality to foreclosure judgments by limiting a circuit court's jurisdiction to modify the judgment of foreclosure; because Subsections (5)(g) and (6) are not concerned with the judicial dispatch of legislation, the subsections do not violate the Separation of Powers Clause of the Michigan Constitution, Const 1963, art 3, § 2, and do not infringe the Michigan Supreme Court's rulemaking authority over practice and procedure under Const 1963, art 6, § 5.

Peter Goodstein for the Tuscola County Treasurer.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for Jennifer A. Dupuis.

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

PER CURIAM. Petitioner, the Tuscola County Treasurer, appeals as of right the order granting respondent,

Jennifer A. Dupuis, conditional relief from an earlier judgment of foreclosure of her property. Respondent cross-appeals that same order on the basis that MCL 211.78k(5)(g) is unconstitutional. We reverse and vacate.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the foreclosure of respondent's property, which is located in Arbela Township. The property became delinquent on property taxes for 2011 and 2012. On January 23, 2014, petitioner granted respondent a financial-hardship deferral that required respondent to pay the 2011 taxes by June 1, 2014, and to pay $300 a month for the 2012 taxes. However, respondent did not pay the 2011 or 2012 taxes in accordance with the financial-hardship deferral.

On May 14, 2014, petitioner filed a petition of foreclosure for properties with unpaid property taxes for 2012 and prior years, and respondent's property was incorporated in the petition. Respondent was provided with notice regarding a January 21, 2015 show-cause hearing and a February 2, 2015 foreclosure hearing. Respondent does not argue that she did not receive these notices. Petitioner also filed with the court proof of publication and proof of personal visits to the property.

Following a hearing on February 2, 2015, the circuit court entered a final judgment of foreclosure on the property. The judgment ordered that fee simple title would vest in petitioner on March 31, 2015, and respondent would lose all rights of redemption unless the delinquent taxes were paid before that date. The order further provided:

> This judgment is a final order with respect to the property affected by this Judgment and except as provided in MCL 211.78k(7) shall not be modified, stayed, or held

> invalid after March 31, 2015 unless there is a contested case concerning a parcel in which event this final judgment, with respect to the parcel involved in the contested case, shall not be modified, stayed, or held invalid 21 days after the entry of the judgment in the contested case.

Another notice was sent to respondent, informing her that she had to pay the delinquent taxes by March 31, 2015, to redeem the property. Respondent does not challenge that she received the notice. Respondent did not pay the delinquent taxes by March 31, 2015. The auction of the property was scheduled for August 26, 2015.

On August 3, 2015, respondent moved to conditionally set aside the judgment of foreclosure pursuant to MCR 2.612(C)(1)(f). Respondent explained in an affidavit that the foreclosure was the result of past hard times and a misunderstanding with township officials. Specifically, respondent stated that she fell on hard times after her husband broke his back and that a township board member told her that she needed to pay the delinquent taxes by May 2015. According to respondent, she submitted $6,000 to petitioner in early May 2015, but petitioner returned the money to her by mail about a month later. Respondent stated that she had the necessary funds to pay the entire tax deficiency in full, including penalties, costs, and expenses, and she had finally located an attorney who could help her.

Petitioner responded on August 6, 2015, contending that the circuit court lacked jurisdiction because the judgment of foreclosure was entered, the redemption period had expired, and respondent was not claiming a denial of due process. Petitioner further argued that, even if the court had jurisdiction, it should not grant relief under MCR 2.612(C)(1)(f) because respondent's position "is solely the result of her actions and inac-

tions." During a hearing on August 10, 2015, the circuit court granted respondent's motion, stating that it had "equitable jurisdiction" and that granting the motion was "the appropriate thing to do." The court explained that it "may be wrong" on the jurisdictional issue but that it preferred to err on the side of doing the appropriate thing. The court then entered an order granting respondent conditional relief from the judgment of foreclosure and directing petitioner to convey the property back to respondent conditioned on respondent's payment of all delinquent taxes, interest, penalties, and fees by August 20, 2015. Respondent paid the taxes, interest, penalties, and fees within the specified time frame, and no auction occurred.

II. STANDARD OF REVIEW

We review de novo whether the circuit court had subject-matter jurisdiction to enter the order granting conditional relief. *In re Wayne Co Treasurer Petition for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 290; 698 NW2d 879 (2005). Whether a statute is unconstitutional because it violates the separation-of-powers doctrine is a question of law, which we review de novo. See *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004); *Okrie v Michigan*, 306 Mich App 445, 453; 857 NW2d 254 (2014).

III. JURISDICTION

Petitioner contends that the circuit court did not have jurisdiction to enter the order granting respondent conditional relief from the judgment of foreclosure. We agree.

"Jurisdiction is a court's power to act and its authority to hear and decide a case." *Riverview v Sibley*

Limestone, 270 Mich App 627, 636; 716 NW2d 615 (2006). "[A] court must take notice when it lacks jurisdiction regardless of whether the parties raised the issue." *In re Knox Complaint*, 255 Mich App 454, 457; 660 NW2d 777 (2003). A circuit court's subject-matter jurisdiction is conferred by statute as follows:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. [MCL 600.605.]

"Thus, circuit courts are presumed to have subject-matter jurisdiction unless jurisdiction is expressly prohibited or given to another court by constitution or statute." *Wayne Co Treasurer*, 265 Mich App at 291.

At issue in this case is the circuit court's ability to conditionally set aside a judgment of foreclosure entered pursuant to the General Property Tax Act (GPTA), MCL 211.1 *et seq*. MCL 211.78k(5) provides, in part:

> The circuit court shall enter final judgment on a petition for foreclosure filed under [MCL 211.78h] at any time after the hearing under this section but not later than the March 30 immediately succeeding the hearing with the judgment effective on the March 31 immediately succeeding the hearing for uncontested cases or 10 days after the conclusion of the hearing for contested cases. All redemption rights to the property expire on the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case 21 days after the entry of a judgment foreclosing the property under this section. The circuit court's judgment shall specify all of the following:
>
> * * *

> (b) That fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit, except as otherwise provided in subdivisions (c) and (e),[1] without any further rights of redemption, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section.
>
> * * *
>
> (g) A judgment entered under this section is a final order with respect to the property affected by the judgment and except as provided in subsection (7) shall not be modified, stayed, or held invalid after the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or for contested cases 21 days after the entry of a judgment foreclosing the property under this section.

MCL 211.78k(6) provides, in part:

> Except as otherwise provided in subsection (5)(c) and (e), fee simple title to property set forth in a petition for foreclosure filed under [MCL 211.78h] on which forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, *shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property* . . . . The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7) or (9). [Emphasis added.]

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[1] MCL 211.78k(5)(c) and (e) provide exceptions that do not apply in the instant case. See MCL 211.78k(5)(c) and (e).

MCL 211.78k(7) adds that "[t]he foreclosing governmental unit or a person claiming to have a property interest under [MCL 211.78i] in property foreclosed under this section may appeal the circuit court's order or the circuit court's judgment foreclosing property to the court of appeals" and clarifies that "[t]he circuit court's judgment foreclosing property shall be stayed until the court of appeals has reversed, modified, or affirmed that judgment."

MCR 2.612(C)(1), the court rule under which the circuit court granted conditional relief, provides in relevant part:

> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.

In *In re Wayne Co Treasurer Petition*, 478 Mich 1, 5; 732 NW2d 458 (2007), our Supreme Court addressed constitutional concerns related to MCL 211.78k(6) after a church did not receive notice of a pending foreclosure because the county treasurer failed to comply with the notice provisions of the GPTA. The county treasurer sent notice to a previous owner and failed to post a notice on the property. *Id*. A judgment of foreclosure was entered and the property was sold to third parties after the redemption period had expired. *Id*. When the church learned of the foreclosure, it filed a motion for relief from the judgment of foreclosure, which the circuit court granted. *Id*. This Court denied the third parties' delayed application for leave to appeal, and our Supreme Court then granted their application for leave. *Id*. Our Supreme Court consid-

ered whether MCL 211.78k(6) deprives the circuit court of jurisdiction to alter the judgment of foreclosure under MCR 2.612(C) when a property owner does not redeem the property within the allotted time frame or appeal the foreclosure judgment. *Id*. at 5, 8.

The Court noted that MCL 211.78k(6) reflects a "legislative effort to provide finality to foreclosure judgments and to quickly return property to the tax rolls." *Id*. at 4. The Court explained:

> If a property owner does not redeem the property or appeal the judgment of foreclosure within 21 days, then MCL 211.78k(6) deprives the circuit court of jurisdiction to alter the judgment of foreclosure. MCL 211.78k(6) vests *absolute title* in the foreclosing governmental unit, and if the taxpayer does not redeem the property or avail itself of the appeal process in subsection 7, then title "*shall not* be stayed or held invalid . . . ." This language reflects a clear effort to limit the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA. The only possible remedy for such a property owner would be an action for monetary damages based on a claim that the property owner did not receive any notice. In the majority of cases, this regime provides an appropriate procedure for foreclosing property because the statute requires notices that are consistent with minimum due process standards. [*Id*. at 8.]

Our Supreme Court then addressed the situation in which the statutory scheme deprives a property owner of his or her property without due process, holding that to the extent MCL 211.78k limits the circuit court's jurisdiction to modify judgments of foreclosure when property owners are denied due process, it is unconstitutional. *Id*. at 8-11. The Court explained that

> the plain language of [MCL 211.78k] simply does not permit a construction that renders the statute constitutional because the statute's jurisdictional limitation en-

> compasses all foreclosures, including those where there has been a failure to satisfy minimum due process requirements, as well as those situations in which constitutional notice is provided, but the property owner does not receive actual notice. In cases where the foreclosing governmental unit complies with the GPTA notice provisions, MCL 211.78k is not problematic. Indeed, MCL 211.78*l* provides in such cases a damages remedy that is not constitutionally required. However, in cases where the foreclosing entity fails to provide *constitutionally adequate* notice, MCL 211.78k permits a property owner to be deprived of the property without due process of law. Because the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse, that portion of the statute purporting to limit the circuit court's jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process. [*Id*. at 10-11.]

Thus, the Court concluded that MCL 211.78k was unconstitutional to the extent that it permitted entry of a judgment of foreclosure without constitutionally adequate notice, and in situations in which the government did not provide constitutionally adequate notice, the circuit court has jurisdiction to modify the judgment of foreclosure. *Id*. at 10-11. However, in situations in which the property owner receives adequate due process, the circuit court does not have jurisdiction to modify or vacate its judgment of foreclosure. See *id*. at 10 (noting that "[i]n cases where the foreclosing governmental unit complies with the GPTA notice provisions, MCL 211.78k is not problematic").

