MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

March 31, 2016, through June 14, 2016

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

VOLUME 315
FIRST EDITION

THOMSON REUTERS®

2017

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WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2021
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KURTIS T. WILDER	2017
PATRICK M. METER	2021
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KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2019
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ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
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DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2017
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	Term Expires January 1 of
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BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2017
RICHARD H. BERNSTEIN	2023
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TABLE OF CASES REPORTED

PAGE

COURT OF APPEALS CASES

TENNINE CORPORATION v BOARDWALK COMMERCIAL, LLC

Docket Nos. 323257 and 324480. Submitted December 2, 2015, at Lansing. Decided March 31, 2016, at 9:00 a.m.

Tennine Corporation (Tennine) filed suit in the Kent Circuit Court against six businesses—Boardwalk Commercial, Boardwalk Condos, Parkplace Properties of West MI (collectively, the Boardwalk defendants); Central Michigan Railway (CMR); The Straits Corporation; and Dark Properties—after hazardous material was deposited on Tennine's property during the demolition of a stretch of railroad tracks adjacent to Tennine's property. The court, Christopher F. Yates, J., granted defendants' motions for summary disposition with the exception of a claim of trespass against CMR, which Tennine subsequently dismissed so that it could appeal the court's ruling that Tennine lacked standing to sue CMR under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. Tennine appealed that ruling in Docket No. 323257. The trial court also awarded offer-of-judgment sanctions to the Boardwalk defendants after Tennine declined the businesses' offers of judgment and the Boardwalk defendants received a more favorable outcome (summary disposition) than represented by their offers of judgment. Tennine appealed the sanctions in Docket No. 324480. The Court of Appeals consolidated Tennine's appeals.

The Court of Appeals *held*:

1. A corporation has standing to sue under NREPA if the corporation sues as a person whose health or enjoyment of the environment is or may be adversely affected by the release or threat of the release of contaminants. In this case, the trial court relied on *Flanders Indus, Inc v Michigan*, 203 Mich App 15 (1993), and concluded that Tennine had no standing to sue CMR because Tennine did not qualify as a person suing to protect its health or enjoyment of property affected by the release or threat of the release of contaminants. However, the plain language of the applicable statutes, MCL 324.20135 (the citizens' suit provision of the NREPA) and MCL 324.301(h) (defining "person" as used in the NREPA to include a corporation), indicates that a corporation may proceed under the NREPA as a person whose enjoyment of

its property is or may be adversely affected by the release or threat of the release of contaminants. *Flanders* was not dispositive in this case because the plaintiff in *Flanders* did not sue as a person affected by the contaminants. Rather, the *Flanders* plaintiff lacked standing under the NREPA because it sought only relief from the costs associated with the release of contaminants; it did not seek relief as a person whose health or enjoyment of the environment was adversely affected by the contamination. In this case, Tennine did not present evidence that the health of its employees was adversely affected by the contaminants released; Tennine's evidence was limited to its claim that the contaminants released during the removal of the railroad ties and tracks from the property adjacent to Tennine's property affected its enjoyment of the property. Because a corporation may be a "person" under the NREPA, and because a corporation may "enjoy" its environment, Tennine had standing to sue CMR under the NREPA. Therefore, the trial court incorrectly held that Tennine lacked standing to bring an action against CMR under the NREPA.

2. Offer-of-judgment sanctions are properly awarded under MCR 2.405 when a party rejects an offeror's offer of judgment and the outcome is more favorable to the offeror than the offeror's average offer. In this case, Tennine did not dispute the amounts awarded. Instead, Tennine argued that the interest-of-justice exception, MCR 2.405(D)(3), should prevent offer-of-judgment sanctions from being awarded. However, the interest-of-justice exception should not be applied in the absence of unusual circumstances. The reasonableness of a refusal to accept an offer, the offeror's ability to pay, and the fact that a claim is valid do not constitute unusual circumstances sufficient to invoke the interest-of-justice exception. That an offeror engaged in gamesmanship may be sufficient to invoke the exception. That the offer made was *de minimis* or did not reflect a legitimate attempt to settle the dispute may be evidence of gamesmanship. In this case, Tennine did not establish that the Boardwalk defendants engaged in gamesmanship. Whether the offers made were reasonable or *de minimis* could not be determined because there was no case evaluation award with which to compare the offers and Tennine did not request a specific amount of damages or make a counteroffer. Tennine also argued that sanctions should not have been awarded because the Boardwalk defendants refused to produce the evidence of ownership that Tennine requested, but there was no indication of what evidence was withheld or that Tennine had filed a motion to compel the evidence it sought.

Therefore, the trial court properly ordered Tennine to pay offer-of-judgment sanctions to the Boardwalk defendants.

Affirmed in part, reversed in part, and remanded.

Kreis, Enderle, Hudgins & Borsos, PC (by *Sean P. Fitzgerald* and *James D. Lance*), for Tennine Corporation.

Charron Law Office (by *David W. Charron*) for Boardwalk Commercial, LLC; Boardwalk Condos, LLC; and Parkplace Properties of West MI, LLC.

Clarkson Law, PLLC (by *Sarah A. Clarkson*), for Central Michigan Railway Company, The Straits Corporation, and Dark Properties, Inc.

Before: SAAD, P.J., and STEPHENS and O'BRIEN, JJ.

O'BRIEN, J. In Docket No. 323257, plaintiff, Tennine Corporation, appeals as of right the trial court's opinion and order granting summary disposition in favor of defendant Central Michigan Railway Company (CMR).[1] We reverse the trial court's decision regarding CMR and remand for further proceedings consistent with this opinion. In Docket No. 324480, plaintiff appeals as of right the trial court's opinion and order granting the motion for costs and attorney fees in favor

[1] The trial court granted summary disposition to all defendants for all claims except for plaintiff's claim against CMR for trespass. However, plaintiff voluntarily dismissed the trespass claim in order to proceed with the appeal. Before granting summary disposition in favor of defendants, the trial court examined the party at issue, the claim raised, and the evidence produced. Plaintiff's challenge to the summary disposition decision solely involves the issue of standing, and the trial court's standing decision only affected CMR. Accordingly, we do not address the trial court's summary disposition decisions involving the other defendants, and unless otherwise indicated, all references to a single defendant are references to CMR.

of defendants Boardwalk Commercial, LLC, Boardwalk Condos, LLC, and Parkplace Properties of West MI, LLC (the Boardwalk defendants). We affirm the trial court's award of actual costs and attorney fees to the Boardwalk defendants.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case concerns real property located in Grand Rapids, Michigan, conveyed from the Berkey & Gay Furniture Company to the Grand Trunk Western Railroad Company (Grand Trunk) in 1914, and from Grand Trunk to defendant CMR in 1987. There is no dispute that this property was conveyed to CMR as a railroad right-of-way (ROW) and was to remain in CMR's possession "as long as" the property was used for railway purposes. The Railroad Code, MCL 462.101 *et seq*., defines a ROW as "the track or roadbed owned by a railroad and that property owned by a railroad which is located on either side of its tracks and which is readily recognizable to a reasonable person as being railroad property . . . ." MCL 462.273(2).

The relevant portion of the ROW began at Monroe Street and continued south to Mason Street. William Tingley, plaintiff's general manager, averred that the northern portion of the ROW between Monroe Street and Walbridge Street was adjacent to plaintiff's property located at 1009 Ottawa Street NW. CMR purchased all rights, title, and interest in the ROW with the intention of using it as a railroad to transport paper to and from the building that housed the Grand Rapids Press. Its use as a railroad ceased after the Grand Rapids Press moved to another city in 2004. CMR then attempted to abandon the ROW and have it converted into a recreational trail.

Under federal law, CMR was required to file an application regarding its abandonment of the ROW with the federal Surface Transportation Board (STB). See 49 USC 10903(a)(1) (stating that a rail carrier intending to "abandon any part of its railroad lines" must file "an application relating thereto with the [STB]. An abandonment or discontinuance may be carried out only as authorized under this chapter"). That is, CMR could not abandon the ROW without authorization from the STB. In instances of railroad abandonment, federal law directed the STB to encourage the establishment of recreational trails "in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use . . . ." 16 USC 1247(d).

On March 12, 2009, CMR applied to the STB for authorization to abandon the ROW and have it converted to recreational use under 16 USC 1247(d). Defendant Dark Properties, Inc., was created for the purpose of assisting CMR with transforming the ROW to recreational use after the STB authorized abandonment. However, the STB did not authorize CMR to abandon the ROW because negotiations were not completed.

Defendants Boardwalk Commercial, LLC, and Boardwalk Condos, LLC, acquired title to real property that was formerly part of the Berkey & Gay Furniture Company and constructed condominiums on the property. The southern segment of the ROW, which began at Walbridge Street and ended at Mason Street, was subject to a reversionary interest. On April 28, 2012, these defendants, Boardwalk Commercial and Board-

walk Condos, transferred their reversionary interest in the southern segment of the ROW to Parkplace Properties of West MI, LLC.

Plaintiff's representative averred that on November 17, 2011, a work crew from Jaeger Salvage arrived at the site and demolished the tracks and rails on the northern and southern parts of the ROW. The crew stacked railroad ties on plaintiff's property. On November 18, 2011, the crew returned with two backhoes to continue the demolition. Soil from the ROW clung to the backhoes and was allegedly tracked onto plaintiff's property. Plaintiff's representative told the crew that the soil on the ROW was contaminated with hazardous chemicals and that the crew did not have permission to enter plaintiff's property. A crew member purportedly indicated that Beth Visser, an agent of the Boardwalk defendants, gave the crew permission to enter the property. The crew complied with plaintiff's request that it stop work, and the crew removed the railroad ties from plaintiff's property. This activity served as the impetus for this litigation.

Plaintiff gave notice of its intent to file a claim under Michigan's Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. On July 30, 2012, plaintiff filed suit against defendants alleging violations of the NREPA, trespass, and nuisance. All defendants filed motions for summary disposition. Pertinent to the appeal, the trial court held that plaintiff did not have standing to raise the NREPA claim against CMR. Following the grant of summary disposition to the Boardwalk defendants, the trial court granted their request for actual costs, including attorney fees, under MCR 2.405, because plaintiff did not accept the Boardwalk defendants' offers of judgment. From these rulings, plaintiff appeals. On November 25, 2014, the

appeals were consolidated "to advance the efficient administration of the appellate process." *Tennine Corp v Boardwalk Commercial, LLC*, unpublished order of the Court of Appeals, entered November 25, 2014 (Docket Nos. 323257 and 324480).

II. DOCKET NO. 323257

Plaintiff alleges that the trial court erred by concluding that it lacked standing to pursue the NREPA claim against CMR. We agree.

The question whether a party has standing presents a question of law reviewed de novo on appeal. *Manuel v Gill*, 481 Mich 637, 642-643; 753 NW2d 48 (2008). The standing doctrine's purpose is to determine whether a litigant has a sufficient interest in the matter to "ensure sincere and vigorous advocacy." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (quotation marks and citation omitted). The standing requirement ensures that only those with a substantial interest may litigate a claim in court. *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 136; 863 NW2d 344 (2014). When a party's standing is contested, the issue becomes whether the proper party is seeking adjudication, not whether the issue is justiciable. *Id*. at 136. Standing is not contingent on the merits of the case. *Id*. Standing may be conferred by legislative expression or implied by duties that arise from the law. *Lansing Sch Ed Ass'n*, 487 Mich at 357-358. A corporation has the power, in furtherance of its corporate purposes, to "[s]ue and be sued in all courts and participate in actions and proceedings, judicial, administrative, arbitrative, or otherwise, in the same manner as natural persons." MCL 450.1261(b).

The purpose of Part 201 of the NREPA, titled Environmental Remediation, MCL 324.20101 to MCL 324.20142, is "to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare, or to the environment from environmental contamination at facilities within the state." MCL 324.20102(c). Under the NREPA, MCL 324.101 *et seq*., a plaintiff shall give a written notice advising of the intent to sue, the basis for the suit, and the relief requested at least 60 days in advance of filing a complaint. MCL 324.20135(3)(a). The notice must be sent to the Department of Environmental Quality (DEQ), the attorney general, and the proposed defendants.[2] *Id*. MCL 324.20135 addresses who may pursue an NREPA action and provides in relevant part:

> (1) Except as otherwise provided in this part, a person, including a local unit of government on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility, other than a permitted release or a release in compliance with applicable federal, state, and local air pollution control laws, by a violation of this part or a rule promulgated or order issued under this part, or by the failure of the directors to perform a nondiscretionary act or duty under this part, may commence a civil action against any of the following:
>
> (a) An owner or operator who is liable under section 20126 for injunctive relief necessary to prevent irreparable harm to the public health, safety, or welfare, or the environment from a release or threatened release in relation to that facility.
>
> (b) A person who is liable under section 20126 for a violation of this part or a rule promulgated under this part or an order issued under this part in relation to that facility.

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[2] The parties do not contest that notice was given or its sufficiency.

The NREPA defines a "person" as "an individual, partnership, *corporation*, association, governmental entity, or other legal entity." MCL 324.301(h) (emphasis added). The circuit court has jurisdiction to remedy the NREPA violation, and the remedies include granting injunctive relief, imposing civil fines, and ordering the action necessary to correct the violation. MCL 324.20135(2).

MCL 324.20126 establishes who is liable under the NREPA, and it includes "[t]he owner or operator of a facility if the owner or operator is responsible for an activity causing a release or threat of release." MCL 324.20126(1)(a). An "operator" includes a "person who is in control of or responsible for the operation of a facility," MCL 324.20101(1)(jj), and an "owner" is a "person who owns a facility," MCL 324.20101(1)(kk). A "facility" is "any area, place, parcel or parcels or property, or portion of a parcel of property where a hazardous substance in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use has been released, deposited, disposed of, or otherwise comes to be located." MCL 324.20101(s). A "[r]elease includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment . . . ." MCL 324.20101(pp). A "hazardous substance" includes any substance defined as a hazardous substance under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). MCL 324.20101(x)(*ii*). CERCLA's definition of the term "hazardous substance" extends to "any hazardous air pollutant listed under section 112 of the Clean Air Act . . . ." 42 USC 9601(14). The Clean Air Act includes arsenic and lead compounds in its list of pollutants. 42 USC 7412(b)(1).

MCL 324.20135 is known as the "citizens suit" provision of the NREPA. *1031 Lapeer LLC v Rice*, 290 Mich App 225, 235; 810 NW2d 293 (2010). This provision governs lawsuits brought by persons when their health or enjoyment of the environment is at risk from a release from a facility or the threat of a release from a facility. *Id*. When a plaintiff does not bring suit as a person "whose health or enjoyment of the environment" was adversely affected by a release or threat of release of hazardous substances, but rather seeks only to recover the monetary costs associated with the release, he or she lacks standing to sue under the NREPA. *Flanders Indus, Inc v Michigan*, 203 Mich App 15, 34; 512 NW2d 328 (1993).

In *Flanders*, the plaintiff—a corporation—purchased an industrial plant on the shores of Green Bay in 1982. Before the purchase, the previous owner and operator discharged paint sludge into Green Bay, a fact unknown to the plaintiff. Because of the paint sludge, the bottom land under Green Bay, which was owned by the state, was contaminated. *Id*. at 18-19. In 1989, the Department of Natural Resources (DNR) notified the plaintiff that it was subject to liability and must remediate the contamination pursuant to the Michigan Environmental Response Act (MERA), MCL 299.601 *et seq*.[3] The plaintiff incurred expenses in removing the sludge. *Id*. at 19. In 1992, the plaintiff sued the state, raising several counts involving the costs it incurred, including a claim for injunctive relief under former MCL 299.615(1), which allowed "a person . . . whose health or enjoyment of the environment

[3] The MERA was repealed by the Legislature, effective March 30, 1995, 1994 PA 451, but the MERA's provisions were recodified as Part 201, MCL 324.20101 *et seq*., of the NREPA. *RCO Engineering, Inc v ACR Indus, Inc (On Remand)*, 246 Mich App 510, 514; 633 NW2d 449 (2001).

is or may be adversely affected by a release from a facility or threat of release from a facility" to bring a civil action against certain entities. *Id*. at 32 (quotation marks omitted; alteration omitted). This Court held that the plaintiff lacked standing to sue under former MCL 299.615:

> Section 15 [i.e., former MCL 299.615] provides that "a person . . . whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release" may bring suit. Plaintiff is not a person whose health may be affected. Rather, plaintiff is seeking relief only from the monetary costs associated with the release caused by [the offending company]. Plaintiff, therefore, is not within the class of persons who may seek relief under the provisions of [former] MCL 299.615. [*Flanders*, 203 Mich App at 34 (citation omitted).]

Because the plaintiff lacked standing to sue under the former MERA, this Court concluded that the trial court properly dismissed the plaintiff's claim under that provision. *Id*. Similarly, in *1031 Lapeer*, 290 Mich App at 235, this Court held that the plaintiffs could not maintain their suit premised on environmental violations when the plaintiffs were not citizens whose health or enjoyment of the environment was threatened. In *1031 Lapeer*, the plaintiffs' complaint arose from the parties' contract and was based on fraud and statutory violations. *Id*. Because the plaintiffs sought rescission of the contract and damages, but not injunctive relief related to the environmental contamination, MCL 324.20135 did not apply. *1031 Lapeer*, 290 Mich App at 235.

In the present case, the trial court relied on the decision in *Flanders* and held that because plaintiff was a corporation, plaintiff was not a person whose health or enjoyment of the environment could be adversely affected by the release of hazardous chemi-

cals. However, the *Flanders* Court did not hold that a corporation lacked standing under the NREPA simply because of its corporate status. Rather, it held that the plaintiff lacked standing because it brought suit under the former MERA to obtain relief for the costs associated with the release. *Flanders*, 203 Mich App at 34. The plaintiff did not bring suit in the capacity of a person *whose health or enjoyment of the environment was adversely affected*; therefore, the plaintiff lacked standing. *Id*.

In contrast, in this case, plaintiff alleged in its complaint that the removal activity on the ROW released or threatened to release hazardous substances that would endanger the health of people on plaintiff's property and reduce the value of plaintiff's property. Additionally, plaintiff advised in its notice to sue that the removal activity was adversely affecting its health and enjoyment of the environment. Because plaintiff sued as a person whose health and enjoyment of the environment was adversely affected by a release of contamination, the reason for the plaintiff's lack of standing in *Flanders*, 203 Mich App at 34—that the plaintiff sued not as a person whose health or enjoyment of the environment was adversely affected, but rather for relief from the costs associated with the release—does not apply to plaintiff in this case. Consequently, we must address whether a corporation has standing to sue under the NREPA when that corporation sues as a person whose health or enjoyment of the environment may be affected by contamination.

The interpretation and application of a statute presents a question of law reviewed de novo on appeal. *Tomecek v Bavas*, 482 Mich 484, 490; 759 NW2d 178 (2008). The principal rule of statutory construction is to discern and give effect to the legislative intent by

examining the most reliable evidence of intent, the statutory language. *Gardner v Dep't of Treasury*, 498 Mich 1, 5-6; 869 NW2d 199 (2015). When the statutory language is unambiguous, the Legislature intended the meaning clearly expressed, the statute must be enforced as written, and no further judicial construction is necessary. *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 256; 865 NW2d 908 (2015).

"Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218; 801 NW2d 35 (2011) (quotation marks and citation omitted). "The words used by the Legislature are given their common and ordinary meaning." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court may consult a dictionary to define terms that are undefined in the statute. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). A legal provision "is ambiguous only if it irreconcilably conflicts with another provision, . . . or when it is equally susceptible to more than a single meaning." *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (quotation marks, brackets, and emphasis omitted). "[A] finding of ambiguity is to be reached only after 'all other conventional means of [ ] interpretation' have been applied and found wanting." *Id*. at 165 (citation omitted; second alteration in original).

First, plaintiff is a corporation, and the NREPA includes a corporation in the definition of a person. MCL 324.301(h). Therefore, plaintiff is a person under the NREPA. See *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007) ("When a statute specifically defines a given term, that definition alone controls."). However, under the specific language of MCL 324.20135(1), not all persons have standing; rather, only those persons "whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of release from a facility" may commence a civil action.

Plaintiff did not present any evidence that the health of its employees was compromised as a result of the removal activity in the ROW. Consequently, we focus on whether plaintiff, as a corporation, may suffer from loss of the enjoyment of the environment as a result of any release. MCL 324.20135(1).

The NREPA defines "environment" as "land, surface water, groundwater, subsurface strata, air, fish, wildlife, or biota within the state." MCL 324.20101(1)(o). The statute does not define "enjoyment"; consequently, this Court may refer to a dictionary to determine its meaning. *Koontz*, 466 Mich at 312. *Black's Law Dictionary* (10th ed) defines "enjoyment" as "**1.** Possession and use, [especially] of rights or property. **2.** The exercise of a right." Furthermore, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "enjoyment" as "possession and use[.]" In light of these definitions, we conclude that a corporation may exercise the right to use its land or water—in other words, a corporation may enjoy the environment. Indeed, our Supreme Court has long held that a corporation may "enjoy" its real property. See, e.g., *Grand Rapids, N & LS R Co v Grand Rapids & I R Co*, 35 Mich 265, 271; 24 Am Rep

545 (1877) (stating that a corporation's right to "enjoy" its land and property is "sacredly guarded and protected under our constitution"). Therefore, under the statute's plain language, a corporation may have standing to sue.

And clearly, a corporation's enjoyment of the environment may be adversely affected by the release or threat of release of hazardous substances. For example, contaminants may prevent a corporation from using its land or water in certain ways. See MCL 324.20102(c) (stating that a purpose of the NREPA is to eliminate the unacceptable risks of environmental contamination). Therefore, the plain language of MCL 324.20135(1) affords a corporation standing to sue if its "enjoyment of the environment is or may be adversely affected by a release . . . or threat [of release of hazardous substances]."

Furthermore, when construing a statute, a "court must consider the object of the statute in light of the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purposes of the statute." *CD Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 408; 834 NW2d 878 (2013). An examination of the purposes of the NREPA indicates that the Legislature did not intend corporations to be without standing simply because of their corporate status. As discussed, the purpose of Part 201 of the NREPA is "to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare, or to the environment from environmental contamination at facilities within the state." MCL 324.20102(c). And the Legislature stated "[t]hat to the extent possible, consistent with requirements under this part and rules promulgated under this part, response activities shall be undertaken by persons liable

under this part." MCL 324.20102(g). The Legislature further declared that Part 201 "is intended to foster the redevelopment and reuse of vacant manufacturing facilities and abandoned industrial sites that have economic development potential, if that redevelopment or reuse assures the protection of the public health, safety, welfare, and the environment." MCL 324.20102(*l*). Accordingly, preventing a corporation from bringing suit under the NREPA would be contrary to the stated purpose and goals of Part 201.

In sum, plaintiff is a corporation, and its health or enjoyment of the environment may be adversely affected by a release or threat of release from a facility. Indeed, such injury is precisely what plaintiff alleged in its complaint in the trial court. In other words, plaintiff "brought suit in the position of [a person] whose health or enjoyment of the environment may be adversely affected by the [alleged] contamination." *1031 Lapeer*, 290 Mich App at 235. Therefore, plaintiff had standing to sue under the NREPA, and the trial court erred by granting CMR's motion for summary disposition of plaintiff's NREPA claim for lack of standing.[4]

III. DOCKET NO. 324480

Lastly, plaintiff asserts that the trial court erred by awarding offer-of-judgment sanctions when such an award was unwarranted under the interest-of-justice exception. We disagree.

In May 2013, each Boardwalk defendant submitted an offer of judgment for $500. Plaintiff did not accept

[4] We express no opinion regarding whether CMR's actions constitute a release and whether a facility was involved. On remand, the parties may address other applicable provisions of the NREPA.

the offers, but instead requested additional information regarding ownership of the parcel. However, there is no indication that plaintiff filed a motion to compel the Boardwalk defendants to disclose ownership information. In January 2014, the Boardwalk defendants moved for summary disposition, and the trial court granted the motion, concluding that there was no evidence that they held an ownership interest or that the criteria for reversion of the property were satisfied. Additionally, the trial court rejected the contention that an agent of the Boardwalk defendants authorized the work because the evidence was premised on hearsay. Subsequently, the Boardwalk defendants moved for offer-of-judgment sanctions. The trial court ruled that the failure to accept the offers of judgment entitled the Boardwalk defendants to an award of $23.04 in costs and $21,368.53 in attorney fees. Plaintiff does not contest the amount of the award on appeal, but only disputes the failure to apply the interest-of-justice exception, MCR 2.405(D)(3). Because the basis of the trial court's grant of summary disposition in favor of the Boardwalk defendants was not challenged, the propriety of their dismissal is not at issue,[5] and we address the merits of the award in their favor. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

We review de novo whether a court rule has been properly interpreted, and the same principles governing the construction of statutes are applied to court rules. *Fraser Trebilcock Davis & Dunlap PC v Boyce*

[5] Plaintiff's statement of the issue in its brief on appeal is limited to whether it had standing to pursue a claim under the NREPA. The standing decision by the trial court only pertained to CMR. Accordingly, plaintiff abandoned the summary disposition rulings involving the Boardwalk defendants. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

Trust 2350, 497 Mich 265, 271; 870 NW2d 494 (2015). However, we review for clear error the factual findings underlying an award of attorney fees. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 516; 844 NW2d 470 (2014). "A finding of the trial court is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made." *Id*. However, we review for an abuse of discretion whether the interest-of-justice exception applies to the facts of a specific case. *Derderian*, 263 Mich App at 374. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Michigan follows the "American rule," which prohibits an award of attorney fees unless a statute, court rule, or contractual provision expressly provides to the contrary. *Haliw v Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005); *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996). Attorney fees may be awarded under MCR 2.405, which is known as "the offer-of-judgment rule." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234 (2009). "The purpose of the offer of judgment rule is to avoid protracted litigation and encourage settlement." *Id*. This rule permits a party to serve on an opponent a written offer to stipulate the entry of judgment. *Id*. "If the offeree rejects the offer and the adjusted verdict is more favorable to the offeror than the average offer, the offeror may recover actual costs from the offeree." *Id*.

A judgment arising from the grant of a dispositive motion constitutes a verdict for purposes of MCR 2.405 and allows for the imposition of sanctions. *Id*. The court rule provides, in relevant part:

> If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> * * *
>
> (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule. [MCR 2.405(D).]

Because the interest-of-justice provision is the exception to a general rule, it should not be applied absent unusual circumstances. *Luidens v 63rd Dist Court*, 219 Mich App 24, 33; 555 NW2d 709 (1996).

> Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous "are too common" to constitute the unusual circumstances encompassed by the "interest of justice" exception. However, the exception may be applicable when an offer is made in the spirit of "gamesmanship . . . , rather than a sincere effort at negotiation," or when litigation of the case affects the public interest, such as a case resolving an issue of first impression. [*Derderian*, 263 Mich App at 391 (citations omitted).]

In *AFP Specialties*, 303 Mich App at 500, the defendant purchased real property in Kalkaska County with the intention of converting the property into a restaurant. Michigan's construction code required the defendant to install a fire suppression system, and the defendant hired the plaintiff, AFP Specialties, to install the system. *Id*. The plaintiff subcontracted Etna to install it. When the defendant failed to pay the plaintiff, the plaintiff filed suit for breach of contract, requesting money damages and foreclosure on its construction lien. *Id*. at 501. Etna filed a counterclaim

against the plaintiff for money damages, and after Etna prevailed at trial, the trial court awarded Etna attorney fees under MCR 2.405. *Id*. at 499. On appeal, the plaintiff argued that the trial court abused its discretion in awarding attorney fees because the interest-of-justice exception precluded the award after Etna engaged in gamesmanship. *Id*. at 519-520.

This Court rejected the plaintiff's argument that Etna engaged in gamesmanship and that its offer of judgment did not represent a compromise or encourage settlement. *Id*. at 519. We concluded that evidence of gamesmanship or a *de minimis* offer was lacking when "there was no case evaluation award to compare with Etna's offer of judgment . . . ." *Id*. "Rather, Etna's offer of judgment was only slightly more than what AFP admitted that it clearly owed to Etna." *Id*. at 520. Furthermore, there was no indication that the plaintiff made a counteroffer in an attempt to resolve the legal dispute between the parties. *Id*. Rather, the record indicated that the plaintiff was "simply unwilling to compromise at all" to resolve its dispute with Etna. *Id*. Although the plaintiff's rejection of Etna's offers of judgment may have been reasonable, this Court held that the reasonableness of the plaintiff's rejection was not an unusual circumstance contemplated by the interest-of-justice exception. *Id*. This Court thus concluded that the trial court did not abuse its discretion by refusing to apply the interest-of-justice exception. *Id*. at 521.

In the present case, plaintiff does not dispute that the actual verdict was more favorable to the Boardwalk defendants, the offerors, and plaintiff does not contest the amount of costs and attorney fees awarded. Rather, plaintiff only contends that the interest-of-justice exception should be applied be-

cause the Boardwalk defendants did not respond to informal requests from plaintiff's counsel regarding documentation of ownership, and the minimal amount of the offers demonstrated gamesmanship, not legitimate offers. The question of ownership was raised in the context of defendants' motions for summary disposition. With regard to the Boardwalk defendants, plaintiff did not present evidence that those entities owned the disputed parcel. Indeed, although the issue of ownership presents a factual question, the nonmoving party must establish a genuine issue of material fact with admissible documentary evidence. *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 463; 708 NW2d 448 (2005). Although plaintiff contends that the Boardwalk defendants failed to offer any evidence regarding ownership, there is no indication that plaintiff identified information that was withheld or filed a motion to compel production of evidence regarding ownership. Moreover, the allegations that the Boardwalk defendants had an ownership interest or obtained a reversionary interest through abandonment is belied by the evidence submitted on behalf of CMR.

Although plaintiff argues that the Boardwalk defendants' offers of judgment were *de minimis*, there is no amount with which to compare their offers. There was no case evaluation award, and plaintiff did not request a specific amount of monetary damages. There is no information that plaintiff made a counteroffer under MCR 2.405, which could provide the trial court a manner in which to determine whether the offers were *de minimis*. See *AFP Specialties*, 303 Mich App at 519-520. Therefore, the trial court did not clearly err by concluding that the amounts offered failed to indicate that the Boardwalk defendants engaged in games-

manship. *Id*.[6] Accordingly, the trial court did not abuse its discretion by holding that the interest-of-justice exception did not bar an award of costs and fees under MCR 2.405. See *Derderian*, 263 Mich App at 374.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. In light of the public question involved, the parties may not tax costs. MCR 7.219(A).

SAAD, P.J., and STEPHENS, J., concurred with O'BRIEN, J.

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[6] Plaintiff also asserted that unusual circumstances warrant application of the interest-of-justice exception because the complaint requested equitable relief. However, its reliance on a concurring opinion is inappropriate because decisions in which a majority of the participating justices do not agree with the reasoning are not binding interpretations. See *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976) (addressing plurality opinions). Moreover, this Court has explicitly held that MCR 2.405 applies where a plaintiff seeks both equitable and monetary relief. *McManus v Toler*, 289 Mich App 283, 289-290; 810 NW2d 38 (2010).

LaBELLE MANAGEMENT, INC v DEPARTMENT OF TREASURY

Docket No. 324062. Submitted January 5, 2016, at Detroit. Decided March 31, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 931.

LaBelle Management, Inc., brought an action in the Court of Claims, alleging that the Department of Treasury (the Department) improperly broadened its interpretation of the term "unitary business group" in MCL 208.1117(6). Brothers Barton and Douglas LaBelle owned LaBelle Management, Inc., The Pixie, Inc., and LaBelle Limited Partnership, and neither brother owned more than 50% of the common stock of each entity during the relevant tax periods. LaBelle Management was originally a subsidiary of Pixie, but Pixie sold all its interest in LaBelle Management to the LaBelle brothers on January 1, 2008. LaBelle Management subsequently reported its business tax as a separate company. In 2011 and 2012, the Department audited LaBelle Management's tax returns and determined that LaBelle Management, Pixie, and LaBelle Limited Partnership should be treated as a "unitary business group" under MCL 208.1117(6), which requires one member of the group to directly or indirectly own or control more than 50% of the ownership interests of the other members. The Department applied the unitary business group control test outlined in Revenue Administrative Bulletin 2010-1 and concluded that LaBelle Management indirectly owned 100% of Pixie and LaBelle Limited Partnership and that Pixie indirectly owned 100% of LaBelle Management and 90% of LaBelle Limited Partnership. Consequently, the Department taxed LaBelle Management as a unitary business group for two tax periods. LaBelle Management paid the bill under protest and filed suit. The parties brought cross-motions for summary disposition. The court, MICHAEL J. TALBOT, C.J., granted the Department's motion for summary disposition and concluded that, under the federal Internal Revenue Code provisions outlined in 26 USC 957, which the court concluded were the most contextually analogous to Michigan's "indirect" ownership requirement in MCL 208.1117(6), LaBelle Management was a unitary business group. LaBelle Management appealed.

The Court of Appeals *held*:

MCL 208.1117(6) defines "unitary business group" as a group of United States persons, other than a foreign operating entity, one of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other United States persons, and that has business activities or operations which result in a flow of value between or among persons included in the unitary business group or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. At issue in this case was how to define "owns or controls . . . indirectly." The Michigan Business Tax Act, MCL 208.1101 *et seq*., does not define ownership or control, but MCL 208.1103 provides that a term used in the act and not defined differently shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required. At the point the trial court acknowledged that federal tax laws do not address a comparable context, it should have used the ordinary rules of statutory construction to define Michigan's indirect ownership requirement in lieu of using federal international taxation provisions 26 USC 957 and 26 USC 958, which incorporate the constructive ownership rules of 26 USC 318(a). Mere similarity between the language used in Revenue Administrative Bulletin 2010-1 and that of 26 USC 318(a)—which does not provide the meaning of the term at issue—is not a reason to ignore the lack of comparable context or to overlook the distinction in 26 USC 958 between "direct and indirect ownership" and "constructive" ownership. Federal tax statutes and regulations are replete with examples that illustrate the proposition that indirect ownership and constructive ownership are two different concepts: federal statutes and regulations are careful never to say that indirect ownership means constructive ownership and, in fact, expressly distinguish between the two at times; rules of construction are not broadly applied whenever indirect ownership is involved, but only when the statute or regulation expressly mandates applying those rules; and rules of constructive ownership are applied in some contexts, but in other contexts only direct and indirect ownership are considered. The constructive ownership rules from federal law might apply when a statute involves stock owned or considered as owned, but to apply these rules to MCL 208.1117(6) would expand the statute beyond the meaning intended by the Legislature. Therefore, the trial court erred by using the Internal Revenue Code definition of constructive ownership to define Michigan's indirect ownership requirement. Using the ordinary

rules of statutory construction that allow consultation of dictionary definitions to give words their common and ordinary meaning, the term "indirect" involves an intermediary. Consistent with these dictionary definitions, indirect ownership in MCL 208.1117(6) means ownership through an intermediary, not ownership by operation of legal fiction. Applying MCL 208.1117(6), the entities at issue did not constitute a unitary business group because none of the involved entities owned—through an intermediary or otherwise—more than 50% of any other entity.

Reversed and remanded for entry of summary disposition in favor of LaBelle Management.

TAXATION — BUSINESS TAXES — UNITARY BUSINESS GROUPS — INDIRECT OWNERSHIP.

MCL 208.1117(6) defines a "unitary business group" in relevant part as a group of United States persons, one of which owns or controls, directly or indirectly, more than 50% of the ownership interest; indirect ownership in MCL 208.1117(6) means ownership through an intermediary, not ownership by operation of legal fiction.

Varnum, Riddering, Schmidt and Howlett LLP (by *Thomas J. Kenny* and *Jack M. Panitch*) for LaBelle Management, Inc.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Emily C. Zillgitt*, Assistant Attorney General, for the Department of Treasury.

Before: SAAD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM. Plaintiff appeals the trial court's order that denied its motion for summary disposition and granted defendant's motion for summary disposition. At issue is the interpretation of MCL 208.1117(6), which defines the term "unitary business group."[1]

[1] Although MCL 208.1117(6) has been amended several times since the tax periods here at issue, most recently by 2011 PA 209, the definition of "unitary business group" has not been changed.

Defendant determined that plaintiff is a member of a unitary business group and taxed plaintiff accordingly for two tax periods. Plaintiff filed suit and alleged that defendant improperly broadened its interpretation of "unitary business group" beyond the scope intended by the Legislature. The trial court agreed with defendant's interpretation. We however disagree, and for the reasons provided below, we reverse and remand.

I. BASIC FACTS

The underlying facts involve three different entities during the relevant tax periods: plaintiff, The Pixie, Inc., and LaBelle Limited Partnership.

Plaintiff is a Michigan corporation that was primarily owned by brothers Barton and Douglas LaBelle. At no time during the tax periods did either brother own more than 50% of plaintiff's common stock.

The Pixie, Inc. (Pixie) is a Michigan corporation. Originally, plaintiff was a subsidiary of Pixie, but Pixie sold all of its interest in plaintiff to the LaBelle brothers on January 1, 2008, thus triggering the tax periods here at issue. Again, during the relevant tax periods, each of the LaBelle brothers never owned more than 50% of Pixie's common stock.

LaBelle Limited Partnership is a Michigan limited partnership. In forming the partnership, each of the LaBelle brothers contributed $50 ($1 for a 1% general partnership and $49 for a 49% limited partnership). The partnership was later amended to add the brothers' children as limited partners, thereby reducing the brothers' share of the limited partnership.

After being sold by Pixie, plaintiff reported its business tax as a separate company. During 2011 and 2012, defendant conducted an audit of plaintiff's tax returns

for the two tax periods at issue. As a result of the audit, defendant determined that plaintiff, Pixie, and LaBelle Limited Partnership should be treated, together, as a "unitary business group" in light of MCL 208.1117(6), which defines that term, and the interpretation of that statute provided by defendant's Revenue Administrative Bulletin 2010-1, describing a unitary business group control test. Applying the test outlined in the bulletin, defendant concluded that plaintiff indirectly owns 100% of Pixie and LaBelle Limited Partnership and that Pixie indirectly owns 100% of plaintiff and 90% of LaBelle Limited Partnership. Defendant calculated the sum owed under this treatment ($228,668), applied each entity's previous tax payments to the outstanding amount, and sent plaintiff a final bill for the remainder in the amount of $11,856.29. Plaintiff paid the bill under protest and commenced this lawsuit in the Court of Claims.

The parties brought cross-motions for summary disposition under MCR 2.116(C)(10). The key issue before the trial court was whether defendant correctly concluded that the three entities involved (plaintiff, LaBelle Limited Partnership, and Pixie) constituted a "unitary business group" as defined in MCL 208.1117(6), which requires one member of the group to directly or *indirectly* own or control more than 50% of the ownership interests of the other members. Because the parties agreed that no entity directly owned more than 50% ownership interest of any of the others, the trial court had to determine whether there was sufficient *indirect* ownership or control to satisfy the statutory definition.

The trial court recognized that it was permissible to refer to the federal Internal Revenue Code (IRC) for definitions in some circumstances and looked to 26

USC 957. The court explained that "[t]he provisions most contextually analogous to a state's determination of indirect ownership or control for combined return purposes are the IRC's international taxation provisions that require a U.S. shareholder to include in its return the income of a 'controlled foreign corporation.' " Like MCL 208.1117(6), the analogous federal provision, 26 USC 957, refers to "more than 50 percent" ownership. While citing Revenue Administrative Bulletin 2010-1, the trial court noted that 26 USC 957 "applies the same attribution rules under [26 USC 318] as are applied by the Department to determine ownership interest under [MCL 208.1117] of the MBT." The court opined that its interpretation "is also consistent with the legislative purpose" of reducing tax avoidance. Accordingly, the court denied plaintiff's motion and granted defendant's motion.

II. STANDARDS OF REVIEW

The following standard applies for review of a summary-disposition motion:

> Appellate review of the grant or denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. 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) (citations omitted).]

Further, "[i]ssues of statutory construction present questions of law that are reviewed de novo." *Atchison v Atchison*, 256 Mich App 531, 534-535; 664 NW2d 249 (2003).

III. ANALYSIS

Plaintiff argues, and we agree, that the trial court erred by using the IRC definition of "constructive" ownership when defining Michigan's "indirect" ownership requirement under MCL 208.1117(6).

A.

"If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citations omitted). Tax 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. *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477-478; 518 NW2d 808 (1994). " '[A]gencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.' " *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 46; 869 NW2d 810 (2015), quoting *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008).

The statute at issue here is MCL 208.1117(6), which defines "unitary business group" as follows:

> "Unitary business group" means a group of United States persons, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other United States persons, and that has business activities or operations which result in a flow of value between or among persons included in the unitary business group or has business activities or operations

> that are integrated with, are dependent upon, or contribute to each other. For purposes of this subsection, flow of value is determined by reviewing the totality of facts and circumstances of business activities and operations.

There is no dispute that the dispositive issue here is what is meant by the phrase "owns or controls, directly or indirectly." There additionally is no dispute that there is insufficient direct ownership to give rise to a unitary business group. Thus, as the trial court correctly observed, the issue is how to define "owns or controls . . . indirectly."

The Michigan Business Tax Act, MCL 208.1101 *et seq*., does not define indirect ownership or control. But it does provide that "[a] term used in this act and not defined differently shall have the same meaning as when used *in comparable context* in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required." MCL 208.1103 (emphasis added). In *Town & Country Dodge, Inc v Dep't of Treasury*, 420 Mich 226, 240; 362 NW2d 618 (1984), the Michigan Supreme Court emphasized that when employing federal tax laws to define a statutorily undefined term, the federal context must be comparable to the Michigan context. Because the Court in *Town & Country* did not find a comparable context, it concluded that "the Legislature intended that the word was to be construed according to its ordinary and primarily understood meaning." *Id*. Similarly, in *Consumers Power Co v Dep't of Treasury*, 235 Mich App 380, 385; 597 NW2d 274 (1999), this Court turned to a legal dictionary after it determined that federal tax law lacked a standard definition of "net income," which was undefined by Michigan tax law.

As the trial court noted, "No [federal income tax] provision is directly comparable to [MCL 208.1117] of

the MBT." Therefore, in the absence of a comparable context, the trial court should have resorted to normal rules of statutory construction to determine the meaning of the undefined term. See *Town & Country*, 420 Mich at 240. Instead, the court sought out "contextually analogous" provisions, and of the numerous places in which indirect ownership or control is considered, the court found most appropriate the provisions relating to international taxation that define a "controlled foreign corporation," specifically 26 USC 957 and 26 USC 958.

Section 957 defines a "controlled foreign corporation" in terms of whether "more than 50 percent of" a corporation's voting stock or total value of stock "is *owned* (within the meaning of section 958(a)), or is *considered as owned* by applying the rules of ownership of section 958(b)." 26 USC 957(a) (emphasis added). Section 958 provides in its entirety:

> **§ 958. Rules for determining stock ownership**
>
> **(a) Direct and indirect ownership**
>
> **(1) General rule**
>
> For purposes of this subpart (other than section 960(a)(1)), stock owned means—
>
> (A) stock owned directly, and
>
> (B) stock owned with the application of paragraph (2).
>
> **(2) Stock ownership through foreign entities**
>
> For purposes of subparagraph (B) of paragraph (1), stock owned, directly or indirectly, by or for a foreign corporation, foreign partnership, or foreign trust or foreign estate (within the meaning of section 7701(a)(31)) shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries. Stock considered to be owned by a

person by reason of the application of the preceding sentence shall, for purposes of applying such sentence, be treated as actually owned by such person.

(3) Special rule for mutual insurance companies

For purposes of applying paragraph (1) in the case of a foreign mutual insurance company, the term "stock" shall include any certificate entitling the holder to voting power in the corporation.