Although it is true that MCR 2.612(C)(1)(f) authorizes a circuit court to relieve a party from a final judgment when such relief is justified, the circuit court in the instant case could not use that authority

to modify the February 2, 2015 judgment of foreclosure because it lacked jurisdiction pursuant to the express prohibition in MCL 211.78k(6) that limits "the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA." *Wayne Co Treasurer*, 478 Mich at 8. In this case, respondent did not appeal the judgment of foreclosure in this Court as provided in MCL 211.78k(7) or pay the delinquent taxes, interest, penalties, and fees on or before the March 31, 2015 redemption deadline. As a result, the circuit court's jurisdiction to modify the February 2, 2015 judgment of foreclosure was extinguished. Indeed, the circuit court's entry of the motion for relief from the judgment of foreclosure appears to be the exact situation the statutory scheme was designed to prohibit. The goal of MCL 211.78k(6) is to provide finality, and setting aside the judgment of foreclosure months after the judgment was entered because the respondent obtained the necessary funds is contrary to the reasoning underlying the statute. See *id*. at 4.

Further, the judicially created due-process exception in *Wayne Co Treasurer* is inapplicable because respondent has never argued that petitioner failed to provide her with constitutionally adequate notice of the foreclosure proceeding or that she was otherwise deprived of due process. Contrary to the situation in *Wayne Co Treasurer*, respondent was provided with notice of the foreclosure proceedings, and she failed to participate or pursue any available remedies under the GPTA to protect her interest. Accordingly, because there was no due-process violation, the circuit court did not have jurisdiction to modify the judgment of foreclosure pursuant to the due-process exception from *Wayne Co Treasurer*.

IV. SEPARATION OF POWERS

Respondent contends on cross-appeal that MCL 211.78k(5)(g) is unconstitutional because it violates the separation-of-powers doctrine. We disagree.

"Statutes are presumed to be constitutional, and we have a duty to construe a statute as 'constitutional unless its unconstitutionality is clearly apparent.' " *Zdrojewski v Murphy*, 254 Mich App 50, 74-75; 657 NW2d 721 (2002) (citation omitted). The party contending that the statute is unconstitutional has the burden to establish that the law is invalid. *Id*. at 75.

The Separation of Powers Clause of the Michigan Constitution provides that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The Michigan Constitution further 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." Const 1963, art 6, § 5.

While the Michigan Supreme Court "retains the authority and duty to prescribe general rules that 'establish, modify, amend, and simplify the practice and procedure in all courts of this state,' " issues of " 'substantive law are left to the Legislature.' " *People v Jones*, 497 Mich 155, 166; 860 NW2d 112 (2014) (citations omitted). Thus, our Supreme Court may not enact " 'court rules that establish, abrogate, or modify the substantive law.' " *Id*. (citation omitted). See also *McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999) (" '[I]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administra-

tion . . . the [court] rule should yield.' ") (citation omitted; second alteration in original). Additionally, "the Supreme Court's rule-making power is constitutionally supreme in matters of practice and procedure *only* when the conflicting statute embodying putative procedural rules reflects no legislative policy consideration other than judicial dispatch of litigation." *In re Gordon Estate*, 222 Mich App 148, 153; 564 NW2d 497 (1997). "In other words, if the statutes in question are grounded on policy considerations other than regulating the procedural operations of the judiciary, they do not impermissibly infringe the Supreme Court's rule-making authority." *Zdrojewski*, 254 Mich App at 82.

Respondent argues that MCL 211.78k(5)(g) infringes on our Supreme Court's constitutional rule-making authority over practice and procedure. We first note that although respondent only raises the issue with regard to MCL 211.78k(5)(g), her argument also encompasses MCL 211.78k(6), which establishes that fee simple title to the property vests in the foreclosing governmental unit if the respondent does not redeem the property and clarifies that the title may not be stayed or held invalid, with limited exceptions. MCL 211.78k(5)(g) provides that the judgment of foreclosure must state that it is a final order and that it cannot be modified, stayed, or held invalid after the redemption period expires. Our Supreme Court clarified in *Wayne Co Treasurer* that MCL 211.78k(6) deprives the circuit court of jurisdiction to modify or invalidate the judgment of foreclosure. *Wayne Co Treasurer*, 478 Mich at 8. Therefore, we conclude that respondent's argument also encompasses MCL 211.78k(6).

We disagree with respondent's contention that a statute divesting the circuit court of jurisdiction to modify or invalidate a judgment of foreclosure follow-

ing the redemption period violates the separation-of-powers doctrine. We first note that our Supreme Court already addressed the issue of the constitutionality of MCL 211.78k(6) in the context of a due-process challenge when it determined that MCL 211.78k(6) divests the circuit court of jurisdiction to modify or invalidate the judgment of foreclosure except in a situation in which the respondent contends that he or she was deprived of due process. *Wayne Co Treasurer*, 478 Mich at 8-11. The Court clarified that in situations in which the respondent was denied due process, the circuit court may modify its judgment of foreclosure. *Id*. at 10-11. Thus, the Court carved out a limited exception permitting the circuit court to exercise jurisdiction if the respondent was denied due process. However, our Supreme Court did not address the exact issue raised in this appeal, namely, whether the statutory scheme violates the separation-of-powers doctrine.

We conclude that the limitation on the circuit court's jurisdiction as outlined in MCL 211.78k(5)(g) and (6) does not violate the separation-of-powers doctrine. Respondent argues that the statutory scheme is an attempt by the Legislature to control the practices and procedures that our Supreme Court has established regarding entry of a final judgment, with MCR 2.612(C)(1)(f) being the rule of practice and procedure that is relevant here. Respondent argues that because the statutory scheme conflicts with MCR 2.612(C)(1)(f), which allows for relief from judgment for any reason justifying relief, the statute is unconstitutional, the court rule controls, and the circuit court was freely able to use MCR 2.612(C)(1)(f) to grant conditional relief.

We disagree with respondent because the statutory provisions at issue constitute substantive law. MCL 211.78k(5)(g) and (6) provide that the court may not

alter the judgment of foreclosure if the owner does not redeem the property and require the judgment of foreclosure to reflect that the circuit court may not modify, stay, or invalidate the judgment of foreclosure after the redemption period has expired. See MCL 211.78k(5)(g) and (6). As the Michigan Supreme Court noted, MCL 211.78k(6) reflects a legislative effort to provide finality to foreclosure judgments and to return property to the tax rolls in a swift manner. *Wayne Co Treasurer*, 478 Mich at 4. The Court further explained that MCL 211.78k(6) reflects "a clear effort to limit the jurisdiction of courts so that judgments of foreclosure may not be modified other than through the limited procedures provided in the GPTA." *Id*. at 8. The same reasoning applies to MCL 211.78k(5)(g), which requires that the circuit court state in the judgment of foreclosure that the judgment cannot be modified, stayed, or held invalid following expiration of the redemption period. Thus, MCL 211.78k(5)(g) and (6) demonstrate a clear legislative policy reflecting considerations other than judicial dispatch of litigation. See *Estate of Gordon*, 222 Mich App at 153. Accordingly, we conclude that MCL 211.78k(5)(g) and (6) do not violate the separation-of-powers doctrine. For the reasons discussed, the circuit court lacked jurisdiction to enter the order granting conditional relief from the judgment of foreclosure.[2]

Reversed and vacated.

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

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[2] Because we conclude that the circuit court lacked jurisdiction to enter the order granting conditional relief, we need not address the issue whether the circuit court properly granted conditional relief under MCR 2.612(C)(1)(f).

In re ATTIA ESTATE

Docket No. 327925. Submitted November 8, 2016, at Detroit. Decided November 10, 2016, at 9:10 a.m.

Mayssa Attia (Attia), as personal representative of the estate of her deceased father, Sabry M. Attia, submitted a will dated July 8, 1986, and related codicils in the Wayne Probate Court after his death. Attia's sister, Mervat A. Hassan, filed an objection to this will. Hassan further petitioned the court to admit instead an unsigned will from September 2014 and to conduct a jury trial. According to Hassan, the decedent had prepared the 2014 will with the help of his attorney but died on the day he had planned to sign it before witnesses. Hassan later filed a second petition, requesting that the court resolve the issue whether an unsigned will may ever be admitted to probate under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. After a hearing, the court, Milton L. Mack, Jr., J., denied Hassan's petition and granted Attia's motion for summary disposition, ruling that the exception in MCL 700.2503 to the requirement in MCL 700.2502(1)(b) that a will be signed applied only to documents that were flawed in their execution. Hassan appealed.

The Court of Appeals *held*:

The trial court erred by concluding that an unsigned will cannot be admitted to probate as a matter of law. MCL 700.2502(1) provides that a will is only valid if it is in writing, signed by the testator or in the testator's name by someone in the testator's conscious presence and by the testator's direction, and signed by at least two witnesses. However, MCL 700.2503 provides that a document that does not comply with the requirements of MCL 700.2502 will be treated as if it had been executed in compliance with MCL 700.2502 if the proponent of the document establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will, a partial or complete revocation of his or her will, an addition to or alteration of his or her will, or a partial or complete revival of his or her formerly revoked will or portion thereof. The plain language of MCL 700.2503 establishes that it permits the probate of a will that does not meet the requirements of MCL 700.2502,

which include the requirement that the document was signed by the testator or in the testator's name. Accordingly, a will need not be signed in order to be admitted to probate under MCL 700.2503 as long as the proponent of the document in question establishes by clear and convincing evidence that the decedent intended the document to be a will.

Reversed and remanded for further proceedings.

WILLS — ESTATES AND PROTECTED INDIVIDUALS CODE — UNSIGNED DOCUMENTS.

A probate court may admit a will without a signature to probate under the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., if the proponent of the document in question establishes, by clear and convincing evidence, that the decedent intended the document to constitute his or her will (MCL 700.2502; MCL 700.2503).

Helm Miller & Miller (by *Beth Anne Miller*) for Mayssa Attia.

Heyboer Law PLC (by *David R. Heyboer*) for Mervat M. Hassan.

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

JANSEN, P.J. Appellant appeals as of right the probate court orders dismissing her petition to determine whether an unsigned will may be admitted to probate and granting summary disposition in favor of appellee Mayssa Attia (appellee Mayssa). We reverse and remand for further proceedings consistent with this opinion.