(b) Constructive ownership

For purposes of sections 951(b), 954(d)(3), 956(c)(2), and 957, section 318(a) (relating to constructive ownership of stock) shall apply to the extent that the effect is to treat any United States person as a United States shareholder within the meaning of section 951(b), to treat a person as a related person within the meaning of section 954(d)(3), to treat the stock of a domestic corporation as owned by a United States shareholder of the controlled foreign corporation for purposes of section 956(c)(2), or to treat a foreign corporation as a controlled foreign corporation under section 957, except that—

(1) In applying paragraph (1)(A) of section 318(a), stock owned by a nonresident alien individual (other than a foreign trust or foreign estate) shall not be considered as owned by a citizen or by a resident alien individual.

(2) In applying subparagraphs (A), (B), and (C) of section 318(a)(2), if a partnership, estate, trust, or corporation owns, directly or indirectly, more than 50 percent of the total combined voting power of all classes of stock entitled to vote of a corporation, it shall be considered as owning all the stock entitled to vote.

(3) In applying subparagraph (C) of section 318(a)(2), the phrase "10 percent" shall be substituted for the phrase "50 percent" used in subparagraph (C).

> (4) Subparagraph[s] (A), (B), and (C) of section 318(a)(3) shall not be applied so as to consider a United States person as owning stock which is owned by a person who is not a United States person.
>
> Paragraphs (1) and (4) shall not apply for purposes of section 956(c)(2) to treat stock of a domestic corporation as not owned by a United States shareholder. [26 USC 958.]

Clearly, the statute identifies three distinct kinds of ownership: direct, indirect, and constructive ownership, the last of which is not true ownership but "considered as owned," i.e., a legal fiction. Assuming 26 USC 958 to be a "comparable context," the correct subsection to apply would have been § 958(a), which uses the same "direct and indirect ownership" terminology used by MCL 208.1117(6), not § 958(b). Further, the only term actually defined in 26 USC 958 is "stock owned"; the remainder explains application and treatment without providing definitions. Notably, both §§ 958(a) and 958(b) apply to situations in which stock is owned "directly or indirectly"; this indicates that while these rules of actual and constructive ownership *apply* to indirectly owned stock, the rules do not *define* that term.

Moreover, federal tax statutes and regulations are replete with examples that illustrate the proposition that indirect ownership and constructive ownership are two different concepts. We recognize that there are federal regulations directing that constructive ownership rules—including 26 USC 318(a)—are to be applied to determine indirect ownership. See, e.g., 26 CFR 1.382-2T(f)(15) (2015) and 26 CFR 1.704-1(b)(2)(*iii*)(d)(6) (2015). There are also regulations directing that constructive ownership rules are to be used to determine whether "stock is owned (directly or

indirectly under the provisions of section 544)." 26 CFR 1.856-1(d)(5) (2015); see also 26 CFR 1.861-8T(c)(2)(*ii*) (2015).

However, there are regulations that more clearly delineate between indirect ownership and constructive ownership. 26 CFR 1.871-14(g)(2)(*ii*)(A) (2015) expressly refers to "stock directly or indirectly owned *and* stock owned by reason of the attribution rules of section 318(a)." (Emphasis added.) Yet another regulation instructs that "the determination of a person's indirect ownership is made on the basis of all the facts and circumstances in each case; the substance rather than the form is controlling . . . ." 26 CFR 1.1291-1T(b)(8)(*i*) (2015). And in certain multitiered corporate contexts,[2] a shareholder at the top of a chain of tiered corporations "indirectly owns" stock in lower-tiered corporations "through such chain." 26 CFR 1.902-1(a)(4)(*ii*) (2015).

Indeed, the constructive-ownership statute used by the trial court as the definition of indirect ownership includes language indicating that, rather than defining the term at issue, the statute instead applies to "stock owned, directly or indirectly"—a phrase that appears in no fewer than nine of the statute's subdivisions. 26 USC 318(a). In the whole of Title 26 of the United States Code and the Code of Federal Regulations, our review uncovers only one instance of an actual definition of "owned indirectly," which appears in the context of consolidated returns: "*Indirectly*, when used in reference to ownership, means ownership through a partnership, a disregarded entity, or a grantor trust, re-

[2] "Tiering" occurs, for example, when there is "a corporation which is owned by a corporation which in turn is owned by a foreign state." *In re Air Crash Disaster Near Roselawn*, 96 F3d 932, 939 (CA 7, 1996).

gardless of whether the partnership, disregarded entity, or grantor trust is a U.S. person." 26 CFR 1.1503(d)-1(b)(19) (2015).

All of this serves to illustrate several points: federal statutes and regulations are careful never to say that indirect ownership *means* constructive ownership and, in fact, expressly distinguish between the two at times; rules of constructive ownership are not broadly applied whenever indirect ownership is involved, but only when the statute or regulation expressly mandates applying those rules; and rules of constructive ownership are applied in some contexts, but in other contexts only direct and indirect ownership are considered.

In sum, at the point the trial court acknowledged that federal tax laws do not address a "comparable context," under Michigan law, it should have used the ordinary rules of statutory construction. Mere similarity between the language used in Revenue Administrative Bulletin 2010-1 and that of 26 USC 318(a)—which does not provide the meaning of the term at issue—is not a reason to ignore the lack of comparable context or to overlook the distinction in 26 USC 958 between "direct and indirect ownership" and "constructive ownership."

B.

Accordingly, because there is no comparable federal context in the IRC, we now turn our attention to the plain and ordinary meaning of MCL 208.1117(6). See *Town & Country*, 420 Mich at 240.

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of

> a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, [t]he words of a statute provide the most reliable evidence of its intent . . . . [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011) (quotation marks and citations omitted).]

The statutory language at issue in MCL 208.1117(6) is "owns or controls, directly or indirectly." "Indirectly" is the adverbial form of "indirect," and the parties do not disagree that the common meaning of the term, as stated in plaintiff's brief, "connotes a pathway that is not straight, i.e., a course that does not proceed along a single line from one point to another but, instead, proceeds through an intermediate point." *New Oxford American Dictionary* (3d ed) defines the adverb "indirectly" as "**1** in a way that is not directly caused by something; incidentally: *the losses indirectly affect us all.* **2** without having had direct experience; at second hand: *I heard of the damage indirectly.* **3** through implication; obliquely: *both writers refer, if only indirectly, to a wealth of other art.*" In relevant part, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines the adjective "indirect" as: "not direct: as **a** (1) : deviating from a direct line or course : ROUNDABOUT (2) : not going straight to the point <an [indirect] accusation> . . . **c** : not directly aimed at or achieved <[indirect] consequences>." *New Oxford* also has definitions of "indirect" that are similar to *Merriam-Webster*'s, but notably includes, "not done directly; conducted through intermediaries." This is consistent with its definitions of "indirectly": all three of the examples given by *New Oxford* involve an intermediary and are closer in context than the "pathway" or "course" definitions.

Black's Law Dictionary (10th ed) does not define "indirect ownership," but under "possession," *Black's* redirects the reader from the subentry for "indirect possession" to the subentry for "mediate possession," which means: "Possession of a thing through someone else, such as an agent. . . . In every instance of mediate possession, there is a direct possessor (such as an agent) as well as a mediate possessor (the principal). — Also termed *indirect possession*." In accordance with this definition, 11 Fletcher Cyclopedia of the Law of Corporations, § 5090, p 55, begins its description of "**Indirectly held shares**" thusly: "Most investors who hold publicly traded shares hold them indirectly through a broker-dealer or bank, which in turn holds its customers' shares indirectly through a clearing house or central depository."

Therefore, consistent with the above definitions and descriptions, we hold that indirect ownership in MCL 208.1117(6) means ownership *through an intermediary*, not ownership by operation of legal fiction, as defendant urges.

While federal law often substitutes rules of constructive ownership when addressing stock indirectly owned, it does not do so consistently, and constructive rules only apply when the statute specifically so directs, which MCL 208.1117(6) does not. Notably, defendant's own argument cannot avoid using the phrase "considered as owned"—language that is absent in MCL 208.1117(6). The constructive ownership rules from federal law might apply when a statute involves stock "owned or considered as owned," but to apply these rules to MCL 208.1117(6) would expand the statute beyond the meaning intended by the Legislature.

Applying MCL 208.1117(6) to the facts of this case, it is clear that no unitary business group exists because

none of the involved entities (plaintiff, Pixie, and LaBelle Limited Partnership) owns—through an intermediary or otherwise—more than 50% of any other entity. Accordingly, plaintiff is entitled to summary disposition as a matter of law.

Reversed and remanded for entry of summary disposition in favor of plaintiff. We do not retain jurisdiction.

SAAD, P.J., and WILDER and MURRAY, JJ., concurred.

In re CM

Docket No. 322913. Submitted April 5, 2016, at Lansing. Decided April 7, 2016, at 9:00 a.m. Reversed in part 500 Mich 890.

The predecessor agency of the Department of Health and Human Services filed a petition in the Mackinac Circuit Court, Family Division, requesting termination of both parents' parental rights to CM and AM. The court, W. Clayton Graham, J., terminated both parents' parental rights in April 2015. The Court of Appeals, METER, P.J., and BOONSTRA and RIORDAN, JJ., affirmed the terminations in an unpublished opinion per curiam, issued March 15, 2016 (Docket Nos. 327556 and 327557). However, in July 2014, the trial court had sua sponte raised the issue of financial responsibility for administrative rates in connection with the supervision of foster-care placement and subsequently entered a dispositional order finding that no legal authority existed for the Mackinac County Child Care Fund to pay administrative rates charged in addition to out-of-home placement costs. Petitioner sought interlocutory leave to appeal, which the Court of Appeals, M. J. KELLY, P.J., and METER and OWENS, JJ., denied by order in November 2014. Petitioner sought leave to appeal that order in the Supreme Court. In lieu of granting leave, the Supreme Court remanded the case to the Court of Appeals.

The Court of Appeals *held*:

MCL 400.117c calls for the county treasurer to create and maintain a childcare fund and directs that the fund be used for the costs of providing foster care for children under the jurisdiction of the family division of circuit court or court of general criminal jurisdiction. MCL 400.115a(1)(a) calls for uniform statewide daily rates for the care of children and states that in the case of children receiving services by or through childcare agencies, the daily rates may include an average daily rate for agency supervision. MCL 803.305(1) in turn states that, but for exceptions not at issue here, the county from which the public ward is committed is liable to the state for 50% of the cost of his or her care. Although the Michigan Legislature has periodically addressed the issue of financial responsibility for agency supervision in appropriations bills, those provisions have not assigned

petitioner sole responsibility for paying administrative fees. And contrary to the trial court's understanding, except when the Legislature has specifically indicated otherwise, customary administrative charges for private agencies contracted to provide supervision of foster-care placements should not be separated from other customary costs of foster care when determining responsibility for covering those costs. The sole statutory provision addressing petitioner's share of responsibility for administrative rates for foster-care services is MCL 400.117a(4)(c), as added by 2013 PA 138. This provision specifically identified an increase in the administrative rate as the portion for which petitioner was responsible, indicating that the Legislature intended the administrative rates to be otherwise subject to the standard even split in financial responsibility between petitioner and the pertinent county in accordance with MCL 803.305(1). Additionally, in 2014, the Legislature specified a particular period for which petitioner incurred sole responsibility for payment of administrative rates covering foster-care services: cases established after October 1, 2013, and through the fiscal years ending September 30, 2014, and September 30, 2015. Because administrative rates covering foster-care supervision services have long been acknowledged as part of what foster care entails, and because the Legislature has assigned sole responsibility for those rates to the pertinent state agency only for distinct periods, the trial court erred by determining that the Mackinac County Child Care Fund bore no responsibility under MCL 803.305(1) for paying administrative rates in connection with supervision of foster-care placements in the absence of legislation specifically providing otherwise for the time frame in question.

Reversed in part and remanded.

FOSTER-CARE PLACEMENTS — ADMINISTRATIVE EXPENSES AND CHARGES — RESPONSIBILITY FOR PAYMENT OF ADMINISTRATIVE RATES COVERING SUPERVISION OF FOSTER-CARE PLACEMENTS.

Except when the Legislature has specifically indicated otherwise, customary administrative charges for private agencies contracted to provide supervision of foster-care placements should not be separated from other customary costs of foster care when determining responsibility for covering those costs.

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

Legal Counsel, and *William R. Morris*, Assistant Attorney General, for the Department of Health and Human Services.

Monica Lubiarz-Quigley for Brandi Patton-McMillan.

Before: BOONSTRA, P.J., and WILDER and METER, JJ.

BOONSTRA, P.J. This case returns to this Court on remand from our Supreme Court.[1] At issue is the trial court's determination that the Mackinac County Child Care Fund (MCCCF) was not responsible for the payment of any cost or administrative rate connected with supervision of foster-care placements. We conclude that, because no statute specifically provides the MCCCF with any such insulation for the time frame in question, the court erred by so concluding. Accordingly, we reverse the trial court's order in that regard and remand for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from child protection proceedings dating from December 2012. In December 2014, upon concluding that extensive efforts to reunify the family were unsuccessful, petitioner, the predecessor of appellant the Department of Health and Human Services,[2] filed a supplemental petition requesting termination of both parents' parental rights to the two subject minor children. The trial court terminated both parents'

[1] *In re CM*, 498 Mich 900 (2015).

[2] See Executive Order No. 2015-4. For convenience, in this opinion the term "petitioner" will refer collectively to the Department of Health and Human Services and its pertinent predecessors.

parental rights in April 2015. In consolidated appeals, this Court affirmed both terminations.[3]

In the course of earlier proceedings, however, the trial court included within a July 2014 dispositional order, after raising the issue sua sponte, the following provision concerning the costs of supervising foster care:

> The Court finds no legal authority for the Mackinac County Child Care Fund to pay administrative rates charged in addition to out-of-home placement costs. THEREFORE, IT IS ORDERED the Mackinac County Child Care Fund shall not pay any further administrative rates charged over and above out-of-home placement costs.

Petitioner asserts that it thereafter absorbed all such costs itself.

Petitioner sought interlocutory relief in this Court, which application this Court denied in an unpublished order entered November 3, 2014.[4] Petitioner then sought leave to appeal in the Supreme Court, which, in lieu of granting leave, remanded the case to this Court "for consideration as on leave granted." *In re CM*, 498 Mich 900 (2015).

Petitioner argues that the trial court erred by declaring that the MCCCF bore no responsibility for payment of the administrative rates associated with the supervision of foster-care placements. Although intervenor the Sault Sainte Marie Tribe of Chippewa Indians has filed no brief on appeal, the tribe concurred in petitioner's application for leave to appeal in this

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[3] *In re McMillan*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2016 (Docket Nos. 327556 and 327557).

[4] *In re CM and AM*, unpublished order of the Court of Appeals, entered November 3, 2014 (Docket No. 322913).

Court. Defending the decision at issue both below and on appeal is respondent-mother.

We note that, of the advocates in this appeal, only petitioner has a greater than incidental interest in the outcome of it. The Sault Sainte Marie Tribe participates in foster care only at petitioner's discretion, and its entitlement to compensation for supervision services does not depend on the source of funding. Respondent-mother in turn had no direct role in the management of her children's foster-care placements, and even her incidental interest concerning sources of funding for any such services was rendered entirely moot with the termination of her parental rights. Nonetheless, we read our Supreme Court's remand order as calling for a decision on the merits regardless of any such procedural concerns. In so deciding, we treat respondent-mother and the Sault Sainte Marie Tribe as participating in this appeal in the manner of amici curiae.

II. FUNDING OF FOSTER-CARE SUPERVISION

A court having jurisdiction over a child on a noncriminal matter may order various placements for the child, including "placement in a foster care home, private institution or agency, or commitment to the state as a state ward," and may also "retain jurisdiction of the child as court ward and turn over the child to [petitioner] for care and supervision." *Oakland Co v Michigan*, 456 Mich 144, 155; 566 NW2d 616 (1997) (opinion by KELLY, J.), citing MCL 712A.18 and MCL 400.115b; see also *Oakland Co*, 456 Mich at 168 (opinion by MALLETT, C.J., concurring in pertinent part). "If the court makes a child a ward of the state, not the county, the county is responsible for paying

the state fifty percent of the cost of the child's care." *Oakland Co*, 456 Mich at 155 (opinion by KELLY, J.), citing MCL 803.305.

The parties agree that, under the circumstances of this case, responsibility for the costs of the subject children's foster-care placements was properly shared between petitioner and the county. At issue is whether the county thus bears responsibility for half of the supervision costs related to petitioner's having engaged the Sault Sainte Marie Tribe's child welfare agency to supervise the children's foster-care placements. Several statutory provisions, respectively from the juvenile code, MCL 712A.1 *et seq.*, the Social Welfare Act, MCL 400.1 *et seq.*, and the Youth Rehabilitation Services Act, MCL 803.301 *et seq.*, bear on the question.

Under MCL 712A.25(1), "Except as otherwise provided by law, expenses incurred in carrying out [MCL 712A.1 to MCL 712A.32] shall be paid upon the court's order by the county treasurer from the county's general fund." MCL 400.117c(1) designates the county treasurer as "the custodian of all money provided for the use of the county [division of the petitioning] agency [or] the family division of circuit court" and calls for the county treasurer to "create and maintain a child care fund." Subsection (2) directs that "[t]he child care fund shall be used for the costs of providing foster care for children . . . under the jurisdiction of the family division of circuit court or court of general criminal jurisdiction."

MCL 803.305(1) in turn states that, but for exceptions not at issue here, "the county from which the public ward is committed is liable to the state for 50% of the cost of his or her care . . . ." MCL 400.115a(1)(a) calls for "uniform statewide daily rates for the care of

children" and states that "[i]n the case of children receiving services by or through child caring agencies . . . , the daily rates may include an average daily rate for agency supervision."

Respondent-mother asserts that the issue of financial responsibility for daily rates covering agency supervision "quietly surfaced" by way of the appropriations bill passed as Public Act No. 190 of 2010. See 2010 PA 190. According to respondent-mother, this appropriations legislation rendered petitioner "responsible for administrative fees charged by private agencies" and "did not shift these costs to the counties." Respondent-mother continues, "[H]owever in subsequent years the language requiring [petitioner] to pay these costs was dropped from the appropriations bills and [petitioner] began shifting these costs to the counties." Respondent-mother does not specify the part or parts of 2010 PA 190 that she alleges engendered this issue, but we note that § 546(1) of the act stated, "From the money appropriated . . . for foster care payments and from child care fund, the department shall pay providers of foster care services not less than a $37.00 administrative rate," and that § 589 of the act directed, "From the money appropriated . . . to facilitate the transfer of foster care cases currently under department supervision from department supervision to private child placing agency supervision, the department shall not transfer any foster care cases that require a county contribution to the private agency administrative rate."

Petitioner, on the other hand, asserts that payment from county childcare funds of the costs of supervising foster-care placements "began long before the Legislature began to specify the administrative rate in appropriations boilerplate" and offers a reproduction

of a 1972 departmental letter from petitioner advising office and field staff that "[i]n addition to the actual board and care rate, bills for the agency's administrative costs . . . are to be submitted to the county department for payment processing." Petitioner also cites appropriations dating back to 2007 PA 131 that set forth various rates "the department" was obliged to pay providers of foster-care services "[f]rom the money appropriated . . . for foster care payments . . . and from child care fund." 2007 PA 131, § 546(1). Section 731 of 2007 PA 131 in turn set forth "[a]s a condition for receiving the appropriation . . . for the child care fund line items [that] the department . . . not charge any county for expenses related to the payment of an administrative rate to private child placing agencies that oversee neglect and abuse wards if these same administrative costs are not charged in a uniform manner to all counties in this state." Section 731 thus relieved counties of sharing in responsibility for administrative rates not charged in a uniform manner across the state, while impliedly leaving that burden in place otherwise. The provision did not purport to amend the provision for the equal sharing of financial responsibility set forth in MCL 803.305(1), but rather conditioned any such charges in connection with present appropriations on uniformity among the counties.

We do not read these provisions as assigning petitioner sole responsibility for paying administrative fees. Although § 546(1) of 2010 PA 190 directed petitioner to pay the administrative rates, it authorized that entity to do so from appropriations for foster-care payments and also from a "child care fund," thus implicating the special funds that county treasurers are obliged to create and maintain under MCL 400.117c. And § 589 of 2010 PA 190 did not amend the

equal sharing of financial responsibility set forth in MCL 803.305(1), but rather prohibited petitioner from spending the funds appropriated by the bill on transferring cases in a way that would force a county to bear a private-agency administrative rate. Further, in providing that petitioner not burden the county with a private-agency administrative rate by transferring certain cases to private agencies, § 589 impliedly recognized the presence of such a burden in other situations.

In this case, the trial court noted that legislation pending at the time would put all the responsibility for paying administrative rates to private agencies for foster-care supervision services on petitioner, and the trial court further suggested that the result of the Legislature's earlier silence on the matter was that "there isn't any legal authority . . . for the County Child Care Fund to be paying an additional Administrative Rate." The court thus suggested that counties never shared in statutory responsibility over such matters when petitioner has chosen "to use . . . private agency providers in certain situations." We disagree and hold that, except when the Legislature has specifically indicated otherwise, customary administrative charges for private agencies contracted to provide supervision of foster-care placements should not be separated from other customary costs of foster care when determining responsibility for covering those costs.

Petitioner argues that 2014 PA 304, which became effective after the order at issue here (and which presumably is the legislation the trial court referred to as then pending), makes petitioner solely responsible for paying the administrative rates in question,

thereby effecting a change from the then-applicable even split between petitioner and the counties. See *Edgewood Dev, Inc v Landskroener*, 262 Mich App 162, 167-168; 684 NW2d 387 (2004) ("A change in the statutory language is presumed to reflect a change in the meaning of the statute."). We agree.

MCL 400.117a was silent on petitioner's share of responsibility for administrative rates until the effective date of 2013 PA 138, which—as was reflected in MCL 400.117a(4)(c) at the time the July 2014 order at issue was entered—assigned to "the department" sole responsibility for a $3 increase in the "administrative rate for providers of foster care services." Specifically, MCL 400.117a(4)(c), as added by 2013 PA 138, stated, "for the fiscal year ending September 30, 2014, the department shall pay 100% of the costs of the $3.00 increase to the administrative rate for providers of foster care services" set forth in recent appropriations. This is the sole statutory provision addressing petitioner's share of responsibility for administrative rates for foster-care services. In singling out the *increase* as the part of the administrative rate for which petitioner was to be exclusively responsible, the Legislature indicated that it was operating with the understanding that the administrative rates were otherwise subject to the standard apportionment of financial responsibility: the even split between petitioner and pertinent county set forth in MCL 803.305(1).

This was followed by the dictate of 2014 PA 304 that "the department" bore sole responsibility for administrative rates in connection with "foster care cases established after October 1, 2013." Specifically, 2014 PA 304, which became effective on October 9, 2014 (i.e., after the order at issue was entered), more broadly

provided that "for the fiscal years ending September 30, 2014 and September 30, 2015, for foster care cases established after October 1, 2013, the department shall pay 100% of the administrative rate for providers of . . . foster care services" as set forth in recent appropriations. MCL 400.117a(4)(d).[5]

Accordingly, our statutory law was silent on petitioner's share of responsibility for the administrative rates until the effective date of 2013 PA 138, which, as reflected in MCL 400.117a(4)(c) at the time the order appealed from was entered, assigned to "the department" sole responsibility for a $3 increase in the "administrative rate for providers of foster care services." This was followed by the dictate of 2014 PA 304 that "the department" bore sole responsibility for administrative rates in connection with "foster care cases established after October 1, 2013."

Because administrative rates covering foster-care supervision services have long been acknowledged as part of what foster care entails, and the Legislature has assigned sole responsibility for those rates to the pertinent state agency only for distinct periods, we conclude that the trial court erred by determining that the MCCCF bore no responsibility under MCL 803.305(1) for paying administrative rates in connection with supervision of foster-care placements in the absence of legislation specifically providing otherwise for the time frame in question.

We therefore reverse the trial court's July 2014 dispositional order in pertinent part and remand this

[5] The current MCL 400.117a(4)(d), as amended by 2015 PA 81, differs from its immediate predecessors mainly in extending petitioner's sole responsibility for administrative rates until September 30, 2016.

case to the trial court for further proceedings. We do not retain jurisdiction.[6]

WILDER and METER, JJ., concurred with BOONSTRA, P.J.

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[6] We note, contrary to respondent-mother's argument, that our holding that petitioner may recoup 50% of the costs of certain administrative fees does not reduce the state-financed proportion of the necessary costs of an existing activity or service by imposing a new cost on county childcare funds; rather, it acknowledges that the responsibility to share certain fees existed under long-established statutes until the Legislature removed this responsibility. See MCL 803.305(1); MCL 400.117a. Thus, our holding (and petitioner's recoupment of costs) does not violate the Headlee Amendment, Const 1963, art 9, § 29. Further, our Supreme Court and this Court have generally recognized the 50% apportionment of responsibility for necessary foster-care fees as not violative of the Headlee Amendment. See *Oakland Co v Michigan*, 456 Mich at 161 (opinion by KELLY, J.); *Ottawa Co v Family Independence Agency*, 265 Mich App 496, 499; 695 NW2d 562 (2005).

PEOPLE v TENNILLE

PEOPLE v RUTLEDGE

Docket Nos. 323059 and 323314. Submitted November 9, 2015, at Detroit. Decided April 14, 2016, at 9:00 a.m.

Timothy F. Tennille and Sean D. Rutledge were both convicted following a joint jury trial in the Wayne Circuit Court of first-degree murder, MCL 750.316(a), felony murder, MCL 750.316(b), and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the shooting death of Charles Whitfield. During voir dire, defense counsel for both defendants objected to the prosecutor's use of peremptory challenges to strike two African-American prospective jurors, DC and WB, from the jury pool, after the prosecutor had previously excused three other African-American prospective jurors. Defense counsel argued that the challenges violated the rule of *Batson v Kentucky*, 476 US 79 (1986), which prohibits the exercise of peremptory challenges on the basis of race. The prosecutor asserted that he exercised the challenges on the basis of the prospective jurors' demeanor and reaction when another prospective juror had stated he would automatically believe a witness because he or she was a police officer. The trial court, Margaret M. Van Houten, J., denied defendants' challenge, concluding that the prosecutor's explanation was a valid race-neutral reason for striking the two prospective jurors from the pool. Defendants appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Under *Batson*, a three-step process is used to determine whether a peremptory challenge has been unconstitutionally exercised solely on the basis of race. Under the first *Batson* step, the defendant must make a prima facie showing of discrimination by showing that he or she is a member of a particular racial group, the prosecutor used a peremptory challenge to exclude from the jury a member of that racial group, and the circumstances raised an inference that the challenge was race based. In this case, defendants established a prima facie case of discrimination because defendants and the two challenged prospective jurors were African-American, as were the three other African-

American prospective jurors who had earlier been excused by the prosecutor through his use of peremptory challenges.

2. Under the second *Batson* step, the prosecutor must articulate a clear and reasonably specific explanation of his or her legitimate reasons for exercising the peremptory challenge. The stated reason does not have to be persuasive or plausible; if the articulated reason is not inherently discriminatory, it is sufficient for purposes of the step-two inquiry. In this case, the trial court did not err by concluding that the prosecutor's stated reason for dismissing DC and WB—their nonverbal response to another prospective juror's bias in favor of believing police officer testimony—was race neutral.

3. Under the third *Batson* step, the trial court must determine whether the challenger of the strike established purposeful discrimination even though the articulated reason was race neutral. The challenger must be allowed an opportunity to argue that the race-neutral reason given by the prosecutor was purposefully discriminatory. The issue is one of credibility for the trial court, and to make that factual determination, the court must review the prosecutor's demeanor when defending his or her peremptory challenge, how reasonable or how improbable his or her stated reasons were, and whether the proffered rationale had some basis in accepted trial strategy; in other words, the trial court must assess the plausibility of the race-neutral explanation in light of all relevant direct and circumstantial evidence of intent to discriminate. A trial court must closely scrutinize a peremptory challenge that is based solely on a juror's demeanor or nonverbal conduct because there is a high risk that it is a pretext for racial discrimination. The trial court must indicate on the record whether it observed the alleged expressions, and even if it did not, it must still find facts that either support or refute that the challenge was racially motivated.

4. The trial court failed to follow the third *Batson* step when it denied defendant's challenge. First, it erred by failing to allow defense counsel an opportunity to argue that the prosecutor's stated race-neutral explanation lacked credibility in light of all surrounding circumstances. The trial court also erred by failing to make factual findings related to whether the peremptory challenges were purposefully discriminatory before accepting the prosecutor's race-neutral explanation and denying defendants' *Batson* challenge. Specifically, the trial court failed to make factual findings regarding the prosecutor's credibility when asserting his race-neutral explanation for the peremptory challenges; the trial court made no findings about whether the prosecutor's

explanation was reasonable, probable, and had some basis in accepted trial strategy as required by *Batson*. The prosecutor's stated reason was also implausible—regardless of DC and WB's strong disapproval of the other prospective juror's answers—because that response was warranted as evidenced by the trial court's decision to remove that prospective juror for cause. Further, the record does not permit a conclusion that the prosecutor's stated reason for the strikes was not race based because the behaviors relied on by the prosecutor did not call into question the jurors' abilities to be fair and impartial in light of the fact that the answers they provided during questioning revealed no bias. The trial court was directed on remand to allow defense counsel an opportunity to argue that the prosecutor's race-neutral explanation was not credible and to find facts in accordance with step three of the *Batson* inquiry.

Remanded.

O'CONNELL, J., concurring, agreed with the majority that remand for a hearing was necessary because the trial court failed to complete the three-step *Batson* analysis by making factual findings regarding the prosecutor's credibility in relation to his asserted race-neutral reasons for the challenges. However, he disagreed with the majority's implied assertion that a prospective juror's nonverbal responses cannot provide sufficient reason to peremptorily excuse that juror because a potential juror's facial expressions, body language, and manner of answering questions are some of the most important criteria in selecting a jury. Judge O'CONNELL would have directed the trial court on remand to make factual findings—holding an evidentiary hearing if necessary—regarding DC and WB's nonverbal responses, the prosecutor's credibility, and whether the prosecutor's challenge was a pretext for purposeful discrimination.

1. JURY — PEREMPTORY CHALLENGES — RACE — THREE-STEP *BATSON* PROCESS.

Under *Batson v Kentucky*, 476 US 79 (1986), a three-step process is used to determine whether a peremptory challenge was unconstitutionally exercised solely on the basis of race: first, the defendant must make a prima facie showing of discrimination by showing that he or she is a member of a particular racial group, the prosecutor used a peremptory challenge to exclude from the jury a member of that racial group, and the circumstances raised an inference that the challenge was race based; second, the prosecutor must articulate a clear and reasonably specific explanation of his or her legitimate reasons for exercising the peremptory challenge; third, the trial court must determine whether the

challenger of the strike established purposeful discrimination even though the articulated reason was race neutral.

2. JURY — PEREMPTORY CHALLENGES — RACE — THIRD STEP OF THE *BATSON* PROCESS — ARGUMENT BY CHALLENGER.

Under *Batson v Kentucky*, 476 US 79 (1986), a three-step process is used to determine whether a peremptory challenge was unconstitutionally exercised solely on the basis of race; in the third step, during which the trial court must determine whether the challenger of the strike established purposeful discrimination even though the prosecutor's articulated reason was race neutral, a trial court may not simply accept the prosecutor's race-neutral explanation for the peremptory challenge but must allow the challenger an opportunity to argue that the race-neutral reason given by the prosecutor was pretextual.

3. JURY — PEREMPTORY CHALLENGES — RACE — THIRD STEP OF THE *BATSON* PROCESS — FACTUAL FINDINGS.

Under *Batson v Kentucky*, 476 US 79 (1986), a three-step process is used to determine whether a prosecutor's peremptory challenge was unconstitutionally exercised solely on the basis of race; in the third step, whether the prosecutor's articulated reason is a pretext for purposeful discrimination is a credibility issue for the trial court; the court must make factual findings regarding the prosecutor's demeanor when he or she defended the peremptory challenge, how reasonable or how improbable his or her stated reasons were, and whether the proffered rationale had some basis in accepted trial strategy in light of all relevant direct and circumstantial evidence of intent to discriminate.

4. JURY — PEREMPTORY CHALLENGES — RACE — THIRD STEP OF THE *BATSON* PROCESS — FACTUAL FINDINGS.

Under the three-step process outlined in *Batson v Kentucky*, 476 US 79 (1986), when deciding in the third step whether a peremptory challenge is unconstitutionally race based, a trial court must closely scrutinize a strike that is based solely on a juror's demeanor or nonverbal conduct because there is a high risk that it is a pretext for racial discrimination; the trial court must indicate on the record whether it observed the juror's alleged expressions, and even if it did not, it must still find facts that either support or refute that the challenge was racially motivated.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting

Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Ana I. Quiroz*, Assistant Prosecuting Attorney, for the people in Docket No. 323059.

Jonathon B. D. Simon for Timothy F. Tennille.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Margaret Gillis Ayalp*, Assistant Prosecuting Attorney, for the people in Docket No. 323314.

Lee A. Somerville for Sean D. Rutledge.

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

GLEICHER, J. Defendants jointly stood trial for the murder of Charles Whitfield. A jury convicted both of first-degree murder, MCL 750.316(a), felony murder, MCL 750.316(b), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendants contend that their convictions are tainted by the prosecutor's use of peremptory challenges to strike five African-American jurors in contravention of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Each also raises evidentiary challenges. We find defendants' *Batson* argument potentially dispositive and remand for proceedings consistent with this opinion.

I

When an attorney raises a *Batson* objection, the trial court must determine whether purposeful discrimination motivated the strike. A well-known three-

step process guides this inquiry. If the defendant establishes a prima facie case of racial discrimination, the burden shifts to the prosecutor to offer race-neutral explanations for his or her exercise of peremptory challenges. *Id*. at 97. Once the prosecutor has made that proffer, the defendant may argue that the stated reasons are pretextual. The trial court then resolves the challenge by determining whether the defendant has established purposeful discrimination. *Id*. at 98.

Sometimes, the prosecutor's race-neutral reason for striking a minority juror is rooted in the juror's demeanor during voir dire interrogation. The trial court must then evaluate "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008). This question is inherently factual.

Here, defense counsel raised a *Batson* challenge when the prosecutor peremptorily excused two prospective African-American jurors. When defense counsel objected, the prosecutor asserted that he exercised the strikes based solely on the jurors' demeanors rather than their responses to questioning. The trial court accepted the prosecutor's explanation as "a valid race neutral reason," but the court made no factual findings regarding the jurors' appearances, the prosecutor's credibility, or whether defendants established purposeful discrimination. Because the trial court failed to articulate the basis for its decision, we must remand for an evidentiary hearing conducted pursuant to the strict guidelines we set forth in this opinion. If the necessary facts cannot be determined with confidence, the trial court must vacate defendants' convictions and retry them.

II

The voir dire of defendants' jury began on June 30, 2014, with the trial judge's announcement: "I do all the voir dire." The initial 14 venire members seated in the jury box included Juror 7, WB. In response to the court's request for basic background information, WB offered that she lived in Detroit and attended "school for paralegal and . . . intern[ed] at Michigan Legal Services. No children."

During a follow-up round of questioning, the court focused on relationships with attorneys and law-enforcement personnel. Juror 5, JG, volunteered that he was "[c]lose friends" with a Michigan state trooper. He conceded that this friendship might prevent him from "being fair and impartial to both sides" and apologized for feeling "biased toward the police in this case." When asked whether he would "automatically believe someone just because their [sic] police officers," JG answered, "99.9 percent, probably." After a few more court-crafted questions aimed at mitigating this patent partiality, JG admitted that he would "probably" "be leaning towards the police." He vowed to "try" to follow an instruction to judge the credibility of a police officer in the same manner as he would judge the credibility of other witnesses. He then added:

> My natural bias is I've had extremely good experience with law enforcement. Extremely good. I live in Dearborn. My experience there is top notch. Where I come from, originally, up north my experience has been very, very good. I was raised to have tremendous respect for them. It was a field I considered going into at one point myself.

The trial court turned to Juror 6, who indicated that his son was a police officer but affirmed that he could nonetheless be "fair and impartial to both sides." The court then addressed prospective juror WB:

The Court: Anyone else? Juror seven?

Prospective Juror: My cousin's a lawyer.

The Court: Your cousin? And you're studying to be a paralegal right now? Do they practice criminal law, civil law?

Prospective Juror: Real estate.

The Court: So, they don't have anything to do with criminal law then?

Prospective Juror: No.

The Court: You promise not to call them up and ask them their opinion about the case?

Prospective Juror: I promise.

The Court: Have you taken any criminal justice or criminal law courses in your paralegal studies?

Prospective Juror: Yes.

The Court: Do you understand I'm giving the instructions in this case?

Prospective Juror: Yes.

The Court: You have to follow the instructions as I give them to you; do you understand that? You might have heard something different in one of your classes. You're going to follow what I say right?

Prospective Juror: Yes.

The Court: And would anything you heard in your classes . . . impact your ability to be fair and impartial to both sides in this case?

Prospective Juror: No.

That concluded WB's voir dire.

Before the close of the first day, the court excused JG for cause. The voir dire continued the next morning with the seating of replacement jurors in several empty positions. Prospective juror DC filled seat number five. The court requested that the new jurors "tell us about yourself, what you do for a living, your spouse

does for a living, if you have children or grandchildren, what city you live in." DC responded that she was "divorced/single," lived in Detroit, had two grown children, and had retired from her city of Detroit position as an "[a]dministrative assistant." When asked whether the new jurors had served on a jury before, DC responded that she had been on a criminal jury that reached a verdict twenty years ago. She spoke no further.

At the next opportunity for challenges (ten transcript pages after DC's response), the prosecutor exercised peremptory strikes to dismiss WB and DC. Defense counsel for Rutledge immediately asked to approach the bench.[1] According to the transcript, a "[b]rief sidebar" ensued. The court then stated, "Jurors 5 and 7, you're excused from this jury." Voir dire continued for several more hours.

After the jury was selected, the court returned to the *Batson* challenge "that was raised" but "never got placed on the record." Here is the colloquy:

> *The Court*: . . . So, during jury selection, jury voir dire, I believe it was Mr. [Wyatt] Harris [counsel for Rutledge] [who] raised a Batson challenge with regard to the challenge of Jurors 5 and 7, [who] were, I believe [DC] and [WB], both of whom were African American females.
>
> *Mr. Harris*: Yes. I know that this Court, your Honor, is familiar with Batson, People versus Batson.
>
> * * *
>
> Your Honor, I made my objection based on the fact that the Prosecutor had, previous to that, excluded three other African Americans off of the jury pool. Or off of the - - used [his] Peremptory [challenges] to excuse three other jurors, three other African American jurors.

[1] Defense counsel for Tennille joined in the challenge.

And then decided that they were going to use their Peremptories to exclude two other African American female jurors. And so I objected based on Batson.

I know that this Court knows the rule. I know the Prosecutor knows that you can't use race as a basis for eliminating a particular juror.

And it was apparent to me, given those exclusions, that that's what the Prosecutor was trying to do.

The Court: And the Prosecutor gave reasons for excusing Jurors 5 and 7 when the challenge was raise[d].

And Mr. Prosecutor?

[*The Prosecutor*]: Yes, Judge. The reason, and of course People know of People v Batson. We understand that jurors cannot be excluded on the basis of race, even though the Defense excused many non-African Americans.

I believe the Prosecutor excused African Americans, as well as non-African Americans. There was no pattern.

The reason that those two jurors were excluded was because during the voir dire period there was [sic] questions about whether or not jurors would accept police testimony.

And . . . one potential juror . . . indicated that he would believe a [sic] police testimony, almost to a fault. And that he would take what they said - - he would give their testimony much more credence than he would a normal witness.

Judge, that's something that we all wish would not be a jurors' [sic] perspective. But those two - - those potential jurors, the ones who were excluded, their reaction[s] to his statements were just over the top, in showing disgust for his answers.

Judge, based on that, I don't know if they had anything against police and prosecutors, in general.

Most people reacted in some way. But those two jurors' reactions were excessive. To the point where my officer in charge pointed it out to me. And just further solidified what I had in my own mind.

> And it was my choice to excuse them based on that. It had nothing to do with race, Judge.
>
> *The Court*: And I accepted that as a valid race neutral reason. And therefore, I denied the Batson challenge.

III

Under the first step of a *Batson* challenge, a defendant must make a prima facie showing that (1) he or she is a member of a particular racial group, (2) the prosecution used a peremptory challenge to exclude from the jury a member of that racial group, and (3) the circumstances raise an inference that the challenge was race based. *Batson*, 476 US at 96. Defendants met this burden. Defendants are African-American, as are WB and DC. And defendants contended that the prosecution's use of five total peremptory challenges to eliminate potential African-American jurors raised an inference of racial motivation. Indeed, the prosecution does not dispute that defendants established a prima facie case of discrimination.

Our focus therefore falls on the second and third steps of the *Batson* analysis. An appellate court reviews de novo *Batson*'s second step, which centers on whether the prosecutor set forth a race-neutral explanation for the strikes. *People v Knight*, 473 Mich 324, 343; 701 NW2d 715 (2005). The third step in the *Batson* analysis requires the trial court to determine whether the challenger has sustained his or her burden of demonstrating a racial motivation for the challenged peremptory strikes. This constitutes a question of fact reviewed for clear error. *Id*. at 344. This standard of review derives from *Hernandez v New York*, 500 US 352, 364; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (plurality opinion), in which the United States Supreme Court explained that *Batson* treated "intent to

discriminate as a pure issue of fact, subject to review under a deferential standard[.]"

IV

Based on our review of the record, we discern that the trial court committed two serious *Batson* errors. First, the court failed to afford defense counsel an opportunity to rebut the prosecutor's stated reason for dismissing jurors DC and WB. Second, the trial court's abbreviated ruling ("And I accepted [the prosecutor's explanation] as a valid race neutral reason. And therefore, I denied the Batson challenge") evinces that the trial court misapprehended its role. Merely stating that a prosecutor has articulated a valid, race-neutral reason for his or her strikes does not suffice under *Batson*. Rather, a court must make some findings of fact regarding whether the prosecutor's justification for the strikes seems credible under all of the relevant circumstances, including whether the jurors actually exhibited the expressions claimed and whether the averred reactions were the real reasons for the strikes. The record in this case contains no factual findings whatsoever. Rather, the trial court improperly conflated steps two and three of the *Batson* framework, thereby failing to reach step three at all.

A

Batson's first step examines whether the facts and circumstances of the voir dire suggest that racial discrimination motivated a strike. Evidence raising merely an inference of discrimination surmounts the first *Batson* step, creating a prima facie case. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimi-

nation, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 US at 359; see also *People v Bell*, 473 Mich 275, 296; 702 NW2d 128 (2005), mod 474 Mich 1201 (2005). As noted, the prosecutor volunteered an explanation for the strikes, and therefore step one of the analysis falls away. We move to steps two and three, which are intended to resolve whether discriminatory purpose actually animated the peremptory challenges.

In step two of the *Batson* framework, "[t]he prosecutor . . . must articulate a neutral explanation related to the particular case to be tried." *Batson*, 476 US at 98. Step two obliges the prosecutor to "give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id*. at 98 n 20 (quotation marks and citation omitted). Our Supreme Court has elucidated that the inquiry at the second step is narrow:

> [A]t *Batson*'s second step, a court is only concerned with whether the proffered reason violates the Equal Protection Clause as a matter of law. See, e.g., *United States v Uwaezhoke*, 995 F2d 388, 392 (CA 3, 1993) ("Thus, if the government's explanation does not, on its face, discriminate on the basis of race, then we must find that the explanation passes *Batson* muster as a matter of law, and we pass to the third step of *Batson* analysis to determine whether the race-neutral and facially valid reason was, as a matter of fact, a mere pretext for actual discriminatory intent."). [*Knight*, 473 Mich at 344.]