The sole issue presented on appeal is whether a decedent must sign a will in order for that will to be admitted to probate. The decedent in the instant case died on September 11, 2014. The decedent had four children: appellant, appellee Mayssa, appellee Mona Nour El Deen, and Madiha Fields (formerly known as Madiha Attia). The decedent executed a will on July 8, 1986, and executed codicils to the will on February 17, 2009, and February 1, 2013. The July 1986 will

provided that both appellant and El Deen were "happily married" and that the decedent would "not designate anything for them because they are not in need." The first codicil provided for additional devises to El Deen and stated, "I recognize that I have not designated any specific gift for my other daughter, Mervat A. Hassan, because I believe that she has been adequately provided for and is not in need." Appellee Mayssa was appointed personal representative of the decedent's estate following his death, and she filed a petition to probate the July 1986 will and subsequent codicils.

Appellant filed an objection to the probate of the July 1986 will and subsequent codicils, as well as a petition to admit an unsigned will to probate. Appellant contended that the decedent changed his estate plan during a meeting with his attorney, Barbara Rende, before his death and that he directed Rende to draft a new will. According to appellant, "others were present with attorney Rende, and/or Sabry M. Attia simultaneously told others of his intention to execute a new Last Will and Testament and the provisions." Appellant contended that Rende drafted a new will and arranged for the execution of the will on September 11, 2014, the same day the decedent died. The probate court decided that it would first determine the legal issue whether an unsigned will may be admitted to probate. Appellant subsequently filed a petition to determine whether an undated, unsigned will may be admitted to probate, contending that, although MCL 700.2502 requires that a will be signed, MCL 700.2503 provides an exception to the signature requirement if the proponent of the will establishes by clear and convincing evidence that the decedent intended for the document to constitute the decedent's will. Appellee Mayssa moved for summary disposition, contending

that the July 1986 will and corresponding codicils should be admitted to probate and that the court should dismiss the petition to admit the unsigned September 2014 will to probate. The court held a hearing and decided the issue as follows:

> Well the Michigan statute is based on the Uniform Probate Code, which relates to fixing harmless error and our statute is no different.
>
> If the [L]egislature wanted to permit an unsigned Will to be permitted [sic], then I think the statute would say, although a document was not executed, or was not executed in compliance with the statute then that would have been more appropriate language.
>
> I think that the language in [MCL 700.2503], relates to a document which is executed but is flawed in its execution.
>
> The only case that we have, which is cited in the Federer's notes is the case out of, I believe it was Australia, where a husband and wife signed Wills, but they signed the wrong Wills and Australia accepted that as a [sic] execution of some sort, but faulty execution.
>
> So, I think it's a bright line rule in Michigan and I certainly welcome the Court of Appeals to address it. So I am going to grant Summary Disposition.

The probate court subsequently entered orders denying the petition to determine whether an unsigned will may be admitted to probate and granting summary disposition in favor of appellee Mayssa. The court entered an order formally admitting the July 1986 will and corresponding codicils to probate. The probate court also denied a motion that appellant filed for an order waiving the attorney-client privilege and for production of Rende's attorney files, notes, correspondence, drafts, and all materials regarding the decedent.

Appellant argues that the probate court erred by concluding that an unsigned will cannot be admitted to probate as a matter of law. We agree.

We review de novo a probate court's decision regarding a motion for summary disposition. *In re Casey Estate*, 306 Mich App 252, 256; 856 NW2d 556 (2014). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim as pleaded, and all factual allegations and reasonable inferences supporting the claim are taken as true." *Id*. In addition, we review de novo issues of statutory interpretation. *Id*.

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., governs this case. The provisions in EPIC are to be construed liberally and applied to promote its purposes and policies, including "[t]o discover and make effective a decedent's intent in distribution of the decedent's property." MCL 700.1201(b). EPIC permits the admission of extrinsic evidence in order to determine whether the decedent intended a document to constitute his or her will. *In re Smith Estate*, 252 Mich App 120, 125; 651 NW2d 153 (2002). MCL 700.2502 outlines the requirements for a valid will and provides:

> (1) Except as provided in subsection (2) and in [MCL 700.2503, MCL 700.2506, and MCL 700.2513], a will is valid only if it is all of the following:
>
> (a) In writing.
>
> (b) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.
>
> (c) Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator's acknowledgment of that signature or acknowledgment of the will.

> (2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting.
>
> (3) Intent that the document constitutes a testator's will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator's handwriting.

MCL 700.2503 provides the following exception to the execution requirements described in MCL 700.2502:

> Although a document or writing added upon a document was not executed in compliance with [MCL 700.2502], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:
>
> (a) The decedent's will.
>
> (b) A partial or complete revocation of the decedent's will.
>
> (c) An addition to or an alteration of the decedent's will.
>
> (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.

The parties dispute whether the plain language of MCL 700.2503 permits a document to be admitted to probate as a will when the testator has not signed the document. The following statutory interpretation principles apply in this case:

> "The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, [the court] must read the statute as a whole and in its grammatical

> context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." [*In re Jajuga Estate*, 312 Mich App 706, 712; 881 NW2d 487 (2015) (citation omitted; alteration in original).]

The plain language of MCL 700.2503 establishes that it permits the probate of a will that does not meet the requirements of MCL 700.2502. One of the requirements of MCL 700.2502 is that the document must be "[s]igned by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction." MCL 700.2502(1)(b). Accordingly, a will does not need to be signed in order to be admitted to probate under MCL 700.2503, as long as the proponent of the document in question establishes by clear and convincing evidence that the decedent intended the document to be a will. To hold otherwise would render MCL 700.2503 inapplicable to the testamentary formalities in MCL 700.2502, which is contrary to the plain language of the statute. Therefore, MCL 700.2503 permits the admission of a will to probate that does not meet the signature requirement in MCL 700.2502(1)(b), as long as the proponent establishes by clear and convincing evidence that the decedent intended the document to be a will.

Although no case in Michigan directly addresses the question of law presented in this case, we find persuasive a decision of the Superior Court of New Jersey, Appellate Division, concluding that a New Jersey statute containing nearly identical language permits the

probate of a will without a signature, provided that the proponent of the will establishes by clear and convincing evidence that the decedent intended for the document to constitute his or her will. In *In re Probate of Will & Codicil of Macool*, 416 NJ Super 298, 303-304; 3 A3d 1258 (NJ App, 2010), the decedent had previously executed a will and codicil. Years later, the decedent went to her lawyer's office intending to change her will. *Id*. at 304. She gave her attorney a handwritten note containing the changes she wished to be made to her will, and the attorney drafted a new will. *Id*. at 304-305. The decedent died before she was able to review the draft will. *Id*. at 305. The lower court took testimony regarding the issue and concluded that the proponent of the will failed to establish by clear and convincing evidence that the decedent intended the particular draft will to constitute her will. *Id*. at 306. The lower court added that the will had to be executed or signed by the testator. *Id*. at 306-307.

On appeal, the Superior Court agreed that the proponent of the document had failed to establish that the decedent intended the "rough draft" document to constitute her will. *Id*. at 309. Relevant to this case, the appellate court clarified that a will does not need to be signed by the testator in order for the will to be admitted to probate. *Id*. at 311. The court reasoned that to hold otherwise would render the savings provision inapplicable to the testamentary formalities. *Id*. *Macool* is persuasive because the *Macool* court established that a will does not need to be signed by the decedent in order for the will to be admitted to probate. See *id*. Therefore, *Macool* supports appellant's position that the probate court must permit the parties to conduct discovery regarding whether the decedent intended the document to constitute his will.

For the reasons discussed, we conclude that MCL 700.2503 permits the probate court to admit a will without a signature to probate if the proponent of the document in question establishes, by clear and convincing evidence, that the decedent intended the document to constitute his or her will. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURPHY and RIORDAN, JJ., concurred with JANSEN, P.J.

PEOPLE v DeLEON

Docket No. 329031. Submitted November 8, 2016, at Lansing. Decided November 15, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 1002.

Joe L. DeLeon was convicted following a jury trial in the Eaton Circuit Court, Edward J. Grant, J., of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (2)(b) (victim under 13; defendant at least 17), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) and (2)(b) (victim under 13; defendant at least 17). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to a 35- to 70-year term of imprisonment for the CSC-I conviction to be served consecutively to a 20- to 30-year term of imprisonment for the CSC-II conviction. Defendant appealed, arguing that the evidence supporting his CSC-II conviction was insufficient and that the consecutive sentences violated his Sixth Amendment rights pursuant to *People v Lockridge*, 498 Mich 358 (2015).

The Court of Appeals *held*:

1. MCL 750.520h provides that the victim's testimony alone can be sufficient evidence to support a conviction of criminal sexual conduct. MCL 750.520c(1)(a) and (2)(b) require that the jury find that a defendant has engaged in sexual contact with a victim who was under 13 years of age when the defendant was 17 years of age or older. MCL 750.520a(q) provides that "sexual contact" means the intentional touching of the victim's or defendant's intimate parts if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification or done for a sexual purpose. When determining whether touching could be reasonably construed as being for a sexual purpose, the conduct should be viewed objectively under a reasonable-person standard. In this case, because the victim testified to multiple instances in which defendant used his hands to make sexual contact with her intimate parts, a rational jury could have objectively found that defendant's touching of the victim's genital area and buttock with his hand or fingers was both intentional and for the purpose of sexual arousal or gratification. The victim additionally testified to several other instances of sexual contact that

were sufficient to support a CSC-II conviction, including instances in which defendant used his penis to touch the victim's genital area and buttock. Viewed in a light most favorable to the prosecution, the evidence at trial was sufficient to support defendant's CSC-II conviction.