Batson's second step does not demand articulation of a persuasive reason, or even a plausible one; "so long as the reason is not inherently discriminatory, it suffices." *Rice v Collins*, 546 US 333, 338; 126 S Ct 969; 163 L Ed 2d 824 (2006), citing *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995).

Here, the prosecutor provided a single race-neutral explanation for challenging both WB and DC: that they reacted "in showing disgust" for JG's insistence "that he would believe a [sic] police testimony, almost to a fault. And that he would take what they said - - he would give their testimony much more credence than he would a normal witness."[2] The prosecutor's stated reason for dismissing the two jurors—their response to another juror's answers regarding police credibility—qualifies as race neutral.

Batson's third step requires the trial court to make a final determination of whether the challenger of the strike has established purposeful discrimination. *Batson*, 476 US at 98. In *Miller-El v Cockrell*, 537 US 322, 338-339; 123 S Ct 1029; 154 L Ed 2d 931 (2003), the United States Supreme Court emphasized that "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . [T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." The Court provided several measures of credibility: "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id*. at 339. In making a finding at step three, the trial court is required to assess the plausibility of the race-neutral explanation "in light of *all* evidence with a bearing on it." *Miller-El v Dretke*, 545 US 231, 251-252; 125 S Ct 2317; 162 L Ed 2d 196 (2005) (emphasis added).

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[2] These are the prosecutor's words. The trial court had excused JG for cause on the first day of voir dire, explaining that "as I continued to question him he seemed to be more and more hesitant he would be able to be fair and impartial with regard to police testimony."

Step three is critical to the *Batson* analytical process. When a court finds that a prosecutor has articulated a race-neutral ground for a peremptory challenge, the court must then determine whether the strike is nonetheless discriminatory. "It is inappropriate for a district court to perfunctorily accept a race-neutral explanation without engaging in further investigation." *United States v Jackson*, 347 F3d 598, 605 (CA 6, 2003). "[A]sking whether something is race-neutral is analytically distinct from determining whether the asserted reason is believable or pretextual." *United States v Rutledge*, 648 F3d 555, 560 (CA 7, 2011). Rather, at step three the trial court must undertake to find facts. Our standard of review for this stage reflects the necessity of this fact-finding. In *Knight*, 473 Mich at 344, our Supreme Court specifically held that *Batson*'s third step presents questions of fact "reviewed for clear error."

B

When a prosecutor's sole explanation for a strike resides in a juror's appearance or behavior, the third step bears heightened significance. Explanations for peremptory challenges based solely on a juror's demeanor "are particularly susceptible to serving as pretexts for discrimination." *Harris v Hardy*, 680 F3d 942, 965 (CA 7, 2012). "Nonverbal conduct or demeanor, often elusive and always subject to interpretation, may well mask a race-based strike. For that reason, trial courts must carefully examine such rationales." *Davis v Fisk Electric Co*, 268 SW3d 508, 518 (Tex, 2008). "[B]ecause such after-the-fact rationalizations are susceptible to abuse, a prosecutor's reason for discharge bottomed on demeanor evidence deserves particularly careful scrutiny." *Brown v Kelly*, 973 F2d 116, 121 (CA 2, 1992).

In *Snyder*, 552 US at 477, the United States Supreme Court expounded on the trial court's central role in discerning whether discriminatory animus motivated a strike premised in part on a juror's expressions, attitude, or comportment. As in this case, *Snyder* involved a peremptory challenge based on a prospective juror's demeanor. The juror in question, Mr. Brooks, was a college student and otherwise fully qualified to sit. The prosecutor explained that he challenged Brooks because "he looked very nervous to me throughout the questioning." The prosecutor then added a second reason for the strike: that jury service might cause Mr. Brooks to miss essential student-teaching time, thereby encouraging him to render a swift not-guilty verdict. *Id*. at 478. Defense counsel disputed both reasons, and the trial court ruled, " 'All right. I'm going [to] allow the challenge[.]' " *Id*. at 479 (first alteration in original).

The Supreme Court carefully examined the record and determined that the prosecutor's second reason, flowing from the juror's college commitments, was "suspicious" and "implausib[le]." *Id*. at 483. As to Brooks's "nervousness," the Court observed that while " 'nervousness cannot be shown from a cold transcript,' " the trial court record "[did] not show that the trial judge actually made a determination concerning Mr. Brooks'[s] demeanor." *Id*. at 479. The Court acknowledged that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance." *Id*. at 477. The Court continued, "In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to

have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id*.

In applying these precepts to the facts of the case before it, the Supreme Court observed that "the trial judge simply allowed the challenge without explanation," elaborating:

> It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks'[s] demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks'[s] demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks'[s] demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous. [*Id*. at 479.]

Because the prosecutor's first reason for striking Mr. Brooks was pretextual, the Court refused to presume based on an empty record that the prosecutor's fallback position—Mr. Brooks's "nervousness"—merited automatic acceptance. As nearly a decade had passed since the defendant's conviction, the Court reversed his conviction rather than remanding for fact-finding. *Id*. at 485-486.

The *Batson* issue in this case also hinges on step three. The Supreme Court highlighted in *Snyder* that at *Batson*'s third step, "The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." *Id*. at 477 (quotation marks and citation omitted). Here, the record is devoid of factual findings. Immediately after the prosecutor

stated his reason for the strikes, the court deemed the reason race neutral. This ruling addressed only step two: whether the prosecutor's explanation for the peremptory challenges was race neutral. The court made no effort to entertain argument from defense counsel regarding whether the strike was racially motivated despite the prosecutor's articulation of a race-neutral ground. Nor did the court reference any argument on that score that had been made during the unrecorded "side-bar conference," and the court did not otherwise indicate that it had considered the question. Instead, the court decisively stated that it "accepted" the prosecutor's explanation as "a valid race neutral reason" and denied the challenge. This premature conclusion of the *Batson* inquiry reflects that the trial court misapprehended defense counsel's role in the *Batson* process and overlooked the inalterable need for factual findings.

In conducting a *Batson* analysis, a court may not simply "accept" a prosecutor's race-neutral explanation and terminate the inquiry there. Rather, the trial court is tasked with engaging in a more penetrating analysis focused on ascertaining whether the prosecutor's proffered race-neutral reason is pretext intended to mask discrimination. Evaluation of this central question requires the court to permit argument by defense counsel, who bears the burden of persuading the court that the prosecutor purposefully discriminated when exercising the strike. *Purkett*, 514 US at 768. After affording the opponent of the challenge an opportunity to argue that the prosecutor's stated reason lacks credibility in light of all surrounding circumstances, the court must render findings focused on the prosecutor's demeanor when making the argument, whether the prosecutor's explanation is reasonable and probable, and "whether the proffered rationale has some

basis in accepted trial strategy." *Cockrell*, 537 US at 339. When demeanor serves as the sole ground for dismissal, some indication of whether the court observed the alleged expressions is required. If the court did not see the expressions, it must nonetheless find facts that either support or refute that racial discrimination motivated the challenge. This fact-finding hinges largely on credibility.

This record lacks any objective indicia of the prosecutor's credibility regarding the extent of the jurors' reactions or the manner in which they compared to the reactions of other jurors. The absence of factual findings in this regard is compelling evidence that the trial court short-circuited the *Batson* process by failing to subject the prosecutor's demeanor claim to a dispassionate evaluation.

In *Thaler v Haynes*, 559 US 43, 48; 130 S Ct 1171; 175 L Ed 2d 1003 (2010), a habeas corpus proceeding, the Supreme Court issued a brief per curiam opinion, holding that the trial court's inability to personally observe a juror's demeanor does not necessarily require rejection of a prosecutor's demeanor-based explanation. The central question in that case was whether the United States Court of Appeals for the Fifth Circuit had correctly applied the deference to state court judgments required under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 USC 2254. The Supreme Court rejected the Fifth Circuit's ruling that it could not afford AEDPA deference to state appellate court rulings " 'because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor.' " *Id*. at 46, quoting *Haynes v Quarterman*, 561 F3d 535, 541 (CA 5, 2009), rev'd by *Thaler*, 559 US 43. The Supreme Court disagreed, explaining that "no decision of this Court clearly estab-

lishes the categorical rule" that a trial judge's inability to verify a juror's reaction or behavior requires rejection of the challenge. *Haynes*, 559 US at 49.[3] Indeed, *Snyder* was decided six years before Haynes was convicted. Nonetheless, the trial judge's " 'firsthand observations' " remain "of great importance." *Id*. (citation omitted). Similarly, "the best evidence of the intent of the attorney exercising a strike is often that *attorney's* demeanor." *Id*. (emphasis added).

This case is governed by *Snyder*, not *Haynes*. Nothing in the record suggests that the trial court made any factual findings at *Batson* step three. Even if the trial court did not personally observe the jurors' reactions, the court "has a pivotal role" in evaluating whether the prosecutor's demeanor, and any pertinent surrounding circumstances, belie that a strike was race neutral. Fact-finding was particularly important in this case as the demeanor explanation for the prosecutor's challenges, standing alone and uninformed by additional facts, required careful scrutiny.

Assuming that jurors DC and WB did react in noticeable ways to JG's inappropriate answers, their reactions do not necessarily support a logical inference that they harbored an anti-prosecution bias. Their disdain for JG's statements was reasonable given that the trial court dismissed JG for cause. Indeed, the prosecutor admitted, "I don't know if they had anything against police and prosecutors, in general. Most people reacted in some way." This is a telling admission. The challenged jurors' negative reaction to JG's

[3] In *Haynes*, two different judges presided over the voir dire. The Supreme Court noted that in *Snyder*, "the judge who presided over the *voir dire* also ruled on the *Batson* objections, and thus we had no occasion to consider how *Batson* applies when different judges preside over these two stages of the jury selection process." *Haynes*, 559 US at 48.

unwillingness to shed his bias in favor of police officers might have been viewed by the trial court as appropriate to the situation. Without the benefit of more information and factual findings, we cannot simply accept that the alleged *extent* of the two jurors' reactions legitimately disqualified them from service. Even if they displayed more pronounced feelings than those revealed by others who shared them, it does not necessarily follow that they would be less disposed than other reacting jurors to accept the prosecutor's proofs. The prosecutor offered no explanation for this logical leap, and we perceive none, especially given the factual vacuum.

Alternatively stated, this record does not permit a conclusion that the prosecutor's stated reason for the strikes was nondiscriminatory, as the behaviors the prosecutor relied on do not call into question the jurors' abilities to be fair and impartial. Their answers to the limited questioning revealed no bias. It appears from the record that these women were not sleeping, nervous, preoccupied, hostile, angry, bored, disrespectful, or agitated. Similarly, it appears that they did not fail to make eye contact. Rather, their reactions were reasonable and shared by other jurors.

Without the benefit of any pertinent facts of record, this case cannot be meaningfully distinguished from *Snyder*. There, as here, the trial judge made no factual determination of the jurors' demeanors, and "we cannot presume that the trial judge credited the prosecutor's assertion" that the jurors reacted in a certain fashion. *Snyder*, 552 US at 479. There, as here, the prosecutor's explanation for peremptorily excusing the two jurors was implausible even if the jurors demonstrated strong disapproval of Juror 5's views as strong

disapproval was warranted, as demonstrated by the trial court's decision to remove JG from the jury.[4]

Moreover, because one of the two challenged jurors (DC) was seated in the public area of the courtroom during JG's colloquy with the court and not the jury box, it is questionable whether the trial court witnessed her alleged reaction. Indeed, it is unlikely that defense counsel saw it either. The prosecutor indicated that he missed it, too; he explained that his demeanor-based strike of DC rested on information supplied by "my officer in charge," rather than first-hand observation. Given this hazy factual background regarding DC and the extent of her actual reaction to JG's statements, the prosecutor's credibility in making the strikes was highly significant. Potentially, so was the credibility of the "officer in charge."

The record provides no reassurance that the trial court even thought about whether the prosecutor's stated reason for the strikes was his real reason. As the prosecutor had already challenged three African-American prospective jurors, it was incumbent on the judge to determine through record fact-finding that the challenges of WB and DC were not the products of impermissible discrimination. The trial court made no effort to demonstrate that it understood or applied *Batson*'s third step, or that it made any reasoned

[4] The United States Supreme Court has observed that a prosecutor's " 'failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.' " *Dretke*, 545 US at 246, quoting *Ex parte Travis*, 776 So 2d 874, 881 (Ala, 2000). Here, the trial court permitted no voir dire. Whether or not the two challenged jurors harbored biases justifying their challenge was not fleshed out during the voir dire conducted by the trial court. And the failure of the trial court to make any factual findings regarding these jurors compounded the problem the court created by conducting the voir dire on its own.

determination whether the strikes of WB and DC were motivated by impermissible discrimination. The court's perfunctory ruling on step two is not equivalent to the thoughtful analysis *Batson* demands on step three. The Supreme Court's admonition in *Snyder* bears repeating:

> [R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. [*Snyder*, 552 US at 477.]

V

This case was tried in June 2014. Almost two years have elapsed since the voir dire. We note that the United States Supreme Court has yet to definitively decide whether in circumstances such as these, remand rather than reversal is required. In the interest of judicial economy, we will remand to the trial court for an evidentiary hearing during which the trial court must conduct the third-step analysis it omitted at defendant's trial.

At *Batson*'s third step, the trial judge must evaluate the plausibility of the prosecutor's race-neutral explanation for a strike "in light of all evidence with a bearing on it." *Dretke*, 545 US at 251-252. This inquiry necessarily includes careful consideration of relevant direct and circumstantial evidence of intent to discriminate. *Batson*, 476 US at 93-94. Furthermore, *Batson* requires that defense counsel be afforded an opportunity to argue on the record that the prosecutor's reasons for the strikes were pretextual. We ac-

knowledge that "if *Batson* is to be given its full effect, trial courts must make precise and difficult inquiries to determine if the proffered reasons for a peremptory strike are the race-neutral reasons they purport to be, or if they are merely a pretext for that which *Batson* forbids." *Coombs v Diguglielmo*, 616 F3d 255, 264 (CA 3, 2010).

Given the passage of time, we are not confident that any of the trial participants will be able to summon actual memories of the facial expressions of the challenged jurors *and* those of the jurors in the venire *and* those seated in the jury box *and* the prosecutor's credibility at the time he argued against the *Batson* challenge.[5] Additional relevant facts include: the number of minority jurors in the jury box at the time of the strikes, the number of minority jurors on the final jury, the prosecutor's demeanor and credibility at the time he made the strikes, and the credibility of the "officer in charge." This case presents a formidable evidentiary gap. It remains to be seen whether that gap can be confidently and reliably filled on remand. Nevertheless, "our concern for judicial economy persuades us that allowing the [trial] judge the opportunity for such findings is the correct course." *United States v McMath*, 559 F3d 657, 666 (CA 7, 2009).

However, "if the passage of time has made such a determination impossible or unsatisfactory," *Dolphy v Mantello*, 552 F3d 236, 240 (CA 2, 2009), the court must grant defendants a new trial. We highlight that our remand order is not an invitation to prevarication or post hoc rationalizations. Nor may the prosecutor offer new reasons for striking the two challenged jurors. We will not affirm based on an incomplete

[5] If any nonminority jurors reacted in an equivalent manner and wound up seated on defendants' jury, the prosecutor's stated reason for his strikes of DC and WB could be regarded as pretextual.

hearing or findings that suggest uncertainty, contrivance, or dissembling. Furthermore, we order the trial court to commence remand proceedings forthwith and under no circumstances more than 30 days from the date of the issuance of this opinion.

If the trial court concludes that defendants proved purposeful discrimination or if the court is unable to reach a conclusion because of the passage of time, defendants' convictions must be vacated and a new trial ordered.

We remand for an evidentiary hearing in conformity with this opinion. We retain jurisdiction.

SHAPIRO, P.J., concurred with GLEICHER, J.

O'CONNELL, J. (*concurring*). At issue in this case is whether a prospective juror's nonverbal response to a question is a sufficient race-neutral reason to withstand a *Batson*[1] challenge. I write separately to emphasize the special importance of nonverbal communication in the jury-selection process and to disagree with the majority opinion's implied assertion that nonverbal communication is not a sufficient reason to peremptorily excuse a prospective juror.

I concur with the majority opinion that the trial court failed to complete the three-step *Batson* analysis, and therefore this case must be remanded for an evidentiary hearing. On remand, I would direct the trial court to make factual findings regarding the jurors' nonverbal responses, the prosecutor's credibility, and whether the prosecutor's challenge was a pretext for purposeful discrimination. On remand, I would direct the trial court to conduct an evidentiary hearing if necessary.

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[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

I. INTRODUCTION

At issue in this case are the nonverbal responses of two African-American prospective jurors. After the prosecutor excused those two jurors solely on the basis of their nonverbal responses to an answer by another prospective juror, defense counsel raised a *Batson* challenge. The majority opinion impliedly asserts in part that the nonverbal responses of these two jurors do not reach the level of significance to survive a *Batson* challenge and that the trial court's factual findings are incomplete. In part, I disagree. I note that one of the most important criteria in selecting a jury includes a potential juror's facial expressions, body language (nonverbal communication), and manner of answering questions. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). I would further emphasize that as a reviewing court we "cannot see the jurors or listen to their answers to voir dire questions." *Id*. at 94. For this reason, most appellate courts are disinclined to rule on the effect of nonverbal responses until the trial court first makes its factual findings; unfortunately, this lower court record is devoid of factual findings by the trial court regarding these issues. Therefore, I believe a remand to the trial court for factual findings is the proper remedy in this case.

II. BACKGROUND FACTS

Charles Whitfield died after being shot twice in his back outside a gas station. According to Crystal Williams, Whitfield stopped at the gas station while giving her and Carmen Ulmer a ride home from work. Ulmer testified that she and Whitfield went into the gas station, and Williams testified that she saw two people enter the gas station after Whitfield and Ulmer.

According to Ulmer, two men came into the gas station and stood behind Whitfield at the cashier's booth. When Ulmer left, the two men were still behind Whitfield. Ulmer went back to Whitfield's truck, but eventually she returned to the gas station because Whitfield had not yet come out. Whitfield was reading a newspaper by the front door, and Ulmer told him that Williams wanted him to "[c]ome on." At that point, Ulmer ran back to the car and told Williams that they should leave because she noticed that the two men had not purchased anything, it was late, they were wearing all black, and "common sense was telling [her] that . . . something . . . was about to happen."

Williams testified that she saw Whitfield and some other people come out of the gas station. According to Ulmer, the two men left the gas station as soon as Whitfield left. They were close behind Whitfield when he approached the truck. Ulmer heard someone say "[a]ye," she saw guns, and she ran. Ulmer ran in one direction and Williams ran in another. Ulmer heard Whitfield say "[n]o, no, no," and then she heard two or three gunshots. When Ulmer looked back, Whitfield was on the ground behind his truck.

Ulmer could not identify the men involved in the shooting because she did not look at them closely. Williams testified that she could not identify the men because she was distracted.

Sergeant Ron Gibson, an expert in forensic videotape analysis, testified that he obtained videotape evidence from the gas station's cameras. According to Gibson, the quality of the videotapes was poor, but he could see that one of the perpetrators had arm tattoos. As part of Gibson's analysis, he created photographs from the videotapes and then photographed Timothy Tennille's arm tattoos for comparison. He compared photographs,

looking for "patterns, density, and basically consistency of tattooing or marking on the skins, in the same positions, [on the] same arms." Gibson found "matching placements of tattooing" between Tennille and one of the perpetrators. Specifically, the right arm tattoos had similar densities and proportions, including script lettering in the style of the letter "l," the shape of clasped hands, and a line of lettering and design. Gibson testified that "[a] sufficient number of similarities [were] present" to "prevent [him] from excluding [Tennille] from consideration."

Tennille's mother testified that she could not recall making statements to the police. However, she acknowledged that a signature on the back of some photographs looked like hers and testified that she had told the prosecutor under oath during an investigative subpoena that she was 100% certain the person in one of the photographs "look[ed] like [her] child."

Turquoise Irvin testified that she did not know Sean Rutledge "personally" but had "seen him around" and knew him as "Merf." According to Irvin, the police showed her photographs. Irvin identified one of the individuals as Tennille and the other as Merf. In the videotape of Irvin's interview with the police, she identified "Tim" and "Merf" in the photographs in response to the officer's question, "Who is this?" Irvin testified that she was being held in police custody and felt threatened by the police. Specifically, she was concerned that the police would charge her as an accessory to the crime if she did not cooperate.

During deliberations, the jury twice reviewed the videotape evidence. Ultimately, the jury found Tennille and Rutledge guilty of first-degree murder, felony murder, and possession of a firearm during the commission of a felony. Tennille and Rutledge now appeal.

III. EXCLUSION OF AFRICAN-AMERICAN JURORS

A. LEGAL STANDARDS

The Equal Protection Clause of the Fourteenth Amendment prohibits a party from using a peremptory challenge to remove a prospective juror solely on the basis of the person's race. *People v Knight*, 473 Mich 324, 335; 701 NW2d 715 (2005). When a defendant alleges that the prosecution has improperly excluded a prospective juror on the basis of race, courts engage in a three-step analysis to determine whether the defendant has shown a case of unlawful discrimination. *Batson v Kentucky*, 476 US 79, 96-98; 106 S Ct 1712; 90 L Ed 2d 69 (1986). First, the defendant must make a prima facie showing that (1) he or she is a member of a racial group, (2) the prosecution has used a peremptory challenge to exclude a member of that group from the jury pool, and (3) the circumstances raise an inference that the exclusion was based on the prospective juror's race. *Id*. at 96. Second, if the trial court determines that the defendant made a prima facie showing, the prosecution must "articulate a race-neutral explanation for the strike." *Id*. at 97. Third, the trial court must determine whether the race-neutral explanation is a pretext and the defendant has proved purposeful discrimination. *Id*. at 98.

When reviewing the trial court's decisions, we review for clear error its factual findings and review de novo its legal determinations. *Knight*, 473 Mich at 338. We review de novo whether the prosecution has articulated a race-neutral explanation for striking a prospective juror. *Id*. at 343. We review for clear error the trial court's findings regarding whether the prosecution's explanation was a pretext and whether the defendant has proved purposeful discrimination. *Id*. at 344-345.

We accord the trial court's ultimate finding "great deference." *Id*. at 344.

B. EXCLUSION OF AFRICAN-AMERICANS FROM THE JURY

Both Tennille and Rutledge contend that the prosecution denied them equal protection by excusing two African-American prospective jurors during the voir dire process. Tennille and Rutledge contend that the trial court clearly erred when it determined that the prosecutor's stated reasons for dismissing the jurors were not a pretext.

In this case, the prosecutor stated that he was seeking to exclude the two jurors because, when another prospective juror stated that he would believe police officers "almost to a fault" and give their testimony more credibility than that of a normal witness, the two jurors "show[ed] disgust," and "their reaction to his statements were just over the top[.]" While most people reacted to the statements in some way, the prosecutor believed that those two specific jurors' reactions were "excessive." As a result, the prosecutor decided that the jurors might be biased against police officers.

It is undisputed that Tennille and Rutledge have made a prima facie showing under *Batson*. Further, the trial court properly determined that, as a matter of law, the prosecutor's stated reason was race-neutral. A neutral explanation is "an explanation based on something other than the race of the juror." *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (plurality opinion). The second-step inquiry is focused only on the face of the explanation, and the persuasiveness of the explanation is an issue for the third step of the inquiry. *Knight*, 473 Mich at 343. In this case, the prosecutor's stated reason concerned

juror bias, an explanation that had nothing to do with the race of the prospective jurors. The trial court properly determined that the explanation was race neutral, and the question is therefore whether the reason was merely a pretext for racial discrimination.

Rutledge asserts that it is incredible that the prosecutor could have surveyed the faces of the entire jury venire to gauge their responses to one prospective juror's answer to a question. I am not definitely and firmly convinced that the trial court made a mistake when it found the prosecutor's stated reason valid. This Court gives deference to the trial court's findings, particularly regarding things that cannot be determined through a transcript, such as attorney credibility and the demeanor of prospective jurors. *Snyder v Louisiana*, 552 US 472, 479; 128 S Ct 1203; 170 L Ed 2d 175 (2008).

In this case, the prosecutor's stated reason involved the prospective jurors' nonverbal communication. The prosecutor stated that he observed the reactions of prospective jurors in response to another prospective juror's answer. I note that the record does not reflect the facial expressions of the jurors, and I have no basis from which to determine whether the prosecutor's statement was true or false. Generally, the trial court is in a position to observe not only the prosecutor, but also the prospective jurors in the venire. The trial court may very well have found the prosecutor credible. Appellate courts are not in a position to second-guess the trial court's findings on these matters, but unfortunately the trial court's findings in this case are almost nonexistent. While the trial court ruled in favor of the prosecution, it did not make sufficient findings of fact for this Court to engage in any meaningful review.

I note that the prosecutor exercised several other peremptory challenges, and there is no indication in the record that these challenges were based on race. Further, there is no indication of the ultimate jury composition and whether it disproportionately or entirely excluded African-Americans. There is simply a lack of record evidence and factual findings by the trial court to support a conclusion that the prosecutor's reason was or was not a pretext for purposeful discrimination. In this instance, the proper remedy is a remand for further factual findings.

On remand, I would direct the trial court to make factual findings regarding the jurors' nonverbal responses, the prosecutor's credibility, and whether the defendants established purposeful discrimination. I would direct the trial court to conduct an evidentiary hearing if necessary.

In re GACH

Docket No. 328714. Submitted April 5, 2016, at Lansing. Decided April 19, 2016, at 9:00 a.m.

The Department of Health and Human Services petitioned the Livingston Circuit Court, Family Division, for an order terminating the parental rights of respondent to her three-year-old child after the child had been found wandering outdoors with two dogs while unsupervised and wearing a heavily soiled diaper. Respondent had three prior terminations of parental rights, and these earlier terminations stemmed from her relationship with Jose Baker, who was the father of three of respondent's five children, but who was not the father of the three-year-old child in this proceeding. Baker had been convicted of felony homicide in the death of one of his three children with Gach. The court, Miriam A. Cavanaugh, J., entered an order terminating respondent's parental rights, finding that the statutory grounds listed in MCL 712A.19b(3)(g), (i), (j), and (*l*) were proved by clear and convincing evidence and that termination was in the child's best interests. The court further stated that the referee's findings from respondent's previous termination case provided compelling evidence of respondent's failure to protect her children from her domestic partner and that the child's autopsy from the previous case was strongly indicative of child abuse and neglect. Respondent appealed.

The Court of Appeals *held*:

1. MCL 712A.19b(3)(i) provides that the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, that parental rights to one 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. It is undisputed that respondent's parental rights to her children were terminated previously. And a parent may "neglect" a child by failing to protect the child from another abusive adult. However, this statutory subdivision also requires that prior attempts at rehabilitation have proved unsuccessful. In this case, the trial court essentially based its conclusion on Baker's prior abusive conduct and its

determination that respondent had some sort of persistent relationship with him that constituted a failure to rehabilitate. Although the trial court may have possessed a level of skepticism based on respondent's decision in earlier termination cases to maintain a relationship with Baker after he showed himself to be abusive, the record did not contain evidence of any interaction between Baker and respondent within the past four years. Further, respondent not only denied any relationship with Baker, but she also testified as to her awareness that a relationship with Baker would put her children at risk. Therefore, the trial court had no evidence upon which to base its conclusion that prior attempts to rehabilitate respondent had been unsuccessful. The trial court clearly erred by concluding that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(i).

2. MCL 712A.19b(3)(g) provides that the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, that the parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age. MCL 712A.19b(3)(j) provides that the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, that there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent. The trial court clearly erred by concluding that respondent was either currently in a relationship with Baker or would resume a relationship with him in the future, which constituted the bulk of the trial court's reasoning for termination under Subdivisions (g) and (j). Additionally, the incident that gave rise to the petition, on its own, would have likely resulted in nothing more than an offering of services had it not been for the earlier terminations. The child suffered no harm from the incident, several witnesses testified that the child was generally well-supervised and had never before left the house unsupervised, and there was no evidence that the dogs represented a danger to anyone. Nothing in the record supported the conclusion that harm would come to the child if returned to respondent or that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time given the child's age. The trial court clearly erred by finding that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(g) and (j).

3. MCL 712A.19b(3)(*l*) provides that the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, that the parent's rights to another child were terminated as a result of proceedings under § 2(b), MCL 712A.2(b), of the juvenile code, MCL 712A.1 *et seq*., or a similar law of another state. In contrast to MCL 712A.19b(3)(i), there is no requirement under Subdivision (*l*) that its application be limited to serious and chronic neglect or physical or sexual abuse and that prior attempts to rehabilitate the parents have been unsuccessful. Instead, Subdivision (*l*) essentially allows a trial court to proceed directly to a best-interest determination when it has taken jurisdiction over a child and the respondent has had a previous termination under the juvenile code for any reason. MCL 712A.19b(5) directs that if the court finds that there are grounds for termination of parental rights 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. And MCL 722.638(1)(b)(*i*) requires a petitioner to submit a petition for authorization upon determining that there is risk of harm to the child and the parent's rights to another child were involuntarily terminated in accordance with the law of this state or similar law of other states. MCL 722.638(2) directs, in relevant part, that when a parent who is subject to such a petition is a suspected perpetrator, the department shall include a request for termination of parental rights at the initial dispositional hearing. Taken together, these statutory subsections and MCL 712A.19b(3)(*l*) ensure that a respondent who has had his or her parental rights involuntary terminated under the juvenile code, and over whose child the court has assumed jurisdiction, can only retain his or her parental rights if the trial court fails to conclude by a mere preponderance of the evidence that the termination is in the child's best interests. This provides constitutionally deficient protection to a respondent's due-process interest in raising his or her children. The combination of statutory provisions operates to create a presumption of a respondent's unfitness when that respondent has been subjected to a prior termination. The United States Supreme Court has decreed that a statute creating a presumption that operates to deny a fair opportunity to rebut it violates the Due Process Clause of the Fourteenth Amendment. As written, MCL 712A.19b(3)(*l*) provides no way to rebut this presumption of unfitness, assuming the fact of the prior involuntary termination, and therefore MCL 712A.19b(3)(*l*) violates the due-process protections of the federal and state Constitutions.

4. While other jurisdictions have applied saving constructions to salvage the constitutionality of similar statutory provisions—such as the addition of a temporal limitation, the determination that the current termination is for the same cause as the prior termination, or the requirement that the trial court determine the respondent's current fitness and whether the respondent has successfully ameliorated the issues that led to the earlier termination—application of a saving-construction remedy with regard to MCL 712A.19b(3)(*l*) would, in effect, substantially rewrite an unambiguous (though constitutionally deficient) statute. MCL 712A.19b(3)(*l*) is not ambiguous, and any revision of the statute is properly the province of the Legislature.

Reversed and remanded.

METER, J., concurring, wrote separately to urge the Legislature to amend MCL 712A.19b(3)(*l*) such that it will adequately protect a parent's fundamental liberty interest in the raising of children.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — STATUTORY GROUNDS FOR TERMINATION — EARLIER TERMINATIONS OF PARENTAL RIGHTS.

Parents have a significant interest in the companionship, care, custody, and management of their children that is protected by the Due Process Clauses of the state and federal Constitutions; MCL 712A.19b(3)(*l*) provides that the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, that the parent's rights to another child were terminated as a result of proceedings under Section 2(b), MCL 712A.2(b), of the juvenile code, MCL 712A.1 *et seq*., or a similar law of another state; MCL 712A.19b(3)(*l*) essentially allows a trial court to proceed directly to a best-interest determination when it has taken jurisdiction over a child and when a respondent has had a previous termination under the juvenile code for any reason, which ensures that a respondent can only retain his or her parental rights if the trial court fails to conclude by a mere preponderance of the evidence that the termination is in the child's best interests; the presumption imposed by MCL 712A.19b(3)(*l*) violates the due-process protections of the federal and state Constitutions (US Const, Am XIV; Const 1963, art 1, § 17).

William J. Vailliencourt, Jr., Prosecuting Attorney, and *Marilyn S. Bradford*, Assistant Prosecuting Attorney, for petitioner.

Child Welfare Appellate Clinic (by *Vivek S. Sankaran* and Shannon Seiferth (under MCR 8.120(D)(3))) for respondent.

Amici Curiae:

Honigman Miller Schwartz and Cohn LLP (by *Robert M. Riley*, *Andrew M. Pauwels*, and *Sarah E. Waidelich*) for Legal Services Association of Michigan.

Michigan Poverty Law Program (by *Rebecca E. Shiemke*) for Michigan Coalition to End Domestic and Sexual Violence.

Before: BOONSTRA, P.J., and WILDER and METER, JJ.

BOONSTRA, P.J. Respondent appeals by right the trial court's July 23, 2015 order terminating her parental rights to the minor child, DG, under MCL 712A.19b(3)(g) (failure to provide proper care and custody), (i) (parental rights to a sibling of the child have been terminated as a result of abuse or neglect), (j) (child will likely be harmed if returned), and (*l*) (rights to another child were terminated under the juvenile code). We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Respondent is the mother of DG.[1] This case arose when DG was found wandering outdoors while unsupervised and wearing a diaper and a T-shirt. DG was three years old at the time. The initial petition included the following allegations:

[1] The child's father was not identified and was not part of the proceedings below.

> A referral was received on 08/02/2014 alleging minor child [DG] was found outside around noon in the neighbor's front yard and his front yard in just a t-shirt and diaper with 2 dogs. He was also at the park across the street playing. His diaper was soaked with urine and feces seeping out onto his legs. No one was around, supervising the child. The police were contacted and when they arrived at [respondent's home] no one responded. The police were yelling and banging on the doors. The garage door to the home was unlocked and appears to be the door that [DG] got out of. The police went inside yelling, screaming, and banging in the home for a few minutes before respondent . . . and [MC] (half sister . . .) finally got up and came downstairs. There was no one else in the home. . . . The home was dirty, all of the carpet has been removed, and floor boards are exposed. The couch has a huge rip in it . . . . There is dirt and grime all in the home.

The petition further recited that respondent "has three prior terminations through Wayne County" and additionally reported that a child of respondent's had died in 2001 with suspicious injuries. The petition provided that as a result of this suspicious death, "[t]he father, Jose Baker[,] was convicted and sentenced to prison"[2] and that respondent "was charged with Felony Homicide but not convicted." The initial petition requested termination of respondent's parental rights to DG.

The trial court authorized the petition on August 5, 2014, placed DG in a nonrelative foster home, and ordered that parenting time be suspended. On November 7, 2014, respondent pleaded to the trial court's jurisdiction. Due to a series of delays, the termination hearing was not held until February 3, 2015, and did

[2] Jose Baker pleaded guilty to involuntary manslaughter, MCL 750.321, related to an offense dating from 2001, and pleaded guilty to second-degree child abuse, MCL 750.136b(3), related to an offense dating from 2000.

not conclude until July 23, 2015. Respondent received no parenting time with DG during this span of time.

At the termination hearing, respondent testified that Baker was the father of three of her five children, including the child who had died and two of the three children to which her parental rights had been terminated. Respondent testified that Baker was not the father of DG and that DG had been conceived after a one-time sexual encounter. Respondent further testified that Baker had pleaded guilty in connection with the death of their minor child and began a term of incarceration in 2007, although she insisted that the child "was not killed," but rather "died from neubronchial [sic] pneumonia." Respondent testified that she had not seen Baker since she had visited him while he was incarcerated, which was before she learned that she was pregnant with DG. In other words, she had not seen Baker for at least four years. Respondent denied that Baker knew where she lived, and she also testified that she had no intention of contacting him because she believed that he posed a risk to her children. Respondent further testified that she had served as a court-appointed guardian to her juvenile nephew from when he was age 14 until he moved out in 2012 or 2013 at the age of 19. Respondent's nephew confirmed this testimony and additionally testified that he had neither seen Baker nor heard respondent speak of him while living with her.

Felicity Gach, age 19, testified that she was respondent's daughter (to whom respondent's parental rights had previously been terminated), that she was in daily contact with respondent, and that she had neither seen Baker nor heard respondent speak of him in the previous year. Kevin Casey, respondent's brother, tes-

tified similarly, and he additionally opined that DG was well-cared for by respondent.

Melinda Chamberlain, the Child Protective Services (CPS) worker who signed the petition requesting termination, testified that when DG was born, her agency was notified of a "birth match" as a result of respondent's previous terminations of parental rights and subsequently conducted an investigation. Chamberlain testified that, following the investigation, her agency's report concluded that no relationship existed between respondent and Baker and that the agency had no concerns warranting further investigation.

Regarding the incident giving rise to the initial petition, James Michael Damman, a special education teacher, testified that on August 2, 2014, he was at West Street Park in Howell with his family. He testified that he saw a little boy, between two and three years old, wearing only a diaper and accompanied by two puppies and no adults. Damman approached the child, who pointed to where he lived. Damman knocked on the door but received no response. Damman observed that the child's diaper was soiled with feces, that it was running down his legs, and that some had dried on his upper thigh area. After trying and failing to get a response at some neighboring houses, he called the police, who were able to successfully rouse respondent.

Respondent testified that she did not hear DG get up in the morning when he wandered out on his own. She stated that, the night before, after a long day at work, she went to sleep at 1:00 a.m., then arose at 4:00 a.m. to assist her daughter with her job, and finally returned home between 6:45 a.m. and 7:00 a.m. feeling "over exhausted." She further testified that DG had had a change of diaper before going to bed the night

before and that he was sometimes "saturated" when he woke up in the morning. She testified that after the police brought DG home, she changed his diaper and talked to DG, who "basically told us that he wanted to be a big boy and let the dogs out." Respondent also testified that, at that time, the carpet in her house had been removed because she was in the process of putting in a new floor in response to some water damage.

MC, a minor, testified that she was the child of Baker and respondent, but that she had been adopted by her maternal grandmother. She testified that the night before DG was found outside unsupervised, respondent had left the house to help Felicity with her work, leaving MC to babysit DG. She further testified that DG did not normally walk around with heavily soiled diapers, that he was generally clean, and that he had never left the house unsupervised before. Respondent's maternal grandmother testified similarly regarding DG's cleanliness and supervision.

DG's pediatrician testified that respondent was generally current with appointments for DG; while respondent had missed one appointment at 15 months, this was not necessarily "atypical" for patients.

Angela Tisch, a protective-services worker with petitioner, testified that she and Chamberlain, accompanied by police, appeared for a check of the home two days after the incident in which DG had been found unsupervised. Tisch testified that respondent took a long time to answer the door and did not allow them access to the home. Tisch testified that respondent told them that DG was with a friend of the family and that a friend of the family brought DG home about an hour after they arrived. Tisch testified that respondent told her that she was employed, but would not name her employer, and that she had a medical marijuana card,

which she would not produce. Tisch testified that respondent told her that there were five pit bulls living in the home, although Tisch only saw two, which were barking at the front window. Tisch further testified that respondent indicated that she was aware that Baker had been released from prison and reiterated that she did not believe Baker was responsible for the child's death, which she attributed to "pneumonia" or "something about infantigo on his lip or something." Tisch stated that respondent told them that Baker had been trying to contact her constantly since his release from prison, but Tisch did not remember if respondent stated that she had a relationship of any kind with Baker at the time. Tisch testified that police officers removed DG from the home because they deemed the environment unsafe. Tisch indicated that this was partially due to respondent's evasive answers and refusal to allow them to view the home.

Chamberlain testified that were it not for the earlier terminations, respondent would likely have been offered services in connection with the instant case. Chamberlain agreed that respondent would possibly benefit from services if given an opportunity, but she added that her agency was "not allowed" to take that approach "due to state policy." Chamberlain further agreed that but for the earlier terminations, there probably would have been no court filing in the instant case, but instead only the provision of services.

The trial court terminated respondent's parental rights, finding that the statutory grounds listed in MCL 712A.19b(3)(g), (i), (j), and (*l*) were proved by clear and convincing evidence and that termination was in DG's best interests. This appeal followed. This Court granted the joint application of the Legal Services Association of Michigan and the Michigan Coali-

tion to End Domestic and Sexual Violence to participate in this appeal as amici curiae and to file a brief for the purpose of challenging the constitutionality of MCL 712A.19b(3)(*l*).[3]

II. STATUTORY GROUNDS FOR TERMINATION

Respondent first argues that the trial court clearly erred by concluding that termination of her parental rights was warranted under MCL 712A.19b(3)(g), (i), or (j). We agree. We review for clear error a trial court's decision that a statutory ground for termination has been proved by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "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 Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (quotation marks and citations omitted). A reviewing court must defer to the special ability of the trial court to judge the credibility of witnesses. *Id*.

The relevant statutory grounds for termination in this case, apart from statutory ground MCL 712A.19b(3)(*l*), which we will discuss separately, are:

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or

[3] *In re D Gach*, unpublished order of the Court of Appeals, entered February 18, 2016 (Docket No. 328714).

physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent. [MCL 712A.19(b)(3)(g), (i), and (j).]

A. MCL 712A.19b(3)(i)

With regard to this ground, the trial court stated that Baker had been convicted of "felony homicide in the death of [DG's half-sibling] at three months of age which resulted in a . . . term in the Michigan Department of Corrections" and that respondent's parental rights to two of her children were thereafter terminated. The trial court further stated that the referee's findings from the previous termination case "provide[] compelling evidence of respondent mother['s] abysmal child protective history and her contained [sic] failure to protect her children from her domestic partner Jose Baker Sr.," noting that the autopsy findings on the child were "strongly indicative of child abuse and neglect." The court concluded that "the testimony of the respondent mother even in this case here in 2015 supports . . . similar findings even today."

It is undisputed that respondent's parental rights to her children were terminated previously. And a parent may indeed "neglect" a child by failing to protect the child from another abusive adult. However, this statutory subsection also requires that prior attempts at rehabilitation have proved unsuccessful. Thus, the clear language of the statute requires the court to determine the success of prior rehabilitative efforts as of the date of the termination hearing. See *Maxwell v Citizens Ins Co of America*, 245 Mich App 477, 482; 628 NW2d 95 (2001).

In this case, the trial court essentially based its conclusion on Baker's prior abusive conduct and its determination that respondent had some sort of persistent relationship with him that constituted a failure to rehabilitate. Although the trial court is in a superior place to judge credibility, *Miller*, 433 Mich at 337, no evidence or testimony was presented at the termination hearing indicating that respondent was currently in any sort of relationship with Baker. Although the trial court may have possessed a level of skepticism based on respondent's decision in earlier termination cases to maintain a relationship with Baker after he showed himself to be abusive, the record does not contain evidence of any interaction between Baker and respondent within the past four years, other than perhaps attempts by Baker to contact respondent. Further, respondent not only denied any relationship with Baker, but she also testified as to her awareness that a relationship with Baker would put her children at risk. The trial court therefore had no evidence upon which to base its conclusion that "prior attempts to rehabilitate" respondent had been "unsuccessful." MCL 712A.19b(3)(i). We therefore conclude that the trial court clearly erred by concluding that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(i).

B. MCL 712A.19b(3)(g) AND (j)

The bulk of the trial court's reasoning for termination under MCL 712A.19b(3)(g) and (j) also stemmed from its conclusion that respondent was either currently in a relationship with Baker or would resume a relationship with him in the future. As discussed in Part II(A), we hold that the trial court clearly erred in this determination.

Apart from the trial court's concern with Baker, the trial court referred to the incident that had given rise to the filing of the petition, i.e., that DG had been found unsupervised in a park with a heavily soiled diaper and accompanied by two pit bull puppies. However, Chamberlain testified that this event, on its own, would have likely resulted in nothing more than an offering of services had it not been for the earlier terminations. Further, several witnesses testified that DG was generally well-supervised, that he was clean, and that he had never before left the house unsupervised. Additionally, there was no testimony that DG suffered any harm from the incident. We therefore conclude that nothing in the record concerning this incident supports the conclusions, by clear and convincing evidence, that harm would come to DG if he were returned to respondent, MCL 712A.19b(3)(j), or that, although DG may have been "neglected" at the time he was found by Damman, there existed "no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age," MCL 712A.19b(3)(g).