2. Defendant's argument that the trial court violated his Sixth Amendment rights when it relied on judicial fact-finding to impose consecutive sentencing under MCL 750.520b(3) was not preserved and therefore was reviewed for plain error. In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute. MCL 750.520b(3) provides that the trial court may order a term of imprisonment to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. The term "same transaction" is not statutorily defined, but it has a temporal requirement; for multiple penetrations in a CSC case to be considered as part of the same transaction, they must be part of a continuous time sequence, not merely part of a continuous course of conduct. In light of the constitutional protections of the Sixth Amendment, the United States Supreme Court held that any fact (other than prior conviction) that increases the *maximum* penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v New Jersey*, 530 US 466 (2000). In *Alleyne v United States*, 570 US ___; 133 S Ct 2151 (2013), the Supreme Court extended this rule to fact-finding that enhances statutory *minimum* sentences, holding that any fact that increases a defendant's mandatory minimum sentence is an element that must be submitted to the jury. *Alleyne* also created the general rule that any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime, and defendants have the right to have a jury find those elements beyond a reasonable doubt. The Michigan Supreme Court applied this general rule in *Lockridge*, 498 Mich at 399, to hold that Michigan's sentencing guidelines scheme violated the Sixth Amendment because it used judge-found facts to compel an increase in the mandatory minimum punishment a defendant receives. Neither *Apprendi*, *Alleyne*, nor *Lockridge* compels the conclusion that consecutive sentencing in Michigan violates a defendant's Sixth Amendment protections. In *Oregon v Ice*, 555 US 160, 164 (2009), the United States Supreme Court specifically held that the Sixth Amendment does not prohibit the use of judicial fact-finding to impose consecutive sentencing, reasoning that whether to impose consecutive or concurrent sentencing historically was a choice that

rested exclusively with the judge and therefore was not within the scope of the constitutional jury right in the Sixth Amendment as articulated in *Apprendi*. Additionally, federal courts, both before and after *Alleyne*, have recognized that judge-imposed consecutive sentences do not violate the rationales of *Apprendi* or *Alleyne*. The rationale of *Ice* applied to Michigan's rules governing consecutive sentencing, and this rationale did not run afoul of *Lockridge*, which has its basis in *Apprendi*'s and *Alleyne*'s reasoning concerning the right to a jury trial and the protections of the Sixth Amendment. Although consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense. By contrast, *Lockridge* prohibits a trial court only from using judge-found facts to increase the floor of the sentencing guidelines range, and thereby the mandatory minimum sentence for an offense, and it prohibits the guidelines from being mandatory. No such increase occurred here, nor would the trial court's imposition of consecutive sentences be affected by whether the sentencing guidelines are mandatory or advisory. Although defendant correctly noted that the jury's verdict in this case did not necessarily incorporate a finding that his CSC-I conviction arose from the same transaction as did his CSC-II conviction, defendant had no Sixth Amendment right to have a jury make that determination.

Affirmed.

CONSTITUTIONAL LAW — SIXTH AMENDMENT — SENTENCES — CONSECUTIVE SENTENCING — JUDICIAL FACT-FINDING.

In Michigan, a consecutive sentence may be imposed only if specifically authorized by statute; the Sixth Amendment does not prohibit the use of judicial fact-finding to impose consecutive sentencing; whether to impose consecutive or concurrent sentencing is a choice that rests exclusively with the judge and therefore is not within the scope of the constitutional jury right in the Sixth Amendment (US Const, Am VI).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Assistant Prosecuting Attorney, for the people.

Laurel K. Young for defendant.

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

BOONSTRA, P.J. Defendant appeals by right his convictions, following a jury trial, of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and (2)(b) (victim under 13; defendant at least 17), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) and (2)(b) (victim under 13; defendant at least 17).[1] The trial court determined that defendant was a third-offense habitual offender, MCL 769.11, and sentenced him to a 35- to 70-year term of imprisonment for the CSC-I conviction to be served consecutively to a 20- to 30-year term of imprisonment for the CSC-II conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant met the victim's mother in September 2006 and moved into her home, where she was residing with her three minor children, in late 2006 or early 2007. Defendant and the victim's mother eventually married.[2] The victim testified that from the time she was six or seven years old until she was 12, defendant "[r]aped" her "[m]ore than once." The victim described multiple instances of sexual abuse, marking the abuse by the location where it occurred: at her family's home on Grand Manor Drive; at defendant's apartment; during a sleepover she had with her cousins at the family's home, then on Marsh Drive; in her mother's bedroom at the Marsh Drive home; and in a bathroom at the Marsh Drive home. At all relevant times, defendant was at least 17 years of age.

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[1] The jury acquitted defendant of another count of CSC-I.

[2] The record reflects that defendant and the victim's mother married in 2008, had a son together, and divorced in 2011, and that the victim's mother and her children maintained a relationship with defendant thereafter.

At sentencing, the trial court found defendant to be a third-offense habitual offender. MCL 769.11. This determination was based on defendant's prior convictions in Texas for "aggravated assault with a deadly weapon" and "indecency with a child, sexual contact in the third degree," his victim at that time being his then stepson. The prosecution, echoing the sentiments expressed by the victim's family following their description of the trauma suffered by the victim and her family, requested consecutive sentencing pursuant to MCL 750.520b(3), which allows a term of imprisonment imposed for CSC-I to be "served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."

In imposing sentence, the trial court characterized defendant's repeated conduct in sexually abusing young children as "almost unbelievable and inconceivable." The court noted that defendant's conduct as alleged in this case began shortly after defendant was released from prison following a 2004 conviction for molesting his stepson in Texas. Addressing defendant, and referring to both the sexual abuse for which defendant was being sentenced in this case and the sexual abuse for which he was earlier convicted in Texas, the trial court stated, "What it appears to me, Mr. Deleon, . . . is that you're finding these women and marrying these women so you have access to the children. That's what it looks like to me. And apparently with a step-son and a step-daughter, you're an equal opportunity pervert in this matter." The trial court found defendant to be "a menace to society. And this ain't gonna be the last time if you're not stopped here today. So we'll make every effort to take care of the problem today." The trial court imposed the sentences noted and ordered consecutive sentencing.

This appeal followed. On appeal, defendant argues only that the evidence supporting his CSC-II conviction was insufficient and that his consecutive sentences violate his Sixth Amendment rights pursuant to our Supreme Court's opinion in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that plaintiff failed to introduce sufficient evidence of CSC-II to support his conviction. We disagree. We review de novo sufficiency-of-the-evidence claims. *People v Osby*, 291 Mich App 412, 415; 804 NW2d 903 (2011). In doing so, we must view the evidence in the light most favorable to the prosecution to "determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Alter*, 255 Mich App 194, 201-202; 659 NW2d 667 (2003). The victim's testimony alone can provide sufficient evidence to support a conviction. *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012); see also MCL 750.520h.

Defendant was convicted of CSC-II under MCL 750.520c(2)(b), which required the jury to find that he had "engage[d] in sexual contact with" the victim who was "under 13 years of age" when he was "17 years of age or older." MCL 750.520c(1)(a) and (2)(b). "Sexual contact" means "the intentional touching of the victim's or [defendant's] intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose . . . ." MCL 750.520a(q). "Intimate parts" include a person's "genital area, groin, inner thigh, buttock, or breast." MCL 750.520a(f). And when determining whether touching

could be reasonably construed as being for a sexual purpose, the conduct should be "viewed objectively" under a " 'reasonable person' standard." *People v Piper*, 223 Mich App 642, 647, 650; 567 NW2d 483 (1997). The ages of the parties at the relevant time are not in dispute.

The victim testified to multiple instances in which defendant used his hands to make sexual contact with her intimate parts. She testified to multiple instances in which defendant used his hands and fingers to touch her "from [her] vagina to [her] butt" before penetrating her with his penis. Given this testimony, a rational jury could objectively find that defendant's touching of the victim's intimate parts with his hand or fingers was both intentional and "for the purpose of sexual arousal or gratification." MCL 750.520a(q).

The victim also testified to several other instances of sexual contact sufficient to support a CSC-II conviction.[3] She described defendant intentionally using his penis to touch her genital area, at the Grand Manor home, and her buttock, at his apartment. She also described defendant intentionally touching either her genital area or buttock with his penis when her cousins spent the night at the Marsh Drive home. She further reported that defendant had some contact with her genital area when she was in her mother's bed at the Marsh Drive home. And she stated that defendant touched her "inner thigh" with his stomach and then touched her genital area with his penis in

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[3] Although the prosecution's closing argument focused on defendant having touched the victim with his fingers and hand before penetrating her, the trial court's instructions did not limit the jury to convicting defendant of CSC-II only upon finding that defendant had touched the victim in that manner. And the court explicitly told the jury without objection that the prosecution did not have to show that the contact occurred on a specific date and time.

the bathroom at the Marsh Drive home. Any one of these contacts would have supported a conviction for CSC-II.

Viewed in the light most favorable to the prosecution, the evidence at trial was sufficient to support defendant's CSC-II conviction. *Alter*, 255 Mich App at 201-202.

III. CONSECUTIVE SENTENCING

Defendant also argues that the trial court violated his Sixth Amendment rights when it relied on judicial fact-finding to impose consecutive sentencing under MCL 750.520b(3).[4] Because defendant failed to preserve this issue, our review is for plain error. *Lockridge*, 498 Mich at 365. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"In Michigan, 'concurrent sentencing is the norm,' and a 'consecutive sentence may be imposed only if specifically authorized by statute.' " *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012), quoting *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). The trial court imposed consecutive sentencing pursuant to MCL 750.520b(3), which provides that the trial "court may order a term of imprisonment . . . to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the

[4] Defendant does not argue that the trial court erroneously determined that his convictions arose from the same transaction; rather, he argues only that the trial court made the determination using judge-found facts supposedly in violation of *Lockridge*.

same transaction."[5] "The term 'same transaction' is not statutorily defined[.]" *Ryan*, 295 Mich App at 402. But it has a temporal requirement. See *People v Bailey*, 310 Mich App 703, 723-725; 873 NW2d 855 (2015). For example, "[f]or multiple penetrations [in a CSC case] to be considered as part of the same transaction, they must be part of a 'continuous time sequence,' not merely part of a continuous course of conduct." *Id*. at 725, quoting *People v Brown*, 495 Mich 962, 963 (2014).

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' " *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2156; 186 L Ed 2d 314 (2013). "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Id*. at ___; 133 S Ct at 2156. In light of the constitutional protections of the Sixth Amendment, the United States Supreme Court in *Apprendi v New Jersey* held that " 'any fact (other than prior conviction) that increases the *maximum* penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), quoting *Jones v United States*, 526 US 227, 243 n 6; 119 S Ct 1215; 143 L Ed 2d 311 (1999) (emphasis added). The United States Supreme Court in *Alleyne*, 570 US at ___; 133 S Ct at 2155, extended this rule to fact-finding that enhances statutory *minimum* sentences, holding that "any fact that increases [a defendant's] mandatory minimum [sen-

[5] Although the trial court did not specifically so state, it is clear from the record and the context of the court's comments at sentencing that its consecutive-sentencing determination was based on the crimes having arisen from the same transaction, and the record further evidences that, on several occasions, defendant sexually touched the victim's intimate areas immediately before penetrating her.

tence] is an 'element' that must be submitted to the jury." Therefore, in combination with *Apprendi*, the United States Supreme Court created the general rule "that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime," and defendants have the right to have a jury find those elements beyond a reasonable doubt. *Id*. at ___; 133 S Ct at 2160, quoting *Apprendi*, 530 US at 490. The Michigan Supreme Court applied this general rule in *Lockridge*, 498 Mich at 399, to hold that "Michigan's sentencing guidelines scheme" "violate[d] the Sixth Amendment" because it used judge-found facts "to compel an increase in the mandatory minimum punishment a defendant receives." For the reasons stated in this opinion, we hold that neither *Apprendi*, *Alleyne*, nor *Lockridge* compels the conclusion that consecutive sentencing in Michigan violates a defendant's Sixth Amendment protections.

Post-*Apprendi*, the United States Supreme Court specifically held that the Sixth Amendment does not prohibit the use of judicial fact-finding to impose consecutive sentencing. *Oregon v Ice*, 555 US 160, 164; 129 S Ct 711; 172 L Ed 2d 517 (2009). In *Ice*, the defendant challenged an Oregon sentencing statute that allowed a trial court judge to order consecutive sentencing after making specific findings of fact. *Id*. at 165. The *Ice* Court contrasted Oregon's determination to so "constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences" with the common-law tradition followed in most states to "entrust to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently" and the practice in still other states in which "sentences for multiple offenses [were] presumed to run consecutively, but sentencing judges [could] order con-

current sentences upon finding cause therefor."[6] *Id.* at 163-164. The Court concluded that "the Sixth Amendment does not exclude Oregon's choice." *Id.* at 164. In so concluding, the Court found that "twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes." *Id.* at 168. It first explained that whether to impose consecutive or concurrent sentencing historically (and for centuries of the common law predating even "the founding of our Nation") was a "choice [that] rested exclusively with the judge"—it was a decision in which "the jury played no role," and it therefore was not within "the scope of the constitutional jury right" in the Sixth Amendment, as articulated in *Apprendi*. *Id.* at 168-170. Further, the Court reasoned that the states' "authority . . . over the administration of their criminal justice systems lies at the core of their sovereign status" and that the states have historically had an "interest in the development of their penal systems." *Id.* at 170. The Court concluded that neither the Sixth Amendment nor *Apprendi* required it to restrain the states' traditional power. *Id.* at 171.

The United States Supreme Court issued *Alleyne* approximately seven years after *Ice*, and, importantly, made no mention of *Ice*. *Alleyne* extended the rationale of *Apprendi* to mandatory minimum sentences, stating that "any fact that increases the mandatory minimum [sentence for a crime] is an 'element' that must be submitted to the jury." *Alleyne*, 570 US at ___; 133 S Ct at 2155. *Alleyne* did nothing to disturb *Ice*'s holding that a trial court's imposition of consecutive sentences

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[6] Like Oregon, other states similarly constrain judicial discretion by requiring judges to find certain facts before imposing consecutive sentences.

based on judge-found facts did not run afoul of Sixth Amendment protections. Our Supreme Court in *Lockridge* applied the rationale of *Apprendi* and *Alleyne* to the Michigan sentencing guidelines, holding that the Sixth Amendment prohibits "judicial fact-finding to score OVs to increase the floor of the sentencing guidelines range." *Lockridge*, 498 Mich at 388-389. *Lockridge* also made no mention of *Ice* or its applicability to the trial court's ability to order, pursuant to relevant statutes, consecutive sentencing for multiple offenses.

Additionally, federal courts, both before and after *Alleyne*, have recognized that judge-imposed consecutive sentences do not violate the rationales of *Apprendi* or *Alleyne*. See, e.g., *United States v White*, 240 F3d 127, 135 (CA 2, 2001) ("[T]he district court did not exceed the maximum for any individual count. It cannot therefore be said that, as to any individual count, the court's findings resulted in the imposition of a greater punishment than was authorized by the jury's verdict."); *United States v Le*, 256 F3d 1229, 1240 n 11 (CA 11, 2001) ("*Apprendi* does not apply when the sentences on two related offenses are allowed to run consecutively under the relevant law and the sentence on *each* offense does not exceed the prescribed statutory maximum for that particular offense."); *United States v Garcia*, 754 F3d 460, 473 (CA 7, 2014) ("The imposition of consecutive sentences on separate counts of conviction does not have the effect of pushing a sentence on any one count above the statutory maximum for a single count of conviction. The court was entitled to find the facts [supporting the imposition of consecutive sentences] by a preponderance of the evidence, so long as those facts did not affect either the statutory maximum or the statutory minimum.") (citations omitted).

We conclude that the rationale of *Ice* should apply to Michigan's rules governing consecutive sentencing and that this rationale does not run afoul of *Lockridge*, which has its basis in *Apprendi*'s and *Alleyne*'s reasoning concerning the right to a jury trial and the protections of the Sixth Amendment. We also find persuasive the reasoning of federal courts confronted with this issue after *Apprendi* and *Alleyne*. Although consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense. By contrast, *Lockridge* prohibits a trial court only from using judge-found facts to increase "the floor of the sentencing guidelines range," and thereby the mandatory minimum sentence for an offense, and it prohibits the guidelines from being mandatory. *Lockridge*, 498 Mich at 389. No such increase occurred here, nor would the trial court's imposition of consecutive sentences be affected by whether the sentencing guidelines are mandatory or advisory.

Therefore, although defendant correctly notes that the jury's verdict in this case did not necessarily incorporate a finding that his CSC-I conviction "ar[ose] from the same transaction" as did his CSC-II conviction, MCL 750.520b(3), defendant has no Sixth Amendment right to have a jury make that determination, *Ice*, 555 US at 164. We discern no conflict between this holding and *Lockridge*.

Affirmed.

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

DENNEY v KENT COUNTY ROAD COMMISSION

Docket No. 328135. Submitted October 4, 2016, at Grand Rapids. Decided November 15, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 997.

Plaintiff, Kimberly Denney, as personal representative of the estate of her husband, Matthew M. Denney, brought an action in the Kent Circuit Court against defendant, the Kent County Road Commission, for Denney's wrongful death. Denney's death resulted from a motorcycle accident caused when his motorcycle hit two potholes on a road under defendant's jurisdiction. Defendant had a duty under MCL 691.1402 to maintain the road in reasonable repair so that the road was reasonably safe and convenient for public travel. Plaintiff's action under the wrongful-death statute, MCL 600.2922, sought economic damages for earnings Denney lost as a result of his death. Defendant moved for partial summary disposition under MCR 2.116(C)(7), claiming that it was immune from liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., for damages beyond those arising from Denney's bodily injury. Plaintiff argued that the highway exception to governmental immunity, MCL 691.1402(1), authorized her action to recover Denney's lost wages. The court, George S. Buth, J., disagreed with plaintiff and granted partial summary disposition in defendant's favor. Plaintiff appealed by leave granted.

The Court of Appeals *held*:

1. Plaintiff's recovery of damages under the wrongful-death statute was limited by the damages available to Denney under the highway exception to the GTLA had he not died from the injuries he sustained in the motorcycle accident. Claims under the wrongful-death statute are derivative claims. The wrongful-death statute authorizes a representative of a decedent's estate to recover damages for claims the decedent would have had if the decedent had survived. In this case, plaintiff, as the representative of Denney's estate, was entitled to recover damages to which Denney would have been entitled under the highway exception to the GTLA if his death had not resulted from the wrongful act, neglect, or fault of defendant. Therefore, the resolution of this case rested on which damages recoverable under the wrongful-death statute were also recoverable under the highway exception to the GTLA.

MCL 691.1402(1) of the GTLA limits an injured person's recovery under the highway exception to damages directly arising and naturally flowing from his or her bodily injury. Claims related to Denney's bodily injury that he could have raised had he not died are the claims that survived his death and on which plaintiff's wrongful-death action was based. Denney would have had a claim for lost earnings if he had not died because an inability to work and consequent loss of wages naturally flow from a person's bodily injury. Defendant attempted to characterize the damages sought by plaintiff as damages related to lost financial support. A claim for lost financial support is a beneficiary's claim, not a decedent's claim. Therefore, a claim for lost financial support would not have been available to Denney under the highway exception, and that claim would not have been available to plaintiff under the wrongful-death statute. But a claim for lost financial support is distinct from a claim for lost earnings. Because Denney would have been entitled to recover damages for his lost earnings and because those damages naturally flowed from the bodily injury he sustained in the accident, plaintiff was entitled to recover damages under the wrongful-death statute for Denney's lost earnings.

2. The direct distribution of damages to the beneficiaries of a decedent's estate does not prevent or otherwise affect a plaintiff's claim under the wrongful-death statute for the decedent's lost earnings. Lost earnings constitute damages naturally flowing from the bodily injury sustained by the decedent, and the decedent, had he or she survived the bodily injuries, would have had a claim for those lost earnings. The fact that the damages might be distributed directly to a beneficiary does not remove those damages from the purview of the wrongful-death act. That is, distribution of damages directly to a beneficiary does not change the nature of a claim.

Reversed and remanded.

Gruel Mills Nims & Pylman PLLC (by *Thomas R. Behm* and *Scott R. Melton*) for plaintiff.

Henn Lesperance, PLC (by *William L. Henn*), for defendant.

Amicus Curiae:

Johnson Law, PLC (by *Christopher P. Desmond*), for the Negligence Law Section of the State Bar of Michigan.

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

PER CURIAM. Plaintiff appeals by leave granted the trial court's April 29, 2015 order granting defendant's motion for partial summary disposition under MCR 2.116(C)(7). We reverse and remand to the trial court for further proceedings consistent with this opinion.