The trial court additionally expressed concern about several dogs in the house that appeared to responding police officers to be barking, growling, and aggressive. However, no evidence was presented that the dogs had ever been a danger to anyone. Although respondent received two tickets in connection with her dogs in 2012 and 2013, the tickets were distributed for allowing the dogs to run loose, not for aggressive behavior on the part of the dogs. Respondent's brother testified that the dogs were protective of DG. Further, there is no evidence that DG was left alone with the dogs, excluding the incident that prompted the filing of the petition. Respondent admitted that she was aware that DG should not be with the dogs unsupervised. Therefore,

we conclude that the record does not contain clear and convincing evidence that the presence of multiple dogs in the home represented either a danger to DG or neglect on the part of respondent.

We hold that the trial court clearly erred by finding that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(g), (i), and (j).

III. MCL 712A.19b(3)(*l*)

Next, respondent and amici argue that MCL 712A.19b(3)(*l*) violates the Due Process Clauses of the federal and state Constitutions, US Const, Am XIV, § 1; Const 1963, art 1, § 17. We agree. Respondent did not raise this constitutional challenge in the proceedings below. However, the petition filed by petitioner requesting termination did not specify MCL 712A.19b(3)(*l*) as a potential ground for termination; rather, the record indicates that the trial court had sua sponte considered this statutory ground. We therefore decline to treat this issue as unpreserved. See MCR 2.517(A)(7); see also *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). We review a constitutional challenge to a statute de novo. *Dana Corp v Dep't of Treasury*, 267 Mich App 690, 694; 706 NW2d 204 (2005).

MCL 712A.19b(3)(*l*) authorizes termination of parental rights when "[t]he parent's rights to another child were terminated as a result of proceedings under section 2(b) [MCL 712A.2(b)] of this chapter [the juvenile code, MCL 712A.1 *et seq*.] or a similar law of another state." There is no question that this statutory ground was proved in the instant case by clear and convincing evidence; respondent's parental rights were previously terminated on multiple occasions as a result of proceedings under § 2(b) of the juvenile code.

In contrast to MCL 712A.19b(3)(i), there is no requirement under statutory ground MCL 712A.19b(3)(*l*) that its application be limited to "serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful." Instead, Subsection (3)(*l*) essentially allows a trial court to proceed directly to a best-interest determination when it has taken jurisdiction over a child and when a respondent has had a previous termination under the juvenile code for any reason. MCL 712A.19b(5) directs that, "[i]f the court finds that there are grounds for termination of parental rights 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." And MCL 722.638(1)(b)(*i*) requires a petitioner to submit a petition for authorization upon determining that there is risk of harm to the child and the parent's rights to another child were involuntarily terminated in accordance with the law of this state or similar law of other states. MCL 722.638(2) in turn directs that when a parent who is subject to such a petition "is a suspected perpetrator . . . , the department shall include a request for termination of parental rights at the initial dispositional hearing . . . ." Taken together, these statutory subsections and MCL 712A.19b(3)(*l*) ensure that a respondent who has had his or her parental rights involuntarily terminated under the juvenile code, and over whose child the court has assumed jurisdiction, can only retain his or her parental rights if the trial court fails to conclude by a mere preponderance of the evidence that the termination is in the child's best interests. See *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). We hold that this provides

constitutionally deficient protection to a respondent's due-process interest in raising his or her children.

"It is well established that parents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). In acknowledgment of this interest, the "statutory-grounds stage," which focuses on the liberty interest of the parent, uses "error-reducing procedures, such as the heightened standard of proof of clear and convincing evidence," to prevent the erroneous determination that a fit parent is unfit. *Moss*, 301 Mich App at 86-87. This is because, at this stage of the proceeding, in addition to the parent's liberty interest, the child and parent both "share a vital interest in preventing erroneous termination of their natural relationship until the petitioner proves parental unfitness." *Id*. at 87 (quotation marks and citation omitted).

However, the combination of statutory subsections described earlier in this opinion instead operates to create a presumption of a respondent's unfitness when that respondent has been subjected to a prior termination. The United States Supreme Court has decreed that " 'a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.' " *Vlandis v Kline*, 412 US 441, 446; 93 S Ct 2230; 37 L Ed 2d 63 (1973), quoting *Heiner v Donnan*, 285 US 312, 329; 52 S Ct 358; 76 L Ed 772 (1932). As written, MCL 712A.19b(3)(*l*) provides no way to rebut this presumption of unfitness, assuming the fact of the prior involuntary termination.

Perhaps in recognition of these problems, MCL 712A.19b(3)(*l*) has been rarely referred to in published

caselaw. In a few cases before this Court, we have affirmed terminations under statutory ground (3)(*l*); however, we have never before considered a due-process challenge to that statutory subsection. See *In re Gazella*, 264 Mich App 668; 692 NW2d 708 (2005); *In re Jones*, 286 Mich App 126, 127-128; 777 NW2d 728 (2009); *In re Smith*, 291 Mich App 621; 805 NW2d 234 (2011).

However, during the pendency of this appeal, and filed as supplemental authority by respondent, Justice MCCORMACK concurred in an order denying leave to appeal a decision of this Court to our Supreme Court and expressed "reservations about using MCL 712A.19b(3)(*l*) as a statutory basis for termination." *In re Jackson*, 498 Mich 943 (2015). We share many of those reservations. Justice MCCORMACK also noted that other state courts have allowed termination under similar provisions only upon a showing of the parent's continuing lack of fitness. *Id*. at 944, citing *In re JL*, 20 Kan App 2d 665, 672-673; 891 P2d 1125 (1995), and *Florida Dep't of Children & Families v FL*, 880 So 2d 602, 609 (Fla, 2004). In this case, as already discussed, we find no evidence of respondent's continuing unfitness.

In sum, we hold that, under our current statutory scheme, when a parent has been subjected to an earlier termination of parental rights, if MCL 712A.19(b)(3)(i) does not justify the new termination because it cannot be clearly and convincingly proved that the parent had failed to remedy the earlier abuse or neglect that led to the earlier termination, application of MCL 712A.19(b)(3)(*l*) "disdains present realities in deference to past formalities" and simply "forecloses the determinative issues of competence and care." *Stanley v Illinois*, 405 US 645, 657; 92 S Ct 1208; 31 L Ed 2d

551 (1972). MCL 712A.19b(3)(*l*) thus fails to comport with due process in light of the fundamental liberty interest at stake. *In re Brock*, 442 Mich at 109.

We note that we are not unsympathetic to the policy concerns raised by the amici curiae, who point out that the presumption in favor of termination that underlies MCL 712A.19b(3)(*l*) imposes special burdens on victims of domestic violence such as respondent. However, because we find that the presumption imposed by Subsection (3)(*l*) violates the due-process protections of the federal and state Constitutions in any event, we need not rely on the policy arguments expressed by the amici.

Further, we note that the amici have alternatively provided this Court (as Justice MCCORMACK also noted in *Jackson*, 498 Mich at 944) with examples of similar statutory provisions in other jurisdictions, to which courts of those jurisdictions have applied a "saving construction" in order to salvage the constitutionality of the statute. These constructions include the addition of a temporal limitation, the determination that the current termination is for the same cause as the prior termination, or the requirement that the trial court determine the respondent's *current* fitness and whether the respondent has successfully ameliorated the issues that led to the earlier termination.[4] However, such a remedy with regard to MCL 712A.19b(3)(*l*) would, in effect, substantially rewrite an unambiguous (although constitutionally deficient) statute. Although the statute at issue in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 208, 213; 731 NW2d 41 (2007), was deemed to pass constitutional muster by our Supreme Court, the Court cautioned reviewing courts

[4] See, e.g., *In re JL*, 20 Kan App 2d at 672-673; *In re TTS*, 373 P3d 1022, 1029-1030; 2015 OK 36 (2015).

against engrafting amendments onto unambiguous statutory provisions "in order to save [them] from being held unconstitutional" as well as against "judicial usurpation of legislative power" and the seizing of "the Legislature's amendment powers." See also *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012) (stating that "statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate"). MCL 712A.19b(3)(*l*) is not ambiguous, and we decline to judicially effect a substantial revision of the statute to salvage its constitutionality because any such revision is properly the province of the Legislature. See *Shirilla v Detroit*, 208 Mich App 434, 443; 528 NW2d 763 (1995).

Because we reverse the trial court's finding that statutory grounds for termination existed and reverse the order terminating respondent's parental rights, we need not reach respondent's remaining issues.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

WILDER, J., concurred with BOONSTRA, P.J.

METER, J. (*concurring*).

I concur in the decision of the majority but write separately simply to urge the Legislature to amend MCL 712A.19b(3)(*l*) such that it will adequately protect a parent's fundamental liberty interest in the raising of children. See, e.g., Or Rev Stat 419B.502 (indicating that "the court shall consider . . . [p]revious involuntary terminations of the parent's rights to another child if the conditions giving rise to the previous action have not been ameliorated").

BROWNLOW v McCALL ENTERPRISES, INC

Docket Nos. 325843 and 326903. Submitted March 8, 2016, at Lansing. Decided April 19, 2016, at 9:05 a.m.

Ronald Brownlow and Susan Travis brought an action in the Washtenaw Circuit Court against McCall Enterprises, Inc., and State Farm Fire and Casualty Company, alleging that plaintiffs' home and personal property were damaged by the ozone generator used in their home by McCall Enterprises to eliminate the odor of smoke that was caused by a fire in their microwave. Plaintiffs also sought damages for loss of use and enjoyment as a result of the ozone exposure. The court, Archie C. Brown, J., granted summary disposition in favor of McCall Enterprises on the basis that the company's actions were exempt from liability as provided by MCL 445.904(1)(a) of the Michigan Consumers Protection Act (MCPA), MCL 445.901 *et seq*., and granted defendant's motion for case evaluation sanctions. Plaintiffs appealed, and the Court of Appeals, SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ., reversed and remanded the case to the trial court. *Brownlow v McCall Enterprises, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2013 (Docket Nos. 306190 and 307883) (*Brownlow I*). On remand, the trial court granted McCall Enterprises' motion in limine and dismissed Travis's claim for personal property and loss of use and enjoyment damages under the MCPA, concluding that in *Brownlow I*, the Court of Appeals had limited recoverable damages to those associated with the house structure itself. The trial court also granted McCall Enterprises' motion to dismiss Brownlow as a party, concluding that he lacked standing because he did not have a legal interest in the home. The trial court then awarded McCall Enterprises fees and costs as case evaluation sanctions against both Brownlow and Travis. The trial court ultimately granted McCall Enterprises' motion for summary disposition of Travis's entire MCPA claim, reasoning that Travis's experts were not qualified to express an opinion on the issue of causation. At that time, the trial court also dismissed Travis's motion for partial summary disposition. Thereafter, the trial court awarded McCall Enterprises attorney fees and costs as case evaluation sanctions against Travis. In Docket No. 325843, plaintiffs ap-

pealed the trial court order that had granted summary disposition to McCall Enterprises and challenged the other nonfinal orders. In Docket No. 326903, plaintiffs appealed the trial court order that had granted McCall Enterprises attorney fees and costs as case evaluation sanctions against Brownlow. The Court of Appeals ordered the cases consolidated.

The Court of Appeals *held*:

1. Under the law-of-the-case doctrine, a ruling by an appellate court binds the appellate court and all lower tribunals with respect to that issue; the doctrine applies when the facts of the case remain materially the same and any differences are legally insignificant. The doctrine only applies to issues actually decided, either implicitly or explicitly, in the prior appeal. However, the law-of-the-case doctrine does not apply when an appellate court reverses a case and remands for a trial on the basis that a material issue of fact exists because the first appeal was not decided on the merits.

2. In *Brownlow I*, the Court of Appeals concluded that the issue of causation as related to plaintiffs' MCPA claim was a jury question and that the law-of-the-case doctrine barred McCall Enterprises from relitigating this issue on remand. For this reason, the trial court erred by considering and granting McCall Enterprises' motion for summary disposition that was premised on an alleged lack of causation. Any differences in the opinion testimony offered by plaintiffs' experts in *Brownlow I* and their new experts were legally insignificant and did not materially change the facts of the case because both the original and substituted experts opined that the damage to plaintiffs' house was consistent with ozone exposure. Further, in *Brownlow I*, the Court concluded it was unnecessary for plaintiffs' experts to determine the ozone levels in plaintiffs' house to establish a prima facie case of causation under the MCPA. Therefore, the facts did not materially change between those present in *Brownlow I* and the current appeal even though plaintiffs' new experts were unable to calculate the level of ozone concentration in the house as was done by plaintiffs' original, now deceased experts. The facts did not materially change simply because the new experts were unable to rule out other causes of damage to plaintiffs' house or because the ozone generator was broken when tested six years after the incident; the new experts' opinions would go to the weight of the evidence presented at trial and did not materially change the facts.

3. The trial court abused its discretion by granting McCall Enterprises' motion in limine to prohibit plaintiffs' recovery of damages for the loss of personal property and the use and

enjoyment of the house. Contrary to the trial court's conclusion, the Court of Appeals did not implicitly or explicitly decide in *Brownlow I* whether plaintiffs' claim for property damage under the MCPA was limited to real property damage. Therefore, because Brownlow could pursue a claim for personal property damages under the MCPA, the trial court erred by dismissing Brownlow as a party to the MCPA claim on the basis that he had no legal interest in the home and that there were no damages he could recover.

4. The trial court did not fully determine under *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993), that plaintiffs' new experts were unqualified to offer expert testimony regarding causation; the trial court failed to hold a full *Daubert* hearing to determine the experts' qualifications. In addition, the trial court's underlying reasoning for concluding plaintiffs' experts were unqualified—that they would have to speculate regarding the amount of ozone output from the generator and the level of ozone concentration in the house—went to the weight of their testimony regarding causation, not to their qualifications.

5. The MCPA was enacted to eliminate the intent element of the common-law tort of fraud; it is a remedial statute designed to prohibit unfair practices in trade or commerce, and it must be liberally construed to achieve its intended goal. Contrary to McCall Enterprises' argument, a plaintiff is not required to prove intent—an essential element of the common-law tort of fraud—to establish a violation of the MCPA unless the provision of the MCPA at issue specifically requires proof of intent. Given that the language of the act does not show a clear legislative intent to alter the common-law meanings of its fraud-based language, when the MCPA contains an ambiguous technical term that has acquired a peculiar meaning under the common law, courts should interpret that term with guidance from the common-law tort of fraud.

6. MCL 445.903(1) of the MCPA provides that unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful in certain circumstances. While certain provisions of the MCPA require proof of a merchant's intent, other provisions do not. In this case, plaintiffs were not required to prove that McCall Enterprises knowingly made a statement that was false, acted recklessly without any knowledge of the statement's truth, or knowingly or recklessly failed to reveal a material fact in order to establish that the company violated MCL 445.903(1)(c), (e), (s), or (cc) of the MCPA.

7. While plaintiffs were not required to prove intent for purposes of establishing a violation under MCL 445.903(1)(c), (e), (s) or (cc), there was a genuine issue of material fact regarding McCall Enterprises' liability under the MCPA, and plaintiffs were not entitled to partial summary disposition on that issue.

In Docket No. 325843, trial court orders that granted summary disposition in favor of McCall Enterprises, dismissed Brownlow as a party, and awarded McCall Enterprises case evaluation sanctions against Brownlow reversed. In Docket No. 326903, trial court order that granted case evaluation sanctions against Travis reversed. Case remanded.

CONSUMER PROTECTION — CONSUMER PROTECTION ACT — NO GENERAL ELEMENT REQUIRING PROOF OF INTENT.

MCL 445.903(1) of the Michigan Consumers Protection Act (MCPA), MCL 445.901 *et seq*., provides that unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful in certain circumstances; the terms used in the MCPA may be construed with reference to the common-law tort of fraud; although the common-law tort of fraud contains an intent element, a plaintiff is not generally required to prove intent by the merchant to establish a violation of the MCPA; an MCPA plaintiff only needs to prove intent if the MCPA provision at issue specifically requires proof of intent.

Donnelly W. Hadden, PC (by *Donnelly W. Hadden*), for Ronald Brownlow and Susan Travis.

Secrest Wardle (by *John Mitchell* and *Sidney A. Klingler*) for McCall Enterprises, Inc.

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

PER CURIAM. In this consolidated appeal, plaintiffs, Ronald Brownlow and Susan Travis, appeal as of right two orders entered by the trial court. The first, at issue in Docket No. 325843, is a July 29, 2015 final order that granted summary disposition in favor of defendant McCall Enterprises, Inc.,[1] and dismissed plaintiff

[1] Plaintiff also filed suit against State Farm Fire and Casualty Company, but State Farm is not a party to this appeal. The term "defendant" as used in this opinion refers to McCall Enterprises.

Travis's claim for damages under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. The second, at issue in Docket No. 326903, is a March 27, 2015 order that granted defendant attorney fees and costs as case evaluation sanctions against plaintiff Travis. Before entering the final order, which granted summary disposition in favor of defendant, the trial court entered a June 12, 2014 order that dismissed plaintiff Brownlow as a party in the case. The trial court then entered an October 3, 2014 order that granted defendant attorney fees and costs as case evaluation sanctions against plaintiff Brownlow. These two orders are also challenged on appeal. In Docket No. 325843, we reverse the trial court order that granted summary disposition in favor of defendant. We also reverse the trial court order that dismissed plaintiff Brownlow as a party, as well as the order that awarded defendant case evaluation sanctions against plaintiff Brownlow. In Docket No. 326903, we reverse the trial court order that granted case evaluation sanctions against plaintiff Travis.

This case was previously before this Court in *Brownlow v McCall Enterprises, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2013 (Docket Nos. 306190 and 307883). A small fire occurred in plaintiffs' microwave on March 12, 2007, which filled plaintiffs' house with smoke. Plaintiffs filed a claim with their insurer, State Farm Fire and Casualty Company, who retained defendant to remove the smoke odor from plaintiffs' house. Defendant placed an ozone generator in plaintiffs' kitchen, turned it on, and let it run for 24 hours. Plaintiffs were instructed to leave for the weekend, and when they returned, the smoke odor was gone. However, there was significant new damage to the inside of the house, particularly to carpet, upholstery, wood, plastic, and

rubber surfaces. Plaintiffs also alleged that they suffered health problems as a result of the ozone exposure.

Plaintiffs filed a complaint against State Farm and McCall Enterprises, alleging that plaintiffs had sustained personal injuries and property damage from excessive ozone exposure and asserting claims for negligence and violations of the MCPA. The negligence claims were dismissed, and plaintiffs do not appeal that ruling. The trial court also dismissed the MCPA claim, concluding that the transaction was specifically authorized by defendant's contractor license, and therefore exempt from the act under MCL 445.904(1)(a), which provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Plaintiffs appealed the dismissal of their MCPA claim.

This Court reversed the trial court order, concluding that the general transaction of cleaning a house was not specifically authorized by defendant's contractor license and therefore not exempt from the act. *Brownlow*, unpub op at 3-4. This Court also addressed defendant's alternate argument supporting summary disposition—that plaintiffs could not establish causation under the MCPA. *Id*. at 4-6. This Court rejected that argument, concluding that plaintiffs had presented "sufficient evidence for a jury to conclude that the ozone generator caused the damage to plaintiffs' house without resort to speculation." *Id*. at 6. Specifically, this Court concluded that plaintiffs did not need to establish the precise amount of ozone that had been released into their house to establish that it caused the damage. *Id*. at 5. The literature and expert reports provided by plaintiffs supported the conclusion that

ozone can damage household materials, and the damage plaintiffs alleged was consistent with ozone exposure. *Id*. at 5-6. Our Supreme Court denied leave to appeal. *Brownlow v McCall Enterprises, Inc*, 495 Mich 852 (2013).

We remanded the case to the trial court, and defendant moved in limine to preclude claims for personal-property damages and for loss of use and enjoyment. Defendant argued that this Court's prior opinion specifically limited plaintiffs' MCPA claim to damage to their "house," which implicitly included only the realty. Defendant also asked the trial court to dismiss plaintiff Brownlow as a party to the action on the basis that he did not have a legal interest in the house and, therefore, did not have standing to assert a claim for real property damages. The trial court granted defendant's motion and ordered that plaintiff Travis be precluded from presenting proof of damages to personal property and for loss of use and enjoyment of the property and that plaintiff Brownlow be dismissed from the action. The trial court also granted defendant's motion to award it attorney fees and costs as case evaluation sanctions against plaintiff Brownlow.

Defendant then moved for summary disposition pursuant to MCR 2.116(C)(10) on the MCPA claim, arguing that plaintiff Travis could not prove causation because there was no evidence that the ozone generator did in fact generate harmful levels of ozone in the house. Defendant argued that a test of the machine, conducted years later, revealed that it was broken and incapable of producing ozone. Defendant also argued that the new experts plaintiffs substituted following the death of two of their previous experts were not qualified to provide expert testimony regarding causation. Specifically, defendant argued that the new ex-

perts did not have experience with an ozone generator and they did not calculate the ozone levels in the house. Plaintiff Travis filed a countermotion for partial summary disposition regarding liability.

The trial court issued a written opinion finding that plaintiff Travis's experts were not qualified to opine on causation because, among other things, they did not have experience with the type of ozone generator used in this case or they were unable to testify regarding the ozone concentration in the house. The trial court concluded that plaintiff Travis failed to offer evidence through affidavits, depositions, or exhibits sufficient to establish a causal connection between the use of the ozone generator and the damage to the house and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). It also denied plaintiff Travis's countermotion for partial summary disposition. The trial court later granted defendant's motion for case evaluation sanctions against plaintiff Travis. Plaintiffs then filed the present appeal.

First, plaintiffs argue that the law-of-the-case doctrine precluded the trial court from considering defendant's second motion for summary disposition on the issue of causation given that this Court previously ruled there was sufficient evidence of causation to go to a jury. "The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue," but only if the facts remain materially the same. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). The doctrine's purpose "is the need for finality of judgments and the lack of jurisdiction of an appellate court to modify its judgments except on rehearing." *South*

Macomb Disposal Auth v American Ins Co, 243 Mich App 647, 654; 625 NW2d 40 (2000).