Plaintiff alleged that on the morning of May 18, 2014, Matthew Denney (the decedent) was riding a motorcycle on Peach Ridge Road NW in Kent County. As he crested a hill, his motorcycle struck two potholes in the road, causing him to lose control of the motorcycle. He sustained fatal injuries. For purposes of this appeal only, defendant does not contest these allegations. There is also no dispute that defendant is a governmental agency with jurisdiction and control over the portion of the road on which the accident occurred and is therefore required to maintain that road in reasonable repair so that it is reasonably safe and convenient for public travel. See MCL 691.1401 and MCL 691.1402(1). Plaintiff, as personal representative of the decedent's estate, sued defendant under the wrongful-death statute, MCL 600.2922.[1] Defendant moved for partial summary disposition, alleging that under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., it was immune from liability for damages beyond bodily injuries suffered by the decedent, including immunity for any loss of financial support (such as the decedent's lost earnings). Plaintiff argued that damages for lost wages and loss of earning capacity fall within the highway exception to the GTLA as provided in MCL 691.1402(1). The trial court dis-

[1] We note that the wrongful-death statute is also often referred to as the "wrongful-death act."

agreed and granted defendant's motion. We granted leave to appeal that decision.[2]

"We review de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(7)." *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). This Court also reviews de novo issues of statutory interpretation. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009). The primary goal of statutory construction is to determine the intent of the Legislature by reasonably construing the purpose and goal of the statute. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). To determine the Legislature's intent, this Court first looks at the specific language of the statute. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 177; 617 NW2d 735 (2000).

"[T]he wrongful death act provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death." *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). The wrongful-death statute states, in relevant part, as follows:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony. [MCL 600.2922(1).]

[2] In the trial court, the parties stipulated the scope of the claim for conscious pain and suffering, and plaintiff withdrew all claims for loss of society and companionship. Accordingly, there are no issues related to noneconomic damages before us.

MCL 600.2922(6) sets forth the damages available in wrongful-death actions. *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 90; 746 NW2d 847 (2008). That provision states, in relevant part, as follows:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. [MCL 600.2922(6).]

The word "including" in MCL 600.2922(6) "indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case." *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651; 761 NW2d 414 (2008). Under the wrongful-death statute, "the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury." *Id*. at 660. Relevant to this case, our Supreme Court has stated that economic damages include "damages incurred due to the loss of the ability to work and earn money . . . ." *Hannay v Dep't of Transp*, 497 Mich 45, 67; 860 NW2d 67 (2014). However, "[b]ecause an underlying claim 'survives by law' and must be prosecuted under the wrongful-death act, . . . any statutory or common-law limitations on the underlying claim apply to a wrongful-death action." *Wesche*, 480 Mich at 89.

As previously stated, the damages available under the wrongful-death statute, MCL 600.2922(6), include "any type of damages, economic and noneconomic,

deemed justified by the facts of the particular case." *Thorn*, 281 Mich App at 651. And economic damages include "damages incurred due to the loss of the ability to work and earn money . . . ." *Hannay*, 497 Mich at 67. Therefore, damages for lost earnings are allowed under the wrongful-death statute. However, as a governmental agency, defendant is immune from tort liability "when . . . engaged in the exercise or discharge of a governmental function," unless an exception under the GTLA applies. MCL 691.1407(1). The GTLA broadly shields government agencies from tort liability and grants immunity to those agencies. The statutory exceptions are narrowly construed. *Moraccini v Sterling Hts*, 296 Mich App 387, 391-392; 822 NW2d 799 (2012).

Plaintiff argues that the highway exception to governmental immunity permits her claim for lost earnings. It states in relevant part that "[a] person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." MCL 691.1402(1). Our Supreme Court has defined "bodily injury" as "a physical or corporeal injury to the body." *Wesche*, 480 Mich at 85. Although the *Wesche* Court was construing the motor-vehicle exception to the GTLA rather than the highway exception when defining "bodily injury," both exceptions are part of the GTLA, and "[i]dentical terms in different provisions of the same act should be construed identically . . . ." *Cadle Co v Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009). Therefore, the phrase "bodily injury" in the highway exception also means "a physical or corporeal injury to the body." *Wesche*, 480 Mich at 85. MCL 691.1402(1) does

not define the term "damage," but "when the Legislature uses a word or phrase that has acquired a unique meaning at common law, it is interpreted to have the same meaning when used in a statute dealing with the same subject." *Lewis v LeGrow*, 258 Mich App 175, 184; 670 NW2d 675 (2003).

In *Hannay*, 497 Mich at 50-51, our Supreme Court was called on to determine whether the phrase "liable for bodily injury" in the motor-vehicle exception to governmental immunity (MCL 691.1405) allowed a plaintiff who was injured in a motor vehicle accident to recover economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering. In making its determination, the Court stated that " 'bodily injury' is simply the category of harm (i.e., the type of injury) for which the government waives immunity under [the motor-vehicle exception] and, thus, for which damages that naturally flow are compensable." *Id*. at 64.

> Therefore, the legal responsibility that arises from "bodily injury" is responsibility for *tort damages* that flow from that injury. This conclusion is supported by the fact that the GTLA generally grants immunity from "tort liability," and to the extent that this immunity is waived, the resulting liability, logically, is liability for *tort damages*. [*Id*. at 64-65.]

The *Hannay* Court continued,

> [T]ort damages generally include damages for all the legal and natural consequences of the injury (i.e., the damages that naturally flow from the injury), which may include damages for loss of the ability to work and earn money, as well as pain and suffering and mental and emotional distress damages. [*Id*. at 65.]

The Court therefore held that a plaintiff may bring a third-party tort action for economic damages, such as

work-loss damages, and for noneconomic damages, such as damages for pain and suffering or emotional distress, against a governmental entity if the requirements of the no-fault act have been met. *Id*. at 51. See MCL 500.3135. The *Hannay* Court also recognized that while damages that naturally flowed from the injury were compensable, the person seeking such damages must have had a bodily injury. *Hannay*, 497 Mich at 71-72. Notably, the *Hannay* Court cited the case of *Roberts v Detroit*, 102 Mich 64; 60 NW 450 (1894), for this proposition, stating that "[t]he issue was whether the highway exception applied" to a noninjured plaintiff's loss of consortium claim. *Hannay*, 497 Mich at 71. Discussing *Roberts*, *Hannay* continued:

> This Court stated, "[s]o far as [the highway exception] is concerned, it limits the liability *to cases of bodily injury*," and concluded that:
>
> > The plaintiff's case [for loss of consortium] does not fall within [the highway exception] (1) because he has no right to recover for the *bodily injury—i.e., pain and suffering, etc*—of another; (2) because the statute in terms limits the recovery to the person so injured or disabled. [*Hannay*, 497 Mich at 71, quoting *Roberts*, 102 Mich at 67 (first, second, and fourth alterations in original).]

" '[B]odily injury' in the motor vehicle exception is not a threshold requirement that opens all doors of potential liability for tort damages; rather, it is a *category* of injury for which items of tort damages that naturally flow are available, as confined by the limitations of the no-fault act." *Hannay*, 497 Mich at 75.

What is taken from *Hannay* is that (1) the tort damages recoverable for bodily injury under the GTLA's motor-vehicle exception—and, by extension, its highway exception—are only those damages that the injured

person suffered and (2) the types of tort damages are confined to the limitations of the statute under which the action is brought—the wrongful-death act in this case. Put another way, under MCL 691.1402(1), a person who sustains a bodily injury as a result of a governmental agency's failure to properly maintain a highway may recover from the governmental agency the damages the person suffered as limited by the wrongful-death act. As our Supreme Court stated, "[T]he wrongful-death act is essentially a 'filter' through which the underlying claim may proceed." *Wesche*, 480 Mich at 88. "As a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries." *Id*. at 90 (quotation marks and citation omitted). " '[T]he cause of action of a proper plaintiff under the wrongful death act is a derivative one in that the personal representative of the deceased stands in his shoes and is required to show that the deceased could have maintained the action if death had not ensued . . . .' " *Id*., quoting *Maiuri v Sinacola Constr Co*, 382 Mich 391, 396; 170 NW2d 27 (1969).

When the decedent lost control of his motorcycle on May 18, 2014, he clearly suffered "a physical or corporeal injury to [his] body"—in other words, he suffered a bodily injury. *Wesche*, 480 Mich at 84-85. Therefore, if the decedent had not died, he would have been able to recover under MCL 691.1402(1) damages from defendant for earnings lost as a result of the bodily injury. See MCL 691.1402(1). And, despite the fact that the decedent died, his claim against defendant for lost earnings survived. MCL 600.2922(1). Plaintiff, a representative of the decedent's estate, brought this claim under the wrongful-death statute. Under the highway exception, MCL 691.1402(1), the decedent could have

maintained an action against defendant for lost earnings resulting from the bodily injury he sustained on May 18, 2014. Because plaintiff was able to bring this derivative claim under the wrongful-death statute, MCL 600.2922(2), the trial court improperly granted defendant's motion for partial summary disposition with regard to plaintiff's claim for damages for the decedent's lost earnings.

Defendant argues that plaintiff's claim for damages for lost earnings does not fall under the highway exception to the GTLA because MCL 691.1402(1) allows for damages only for "[a] person who sustains bodily injury" and plaintiff's claim for damages constituted a claim on behalf of the beneficiaries, not the decedent. But, as discussed, this claim was the *decedent's* claim for lost earnings, which survived his death and was brought under the wrongful-death statute by the personal representative who stood in his shoes. The claim is permitted under MCL 691.1402(1). See MCL 600.2922(1).

Defendant attempts to characterize plaintiff's claim as one for lost financial support and argues that because a claim for lost financial support can be brought under the wrongful-death statute by beneficiaries of the estate, this claim is not one for damages suffered by the decedent. Rather, defendant contends that plaintiff's claim is for damages suffered by the estate's beneficiaries and is therefore not allowed under MCL 691.1402(1). Defendant is correct insofar as it argues that damages for lost financial support under the wrongful-death statute are not damages suffered by "[a] person who sustains bodily injury" and, therefore, such damages would not be allowed under MCL 691.1402(1). See, e.g., *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 606-607; 568 NW2d 93 (1997).

However, a claim for lost financial support under the wrongful-death statute is not the same as a claim for lost earnings. Specifically, lost earnings are damages that the decedent could have sought on his own behalf had he lived, whereas damages for lost financial support would be sought by one who depended on the decedent for financial support. See, e.g., *id*. Because the damages are distinct, the fact that the wrongful-death statute allows for recovery of lost financial support does not change the character of plaintiff's claim for damages for the decedent's lost earnings.

Finally, defendant argues that MCL 600.2922(6)(d) indicates that plaintiff's claim was not one for damages suffered by the decedent because MCL 600.2922(6)(d) provides that damages are distributed directly to the beneficiaries rather than to the estate. We fail to see how the distribution of damages affects our analysis—the decedent's lost earnings resulted from the bodily injury he sustained, and therefore, damages for the decedent's lost earnings were allowed under MCL 691.1402(1).

We reverse the trial court's order granting defendant's motion for partial summary disposition and remand the case for proceedings in accordance with this opinion. We do not retain jurisdiction.

SHAPIRO, P.J., and HOEKSTRA and SERVITTO, JJ., concurred.

MONACO v HOME-OWNERS INSURANCE COMPANY

Docket No. 329214. Submitted November 9, 2016, at Detroit. Decided November 15, 2016, at 9:10 a.m. Leave to appeal denied 500 Mich 1002.

Plaintiff, Laura Monaco, as personal representative of the estate of her daughter, Alison Monaco, brought an action in the Huron Circuit Court, challenging the denial of personal protection insurance (PIP) benefits by defendant, Home-Owners Insurance Company (HOIC). Covenant Medical Center, Inc., and Mary Free Bed Rehabilitation Hospital intervened in the action, seeking reimbursement for costs associated with providing medical care to Alison, who sustained severe injuries when she lost control of a vehicle that she was driving when she was 15 years old. The vehicle was owned by plaintiff, customarily driven by plaintiff's partner, and insured by HOIC. Alison had a permit to drive, but under MCL 257.310e(4), she could only operate the vehicle when accompanied by a licensed parent, guardian, or 21-year-old, and she was not so accompanied at the time of the accident. Plaintiff initially told HOIC in a recorded statement that Alison did not have permission to drive the vehicle when the accident took place, but plaintiff later asserted that Alison did have permission to drive the vehicle at the time of the accident. HOIC moved for summary disposition, alleging that MCL 500.3113(a) barred Alison from obtaining PIP benefits because she took the vehicle unlawfully and did not reasonably believe that she had permission to use the car. The court, Gerald M. Prill, J., denied HOIC's motion, concluding that there was a factual issue regarding whether Alison had permission to take the vehicle and that a distinction existed between "taking" and "using" a vehicle for purposes of MCL 500.3113(a). Following a jury trial, the jury concluded that HOIC had failed to meet its burden of showing that Alison had taken the car without permission, and a judgment consistent with the jury's verdict was entered. HOIC appealed with regard to the legal question whether the undisputed facts—that Alison was 15 years old at the time of the accident and that it was unlawful for her to drive the car unaccompanied by a licensed adult identified in MCL 257.310e(4)—barred the recovery of PIP benefits under MCL 500.3113(a).

The Court of Appeals *held*:

MCL 257.326 provides that no person shall knowingly authorize or permit a motor vehicle owned by him or her or under his or her control to be driven by any person in violation of any of the provisions of the Michigan Vehicle Code, MCL 257.1 *et seq*. At the time of Alison's accident, MCL 500.3113(a) provided that a person was not entitled to be paid PIP benefits for accidental bodily injury if, at the time of the accident, the person was using a motor vehicle that he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle. The plain meaning of the phrase "taken unlawfully" readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law. A taking does not have to be larcenous to qualify as unlawful, and MCL 500.3113(a) applies to any person who takes a vehicle without the owner's authority, regardless of whether that person had the intent to steal the vehicle. Furthermore, MCL 500.3113(a) examines the legality of a taking from the perspective of the driver. For purposes of MCL 500.3113(a), a vehicle is "unlawfully taken" if it is taken without the authority of its owner; therefore, MCL 500.3113(a) does not apply to the lawful owner of a vehicle, even if that person drives it under a circumstance that renders him or her legally unable to operate a vehicle. However, driving while legally unable may have implications under MCL 500.3113(a) for a person who has taken a vehicle unlawfully because as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle. Accordingly, the unlawful operation or use of a motor vehicle is irrelevant with respect to examining the "taken unlawfully" phrase in MCL 500.3113(a). The unlawful operation or use of a motor vehicle is only relevant when the injured person had actually unlawfully taken the vehicle and was attempting to invoke the language in MCL 500.3113(a) allowing recovery when the person reasonably believed that he or she was entitled to take and use the vehicle, despite the unlawful taking. Therefore, the unlawful operation or use of a motor vehicle is simply not a concern in the context of analyzing whether the vehicle was taken unlawfully. In this case, although it may have been unlawful for plaintiff, as owner of the car, to authorize or permit Alison to drive the vehicle in violation of the law, it had no bearing on, nor did it negate, the authorization and permission given by plaintiff for Alison to take the vehicle. Alison did not gain possession of the vehicle contrary to Michigan law; rather, she unlawfully used the vehicle. Therefore, plaintiff was not in violation of MCL 257.326 by merely allowing Alison to take

possession and control of the car; it was the permission allowing Alison to drive the car that implicated MCL 257.326. While plaintiff's actions might have subjected her to prosecution under MCL 257.326, they did not turn an authorized or permitted taking into an unlawful taking. The trial court did not err by denying HOIC's motions for summary disposition and a directed verdict.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — UNLAWFUL TAKING OF MOTOR VEHICLES — UNLAWFUL USE OF MOTOR VEHICLES.

MCL 500.3113(a) generally bars the recovery of personal protection insurance benefits by a person who operated a vehicle that he or she had taken unlawfully; "taking" and "using" are not synonymous or interchangeable for purposes of MCL 500.3113(a); the unlawful operation or use of a motor vehicle is irrelevant in the context of analyzing whether the vehicle was taken unlawfully; personal protection insurance benefits are available under MCL 500.3113(a) when the owner of the vehicle permitted, gave consent to, or otherwise authorized the injured person to take and use the vehicle, but the injured person used the vehicle in violation of the law with the owner's knowledge.

Serafini, Michalowski, Derkacz & Associates (by *Phillip S. Serafini*) for Laura Monaco.

Miller Johnson (by *Thomas S. Baker* and *Christopher J. Schneider*) for Covenant Medical Center, Inc., and Mary Free Bed Rehabilitation Hospital.

Warner Norcross & Judd LLP (by *John J. Bursch*, *Matthew T. Nelson*, and *Conor B. Dugan*) and *Willingham & Coté, PC* (by *David M. Nelson* and *John A. Yeager*), for Home-Owners Insurance Company.

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

MURPHY, J. In this dispute concerning the recovery of personal protection insurance benefits, commonly referred to as PIP benefits, under the no-fault act,

MCL 500.3101 *et seq.*, defendant, Home-Owners Insurance Company (HOIC), appeals as of right the judgment entered in favor of plaintiff, Laura Monaco (hereafter, plaintiff), and intervening plaintiffs, Covenant Medical Center, Inc., and Mary Free Bed Rehabilitation Hospital (hereafter, the medical providers).[1] The judgment reflected the verdict rendered by a jury following trial and certain stipulations between HOIC and the medical providers regarding the amount of damages. HOIC challenges the pretrial denial of its motion for summary disposition and the denial of its motion for a directed verdict. There is but one issue in this appeal that we must resolve. It concerns the legal question whether a person injured in a motor vehicle accident is barred from recovering PIP benefits under MCL 500.3113(a)—which generally precludes coverage when a person used a vehicle that he or she had "taken unlawfully"—when the owner of the vehicle permitted, gave consent to, or otherwise authorized the injured person to take and use the vehicle, but the injured person used the vehicle in violation of the law with the owner's knowledge. We hold that PIP benefits are available in such circumstances because the phrase "taken unlawfully," as employed in MCL 500.3113(a), does not encompass the unlawful *use or operation* of a motor vehicle, just the unlawful *taking* of a vehicle. Accordingly, we affirm.

I. BACKGROUND

In July 2012, plaintiff's daughter Alison, then 15 years old, sustained severe injuries when she lost control of a vehicle that she was driving and crashed into a roadside ditch. At the time, Alison had completed

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[1] Any reference in this opinion to "plaintiffs" in the plural shall pertain to plaintiff and the medical providers.

and passed a driver's training course and obtained a permit to drive, but only if accompanied by a licensed parent, guardian, or 21-year-old, and she was not so accompanied when the accident occurred.[2] The motor vehicle was owned by plaintiff, customarily driven by plaintiff's partner, and insured by HOIC. The medical providers treated Alison's extensive injuries and assisted in her rehabilitation.

Plaintiff filed a claim with HOIC for PIP benefits. In a recorded statement, plaintiff told HOIC's insurance adjuster that Alison did not have permission to drive the vehicle when the accident took place. HOIC thus denied coverage under MCL 500.3113(a) and language in the insurance policy that tracked the statutory provision. Plaintiff then telephoned the adjuster to inquire whether there would be coverage if her partner had permitted Alison to use the vehicle. According to HOIC's adjuster, she informed plaintiff that HOIC would "reevaluate" the question of coverage in that event, but the adjuster never heard back from plaintiff in the matter.

Plaintiff, then acting as Alison's next friend, filed suit challenging HOIC's denial of PIP benefits. The medical providers, aligning themselves with plaintiff, intervened in the action, seeking reimbursement for costs associated with providing medical care to Alison. HOIC filed a motion for summary disposition under MCR 2.116(C)(10), asserting that plaintiff had admitted during her deposition that she had previously lied to HOIC's adjuster when she stated that Alison lacked

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[2] MCL 257.310e(4) applied to Alison, and it provides that "[a] person issued a level 1 graduated licensing status may operate a motor vehicle only when accompanied either by a licensed parent or legal guardian or, with the permission of the parent or legal guardian, a licensed driver 21 years of age or older."

permission to drive the vehicle. HOIC argued that MCL 500.3113(a) barred Alison from obtaining PIP benefits because she took the vehicle unlawfully and did not reasonably believe that she had permission to use the car. HOIC maintained that "self-serving" deposition testimony given by plaintiff, her partner, and Alison, which contradicted plaintiff's earlier recorded statement, was inadequate to establish a genuine issue of material fact for trial. HOIC additionally contended that Alison had taken the vehicle unlawfully regardless of any possible parental permission, considering that, in light of Alison's age and the restricted nature of the driver's permit, plaintiff had violated the law by allowing or authorizing Alison's unaccompanied operation of the car.

Plaintiffs responded that Alison had taken the vehicle lawfully, citing the deposition testimony of plaintiff, her partner, and Alison, which indicated that Alison had permission to take and drive the car on her own at the time of the accident. Plaintiffs further asserted that Alison's lack of a driver's license that would have allowed her to drive on her own was irrelevant with respect to whether she took the car lawfully, arguing that HOIC was conflating unlawful taking with unlawful use. The trial court denied HOIC's motion for summary disposition, concluding that there was a factual issue regarding whether Alison had permission to take the vehicle and that the law supported plaintiffs' proffered distinction between "taking" and "using" a vehicle for purposes of MCL 500.3113(a).

At trial, plaintiff testified that her initial statement to the insurance adjuster was not truthful and that Alison actually had permission to take and use the vehicle on the day of the crash. Plaintiff admitted that

she feared criminal liability for allowing her daughter to drive when she gave the statement to HOIC's adjuster. Plaintiff's partner testified that Alison had permission to take and use the vehicle on the day of the accident, and Alison indicated that she frequently drove the vehicle with plaintiff's knowledge and consent.[3] Plaintiffs additionally produced witnesses who testified that they saw Alison driving the vehicle alone on several occasions, and one witness claimed that he observed plaintiff's partner at times giving Alison the car keys. HOIC in turn elicited testimony from witnesses who questioned the credibility of plaintiffs' witnesses, and one of HOIC's witnesses testified that the partner had stated that he told Alison not to take the vehicle.

At trial, HOIC renewed its summary disposition arguments in moving for a directed verdict at the close of proofs, and the court again rejected them. HOIC and the medical providers had stipulated before trial to the amount of damages (outstanding medical charges plus penalty interest) should there be liability for PIP benefits, leaving the jury to resolve the issue of liability. And the jury concluded that HOIC had failed to meet its burden of showing that Alison took the car without permission, effectively rendering HOIC liable for the stipulated sums. The jury, of course, reached the same conclusion on liability relative to plaintiff, and the jurors made additional findings in regard to the nature and amount of allowable expenses and interest to which plaintiff was entitled. A judgment consistent with the jury's verdict and the stipulation was entered, and this appeal followed.

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[3] Tragically, Alison died in an unrelated house fire before trial; therefore, the trial court allowed her deposition testimony to be read into the trial record.

II. ANALYSIS

A. STANDARD OF REVIEW AND GOVERNING TEST FOR SUMMARY DISPOSITION AND DIRECTED VERDICT MOTIONS

"A trial court's decision regarding a motion for summary disposition and a motion for a directed verdict are reviewed de novo," *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003), as are questions of statutory interpretation, *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). The test with respect to a motion for summary disposition brought under MCR 2.116(C)(10) is essentially the same in regard to a motion for a directed verdict, "namely, whether reasonable minds, taking the evidence in a light most favorable to the nonmovant, could reach different conclusions regarding a material fact." *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994).

B. PRINCIPLES OF STATUTORY CONSTRUCTION

The Michigan Supreme Court in *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), set forth the well-established principles governing statutory construction, observing:

> 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

HOIC contends on appeal that Alison necessarily took the vehicle unlawfully given her age and restricted license, precluding entitlement to PIP benefits pursuant to MCL 500.3113(a). We note that HOIC does not challenge the jury's factual determination that HOIC failed to satisfy its burden of showing that Alison took the car without permission. HOIC's appellate argument is squarely one of law, entailing statutory construction. There is no genuine issue of material fact that Alison was only 15 years old when the accident took place and that, in light of the limited nature of her license or permit, it was unlawful for her to drive the car unaccompanied by a licensed adult identified in MCL 257.310e(4). Therefore, we must entertain the question whether those undisputed facts bar the recovery of PIP benefits under MCL 500.3113(a) as a matter of law, such that an order granting summary disposition or a directed verdict should have entered in favor of HOIC.

"The Michigan no-fault act requires that owners and registrants of automobiles carry personal protection insurance to cover an insured's medical care arising from injuries sustained in an automobile accident." *Krohn*, 490 Mich at 155, citing MCL 500.3101(1) and MCL 500.3105(1). At the time of Alison's accident, MCL 500.3113(a) provided:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

> (a) The person was using a motor vehicle . . . which he or she had *taken unlawfully*, unless the person reasonably believed that he or she was entitled to take and use the vehicle. [Emphasis added.]

This provision was subsequently amended pursuant to 2014 PA 489, but it still generally bars the recovery of PIP benefits by a person who operated a vehicle that he or she had "taken unlawfully." The first level of inquiry when applying MCL 500.3113(a) always concerns whether the taking of a vehicle was unlawful, and if the taking was lawful, the inquiry ends because the statute is inapplicable. *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 599; 808 NW2d 1 (2010).

In construing the language "taken unlawfully," our Supreme Court in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 516-517; 821 NW2d 117 (2012), observed:

> In determining the Legislature's intended meaning of the phrase "taken unlawfully," we must accord the phrase its plain and ordinary meaning, and we may consult dictionary definitions because the no-fault act does not define the phrase. The word "unlawful" commonly means "not lawful; contrary to law; illegal," and the word "take" is commonly understood as "to get into one's hands or possession by voluntary action." When the words are considered together, the plain meaning of the phrase "taken unlawfully" readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law. [Citations omitted.]

The *Spectrum Health* Court further held that "any person who takes a vehicle contrary to a provision of the Michigan Penal Code[, MCL 750.1 *et seq*.]—including MCL 750.413 and MCL 750.414, informally known as the 'joyriding' statutes—has taken the vehicle unlawfully for purposes of MCL 500.3113(a)." *Id*.

at 509. After analyzing the language of the two joyriding statutes, the Court concluded that both "make it unlawful to take any motor vehicle without authority, effectively defining an unlawful taking of a vehicle as that which is unauthorized." *Id*. at 517-518. A taking does not have to be larcenous to qualify as unlawful, and MCL 500.3113(a) applies to any person who takes a vehicle without the owner's authority, regardless of whether that person had the intent to steal the vehicle. *Id*. at 518. MCL 500.3113(a) examines the legality of a taking from the perspective of the driver. *Id*. at 522. The following language from *Spectrum Health* effectively belies HOIC's argument in this case:

> The "authority" referred to in the joyriding statutes is obviously the authority of the owner of the vehicle. Accordingly, for purposes of MCL 500.3113(a), a vehicle is "unlawfully taken" if it is taken without the authority of its owner. . . . Therefore, MCL 500.3113(a) does not apply to the lawful owner of a vehicle, even if that person drives it under a circumstance that renders him or her legally unable to operate a vehicle. However, driving while legally unable may have implications under MCL 500.3113(a) for a person who *has* taken a vehicle unlawfully because as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle. [*Id*. at 518 n 25 (citation and quotation marks omitted).]

As reflected in this language, the owner of a vehicle could never be barred from coverage under MCL 500.3113(a) because he or she would not be capable of taking the vehicle absent owner authorization; he or she is the owner. And, importantly, this is true even if the owner drives the vehicle "under a circumstance that renders him or her legally unable to operate a vehicle." *Id*. This statement effectively signifies, in direct contradiction of HOIC's theory, that the unlaw-

ful *operation* or *use* of a motor vehicle is irrelevant with respect to examining the "taken unlawfully" phrase in MCL 500.3113(a); otherwise, the Supreme Court's example concerning an owner would not hold water. Our view is buttressed by the final sentence in the quoted passage from *Spectrum Health*, which indicates that the unlawful operation or use of a motor vehicle is only relevant when the injured person *had actually* unlawfully taken the vehicle and was attempting to invoke the language in MCL 500.3113(a) allowing recovery when "the person reasonably believed that he or she was entitled to take and use the vehicle," despite the unlawful taking. *Id*. Therefore, the unlawful operation or use of a motor vehicle is simply not a concern in the context of analyzing whether the vehicle was taken unlawfully.

The distinction between unlawfully taking a motor vehicle and unlawfully using a vehicle was recognized in *Rambin v Allstate Ins Co*, 495 Mich 316, 331; 852 NW2d 34 (2014), wherein the Supreme Court stated that "the unlawful use of a vehicle . . . is not relevant under the unlawful taking language in MCL 500.3113." And this Court has observed that, with respect to the language in MCL 500.3113(a), "[c]learly, the terms 'take' and 'use' are not interchangeable or even synonymous; obtaining possession of an object is very different from employing that object or putting it into service." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009), abrogated in part on other grounds by *Rambin*, 495 Mich at 323-324 n 7.

HOIC argues that it was unlawful for plaintiff to give Alison permission to drive the car under the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*.; therefore, there effectively was no recognizable authorization to operate the vehicle, resulting in the unlaw-

ful taking of the vehicle by Alison. MCL 257.326 provides that "[n]o person shall knowingly authorize or permit a motor vehicle owned by him or under his control *to be driven* by any person in violation of any of the provisions of [the MVC]." (Emphasis added.) As noted earlier in this opinion, Alison was driving the car in violation of the MVC, particularly MCL 257.310e(4). Although it may have been unlawful for plaintiff, as owner of the car, to authorize or permit Alison *to drive the vehicle* in violation of the law, it had no bearing on, nor did it negate, the authorization and permission given by plaintiff for Alison *to take the vehicle*. Alison did not "gain[] possession of [the] vehicle contrary to Michigan law," *Spectrum Health*, 492 Mich at 517; rather, she unlawfully used the vehicle, i.e., Alison "put[] it into service" in violation of Michigan law, *Plumb*, 282 Mich App at 428. Plaintiff was not in violation of MCL 257.326 by merely allowing Alison to take possession and control of the car; it was the permission allowing Alison to drive the car that implicated MCL 257.326. While plaintiff's actions might have subjected her to prosecution under MCL 257.326, they did not turn an authorized or permitted taking into an unlawful taking.

III. CONCLUSION

All of HOIC's arguments are unavailing because they ultimately conflate the unlawful use or operation of a motor vehicle with the unlawful taking of a vehicle. Despite HOIC's protestation to the contrary and our appreciation that a very fine line exists, "taking" and "use" are simply not synonymous or interchangeable for purposes of MCL 500.3113(a), as reflected in the statute's plain and unambiguous language and the caselaw interpreting the statute. The trial court did

not err by denying HOIC's motions for summary disposition and a directed verdict.

Affirmed. Having fully prevailed on appeal, plaintiffs are awarded taxable costs under MCR 7.219.

JANSEN, P.J., and RIORDAN, J., concurred with MURPHY, J.

Special Orders

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered August 31, 2016:

SOUTHEAST MICHIGAN SURGICAL HOSPITAL LLC v ALLSTATE INSURANCE COMPANY, Docket No. 323425 [opinion reported at 316 Mich App 657]. The Court orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve a conflict between this case and *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016) (Docket No. 320518).