Defendant cites *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), citing *Borkus v Mich Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982), for the principle that "[w]hen this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." Defendant argues that because this Court's prior decision resulted in a remand for trial predicated on the existence of a genuine issue of material fact regarding causation under the MCPA, the law-of-the-case doctrine is not implicated because the first appeal was not decided on its merits. Defendant, however, misinterprets *Brown* and *Borkus*.

In both *Brown* and *Borkus*, on which *Brown* relied, this Court did not make a ruling on a question of law before reversing the trial court's grant of summary disposition; it simply ruled in both cases that factual questions existed that precluded summary disposition. In the first appeal in this case, it was not merely the existence of factual questions that occasioned this Court's remand order, unlike in *Brown* and *Borkus*. Rather, this Court ruled as a matter of law that the transaction at issue fell under the MCPA, and that ruling was necessary to this Court's determination that the trial court had erred by granting summary disposition, particularly when the trial court held that the transaction was exempt from the MCPA and did not address whether plaintiffs proved causation under the MCPA. It was the decision that the MCPA applied as a matter of law that primarily necessitated this Court's remand, and it was then left to the trier of fact to resolve the question of causation under the MCPA.

Further, in *Borkus* this Court had initially reversed because factual questions existed. *Borkus*, 117 Mich App at 667. On remand to the trial court, a bench trial was held. *Id*. at 665. The defendant appealed the trial court's ruling, and the plaintiff argued that the law-of-the-case doctrine barred this Court from considering the issues raised by the defendant. *Id*. at 666. However, because this Court's earlier decision in *Borkus* simply ruled that factual questions existed, which precluded summary disposition, it remanded the case without addressing the merits of the defendant's claims raised in the first appeal. *Id*. at 666-667. Therefore, the defendant was free to raise the issues in the second appeal, which followed the bench trial, because the issues had not been previously addressed by this Court. Clearly, the law-of-the-case doctrine would not apply to claims that were not decided on the merits, thus leading to this Court's statement that "[w]here an order of summary judgment is reversed and the case is returned for trial because an issue of material fact exists, the law of the case doctrine does not apply to the second appeal because the first appeal was not decided on the merits." *Id*. at 666.

In *Brown*, the plaintiff argued that the law-of-the-case doctrine precluded the defendants from relitigating the issue of duty to warn. *Brown*, 209 Mich App at 144. This Court stated that the plaintiff misunderstood this Court's prior decision. *Id*. Specifically, this Court explained that it had not previously ruled that the defendants, as manufacturers, had a duty to warn of the dangers of formaldehyde. *Id*. Rather, this Court held that factual questions existed with regard to whether the use of formaldehyde as a cleaning agent was foreseeable, which precluded summary disposition. *Id*. It was that ruling which occasioned this Court's remand order. *Id*. This Court did not decide the merits of the

plaintiff's claim regarding the duty to warn of the dangers of formaldehyde, so logically, the law-of-the-case doctrine would not apply, thus leading to the *Brown* Court's citation of *Borkus*, stating, "When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Id*.

It is too broad to read *Brown* and *Borkus* as barring application of the law-of-the-case doctrine whenever there is a grant of summary disposition based on the presence of factual questions, and doing so undermines the doctrine's purpose and effectively eviscerates it. As can be understood from the facts of *Brown* and *Borkus*, the principle defendant cites from those cases merely indicates that the law-of-the-case doctrine does not apply to issues that were never decided by this Court. That principle applies to situations in which this Court merely remanded because factual questions existed and never addressed issues that were later raised in a second appeal. Notably, in both *Brown* and *Borkus*, the parties were not relitigating the issue on which this Court previously remanded because factual questions existed. Rather, they were challenging other issues that were raised in the first appeal but never decided by this Court.

In our prior decision in this case, this Court clearly determined that the issue of causation should go to the jury. Nevertheless, in moving for summary disposition a second time, defendant relitigated the issue of causation. The law-of-the-case doctrine clearly precluded defendant from doing so, and it was error for the trial court to consider defendant's motion.

We also reject defendant's argument that the law-of-the-case doctrine does not apply because the facts

have materially changed. See *South Macomb Disposal Auth*, 243 Mich App at 655; *Driver*, 226 Mich App at 565. Defendant argues that the facts materially changed because of the substitution of new expert witnesses whose opinions were speculative and because the ozone generator was broken when it was tested years after the incident.

First, although this Court did not have the benefit of the new experts' opinions in the first appeal, any differences between the experts' opinions referred to in our earlier decision and the new experts' opinions were legally insignificant and did not materially change the facts of the case. See *Ewing v Detroit*, 252 Mich App 149, 164 n 5; 651 NW2d 780 (2002), rev'd on other grounds 468 Mich 886 (2003) (concluding that the law-of-the-case doctrine applied when the facts remained materially the same and any differences were legally insignificant). The deaths of plaintiffs' experts Verne Brown and Roger Wabeke after this Court's remand prompted plaintiffs to substitute new experts. In our earlier opinion, this Court noted that while Wabeke's testimony focused on the health risks of ozone, he also opined that defendant should have warned plaintiffs of possible damage to materials from ozone. This Court also pointed to Brown's affidavit in which he stated that the damages to plaintiffs' house were consistent with ozone exposure and explained how he had determined that the ozone levels in the house were high enough to cause the damage. The new experts plaintiffs substituted were able to opine that the damage to plaintiffs' house was consistent with ozone exposure. For example, Douglas A. Haase testified that the more organic an item is, the more it reacts to ozone—like the carpet, which was damaged in plaintiffs' house. According to Jeffrey A. Siegel, ozone is ten times more likely to react with materials in a house

than it is to ventilate. Siegel also testified that the photographs he reviewed of the damage to plaintiffs' house showed "very stereotypical degradation patterns" from ozone.

Further, defendant spends a great deal of time arguing that the level of ozone concentration in the house was unknown and that plaintiffs' new experts, unlike Brown, were unable to express an opinion regarding the level of ozone concentration in the house. Brown's calculation of the ozone levels in plaintiffs' house, however, is not necessary for plaintiffs to establish causation. As this Court stated in the prior opinion, this fact is irrelevant. *Brownlow*, unpub op at 5. Plaintiffs do not need to establish the precise amount of ozone released into their house to infer causation. *Id*. It was undisputed that defendant placed an ozone generator in plaintiffs' house on Friday and set it to an output of "8" on a scale of 0 to 10. Plaintiffs were instructed to leave for the weekend and returned on Monday to discover extensive interior damage to a variety of surfaces, including carpet, upholstery, wood, brick, plastic, and rubber. Plaintiffs presented evidence, through their experts and literature, that ozone reacts with these various organic materials, and defendant does not dispute that ozone can cause damage to building materials as well. As this Court previously concluded, this is enough to infer causation without resort to speculation. These facts remained materially the same and were not affected by the substitution of new experts, particularly when, as discussed, the new experts were able to opine that the damage to plaintiffs' house was consistent with ozone exposure. Once this Court concluded that plaintiffs established a prima facie case of causation under the MCPA to warrant a trial, plaintiffs were entitled to prove their case how they saw fit. The experts' opinions simply go

to the weight of the evidence presented at trial. See *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401; 628 NW2d 86 (2001) (noting that "an opposing party's disagreement with an expert's opinion or interpretation of facts . . . are matters of the weight to be accorded to the testimony, not its admissibility").

Defendant also seems to argue that because the new experts could not rule out other causes of damage to plaintiffs' house, the facts materially changed, particularly in light of this Court's statement in our earlier decision that no witness had advanced any possible cause of the alleged damages other than ozone exposure. See *Brownlow*, unpub op at 6. Plaintiffs' new experts, however, merely acknowledged that there could be other possible factors that caused plaintiffs' damages; they could not say with reasonable certainty whether these other factors in fact caused the damages. David O. Peters, a residential builder who did not have experience with ozone, testified that various things can affect the condition of building materials, including age, ultraviolet light, and humidity. However, his testimony suggested that he had never seen these factors result in damages like those that he observed at plaintiffs' house. Additionally, although Siegel could not rule out with "perfect certainty" that age or ultraviolet rays damaged the carpet, the damage was certainly consistent with ozone exposure, and he stated that ozone was the likely cause. Again, the experts' opinions go to the weight of the evidence presented at trial, *Bouverette*, 245 Mich App at 400, and do not materially change the facts, *Ewing*, 252 Mich App at 164 n 5.[2]

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[2] In reaching our decision, we reject defendant's argument that the trial court determined plaintiffs' new experts were not in fact qualified to offer expert testimony as required by *Daubert v Merrell Dow Pharm,*

Second, the fact that the ozone generator was broken when it was tested six years after the incident did not materially change the facts. Rather, it goes to the weight of the evidence at trial. Simply because the generator was broken six years after the incident does not automatically mean that the machine was not operating properly when it was placed in plaintiffs' house. This is particularly true when there is no indication from the testimony of defendant's employee that the generator was not operating as intended when he placed it in plaintiffs' house, the ozone generator successfully removed the smoke odor, and plaintiffs presented evidence that the damage to their house was consistent with ozone exposure.

Inc, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The trial court never held a *Daubert* hearing to determine the qualifications of plaintiffs' experts, nor did defendant request a hearing. Rather, defendant filed a supplemental brief in support of its second motion for summary disposition, in which it asserted that the new experts were not qualified to provide expert testimony regarding causation. In ruling on the motion for summary disposition, the trial court concluded with respect to both Haase and Siegel—plaintiffs' only expert witnesses on the direct issue of causation—that they were "not qualified to offer expert testimony as to causation." However, this finding was not made pursuant to *Daubert*. Rather, when examining the trial court's reasoning, it is clear that the trial court primarily found that Haase and Siegel were not qualified to render an opinion regarding causation because they would need to speculate regarding the amount of ozone output from the machine and the level of ozone concentration in the house. As this Court previously ruled, however, plaintiffs do not need to establish the precise amount of ozone that was released into the house to establish the causal link between the ozone and the alleged damages. Further, to the extent that the trial court relied on other findings to conclude that Haase and Siegel were not qualified to offer expert testimony regarding causation, such as lack of experience with the type of ozone generator used in this case, those findings were inadequate to conclude that they were not qualified to render an expert opinion pursuant to *Daubert*. Rather, the trial court's findings went to the issue of the weight of their testimony and not their qualifications. *Bouverette*, 245 Mich App at 400.

Therefore, we conclude that the law-of-the-case doctrine applies to the issue of causation. The trial court erred by holding that defendant could seek summary disposition regarding causation after this Court previously ruled that there was sufficient evidence of causation to go to a jury. Accordingly, we reverse the trial court's grant of summary disposition in favor of defendant and dismissal of plaintiff Travis's MCPA claim.

Next, plaintiffs argue that the trial court abused its discretion by granting defendant's motion in limine to exclude damage to personal property. A trial court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). The abuse of discretion standard recognizes that if there is more than one reasonable and principled outcome, a trial court does not abuse its discretion if it selects one of those outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court determined that this Court's decision in the earlier appeal limited the MCPA claim to damage to real property only, and therefore it was bound by the law-of-the-case doctrine. Specifically, the trial court determined that this Court's use of the term "house" limited damages to "the structure itself" and implicitly excluded plaintiffs' personal-property-damage and quiet-enjoyment claims from being considered on remand.

The law-of-the-case doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The issue whether plaintiffs' claim for property damage under the MCPA was limited to real property was never

before this Court previously, and this Court did not implicitly or explicitly decide that issue.

In our opinion, this Court interchangeably used the terms "home" and "house" and only referred to damage as "property" damage. Additionally, this Court implicitly referred to damage that occurred to plaintiffs' personal property. For example, with regard to causation, we determined that there was sufficient evidence that ozone can damage building and *household* materials. *Brownlow*, unpub op at 5. As we noted in the first appeal, this evidence included plaintiffs' allegations that after the ozone machine had been running for the weekend, "a variety of exposed surfaces—including carpet, upholstery, wood, brick, and plastic—had been damaged. Among other things, finish had come off of wood, furniture changed color, bricks were crumbling, plastic had aged, and carpets were sticky." *Id*. at 5-6.

Contrary to the trial court's determination, there was no need for this Court to specify those types of property damages that may be recovered under the MCPA because that issue was not before this Court. Plaintiffs' claim under the MCPA involved *property* damage to their *house*, and plaintiffs' complaint made it clear that this included real and personal property—a fact acknowledged and not contested by defendant in the prior appeal. Finally, "house" is defined as "a building in which people live; residence," or "a household." *Random House Webster's College Dictionary* (2001). The definition in no way restricts the term to "the structure itself" or "realty," as the trial court defined it.

Therefore, the trial court abused its discretion by granting defendant's motion in limine to limit plaintiffs' MCPA claim to real property damages only. *Bartlett*, 149 Mich App at 418. Consequently, the trial

court erred by dismissing plaintiff Brownlow as a party for lack of standing because he did have standing to pursue a claim for personal-property damage.

Finally, plaintiffs argue that the trial court erred by declining to grant their countermotion for summary disposition regarding defendant's liability under the MCPA. We review de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing the motion, we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Plaintiffs argue summary disposition regarding liability was appropriate because defendant violated MCL 445.903 of the MCPA, which provides, in relevant part:

> (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> * * *
>
> (c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits,

> or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.
>
> * * *
>
> (e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
>
> * * *
>
> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.
>
> * * *
>
> (cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

The parties argue over whether the MCPA should be construed with reference to the common-law tort of fraud. Defendant relies on *Zine v Chrysler Corp*, 236 Mich App 261, 283; 600 NW2d 384 (1999), quoting *Mayhall v AH Pond Co, Inc*, 129 Mich App 178, 182-183; 341 NW2d 268 (1983), in which this Court stated "that it is proper to construe the provisions of the MCPA 'with reference to the common-law tort of fraud.' " Defendant argues that the MCPA subsections on which plaintiffs rely are fraud based, and therefore plaintiffs must plead and establish all the elements of fraud, specifically that defendant had actual knowledge of the misrepresentation or a reckless disregard of its truth.[3] However, defendant's argument erroneously

[3] To support this argument, defendant relies on unpublished cases, which are not precedentially binding on this Court. MCR 7.215(C)(1).

interprets the rule of law stated in *Zine*, and writes elements of fraud into the provisions of the MCPA that do not, and should not, exist, thereby ignoring the longstanding principles of statutory interpretation.

It is well settled that "[t]he primary goal of statutory interpretation is to give effect to the Legislature's intent." *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). The first step in determining the Legislature's intent is to review the language of the statute itself. *Id*. If the language is plain and unambiguous, then this Court is to apply the statute as written. *Id*. at 438-439. "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011); see also MCL 8.3a (stating that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language"). When the words of a statute are given their plain and ordinary meaning, they provide the most reliable evidence of legislative intent. *Krohn*, 490 Mich at 156-157 (citation omitted). Further, to give words their plain and ordinary meaning, this Court may use dictionary definitions. *Id*. at 156. However, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a.

The panel in *Zine* held that it is "proper" (but did not hold that it is required) to interpret the provisions of the MCPA with reference to the common-law tort of fraud (just as it is proper, but not required, to resort to a dictionary to determine the plain and ordinary meaning of nontechnical words in statutes). *Zine*, 236 Mich

App at 283; see also MCL 8.3a. The panel in *Zine* referred to the common-law tort of fraud to determine whether under MCL 445.903(1)(s) the failure to reveal a "material fact" must affect the transaction to violate the MCPA. *Id*. at 282-283. This is consistent with the longstanding principles of statutory interpretation, i.e., this Court must first examine the language of the statute to determine the Legislature's intent, and it must give words of the statute their plain and ordinary meaning. But when a statute contains a technical term that has acquired a peculiar meaning under the law, such as "material fact," this Court may look to the common law. See, e.g., *Ford Motor Co*, 475 Mich at 439 (referring to the common law to define the term "mutual mistake of fact," as used in the General Property Tax Act (GPTA), MCL 211.1 *et seq*.).

Quoting 2B Singer, Statutes and Statutory Construction (6th ed), § 50:03, p 152, the *Ford Motor Co* Court stated that when interpreting technical terms that have acquired a peculiar meaning in the law, " 'common-law meanings are assumed to apply even in statutes dealing with new and different subject matter, to the extent that they appear fitting and in the absence of evidence to indicate contrary meaning.' " *Ford Motor Co*, 475 Mich at 439. In *Zine*, it was fitting for the panel to consult the common-law tort of fraud to define "material fact" because the MCPA is in many ways derivative of the common-law tort of fraud. However, the MCPA was enacted to eliminate an essential element of the common-law tort of fraud, i.e., proof of the intent of the merchant. Bladen, *How and Why the Consumer Protection Act Came To Be* (2005), pp 9-10, available at <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/3b217bd2-fb65-46ff-86co-ea1a7b303b13/UploadedImages/pdfs/HowWhy.pdf> (accessed April 1,

2016) [https://perma.cc/DZ9S-YQ8C].[4] Its purpose was to provide consumers with an effective remedy when, for example, a merchant's conduct was unfair or deceptive but did not amount to fraud. *Id*. Although the MCPA eliminated the intent element of fraud, many of its provisions still contain fraud-based language, such as "[u]sing deceptive representations," MCL 445.903(1)(b), "[m]aking false or misleading statements of fact," MCL 445.903(1)(i), and "[f]ailing to reveal a material fact," MCL 445.903(1)(s). Indeed, the elements of actionable fraud include making a material representation that was false. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012).

Although Edwin M. Bladen, an author of the MCPA, has stated that the authors of the act did not intend for it to be construed with reference to the common-law tort of fraud, *How and Why the Consumer Protection Act Came To Be*, pp 9-10, this statement was made in discussing the authors' aim to eliminate the element of proof of intent. There is nothing in the MCPA that suggests the Legislature intended to alter the common-law meanings of the fraud-based language used in the MCPA. See *Ford Motor Co*, 475 Mich at 439 (noting that absent a clear legislative intent in the GPTA to alter the meaning of the common-law term "mutual mistake of fact," the Court could refer to the common law to define the term as used in the GPTA). Indeed, "it is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation." *Id*. at 439-440 (quotation marks and citation omitted). Therefore, consistently with our holding in *Zine* and longstanding principles of statutory interpretation, we may refer to the common-law tort of fraud

[4] Edwin M. Bladen was the principal author of the MCPA. *How and Why the Consumer Protection Act Came To Be*, p 1 n 2.

for guidance when interpreting ambiguous provisions of the MCPA, but only if necessary, i.e., when the act contains a technical term that has acquired a peculiar meaning under the law.

Contrary to defendant's argument, the panel in *Zine* did not hold or imply that a plaintiff must plead and prove all elements of fraud, particularly intent, when asserting a claim under the MCPA, even if certain provisions of the act contain fraud-based language; there are no published cases from this Court or our Supreme Court that state this proposition. By asserting that plaintiffs must show that defendant had actual knowledge of the misrepresentation or a reckless disregard of its truth, defendant ignores the unambiguous language of the MCPA and undermines the Legislature's intent to eliminate the intent element of fraud. Simply because certain subsections of the MCPA contain fraud-based language does not mean that every prohibited practice enumerated in the MCPA requires proof of intent. When the Legislature intended to require a plaintiff to prove the defendant's intent, it specifically so provided in the statute. See, e.g., MCL 445.903(1)(g) ("Advertising or representing goods or services *with intent* not to dispose of those goods or services as advertised or represented.") (emphasis added); MCL 445.903(1)(h) ("Advertising goods or services *with intent* not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity in immediate conjunction with the advertised goods or services.") (emphasis added). This Court has made clear that "the MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce, [and] it must be liberally construed to achieve its intended goals." *Price v Long Realty, Inc*, 199 Mich App 461, 471; 502 NW2d 337 (1993). Requiring a plaintiff to prove the intent ele-

ment of fraud when it is not provided for in the statute would clearly inhibit the intended goals of the MCPA and would be contrary to the plain language of the statute.[5]

The plain, unambiguous language of the prohibited practices at issue in this case, MCL 445.903(1)(c), (e), (s), and (cc), does not require plaintiffs to prove that defendant made a statement knowing it was false, that defendant acted recklessly without any knowledge of the statement's truth, or that defendant knowingly or recklessly failed to reveal a material fact. With regard to the prohibited practices at issue in this case, we conclude there is a genuine issue of material fact regarding defendant's liability under the MCPA and, therefore, plaintiffs were also not entitled to summary disposition with regard to liability.

First, regarding MCL 445.903(1)(c), plaintiffs argue that defendant violated the MCPA by representing that the ozone generator would remove the smoke odor when, in actuality, it would not. In support of their argument, plaintiffs cite a public information document issued by the United States Environmental Protection Agency, which states that ozone is generally ineffective at controlling indoor air pollution. Although the document cites written sources from the late 1990s, there is no indication of when this document was issued. The document states that while vendors of ozone generators have made statements that lead the public to believe the machines are safe and effective at

[5] Notably, the Michigan Model Civil Jury Instructions state that a plaintiff must only prove that "(1) [d]efendant engaged in trade or commerce; (2) [d]efendant committed one or more of the prohibited methods, acts, or practices alleged by plaintiff [as stated in MCL 445.903]; and (3) [p]laintiff suffered a loss as a result of defendant's violation of the act." M Civ JI 113.09. There is no element that requires proof of actual knowledge or reckless disregard for the truth.

controlling indoor air pollution, health professionals have refuted these claims "for centuries." Nevertheless, Siegel testified during his deposition that an ozone generator is capable of removing odors by reacting with components of the odors and chemically converting them to something that is less odorous. Brian McCall, the owner of McCall Enterprises, also testified that he operates an ozone generator in his building a couple times a month, and he did not state that it was ineffective at removing indoor air pollution. Accordingly, there is a genuine issue of material fact whether the ozone generator was capable of removing the smoke odor.

Next, regarding MCL 445.903(1)(e), plaintiffs argue that defendant violated the MCPA by representing that use of the ozone generator was the standard of the industry, even though the EPA document indicates that it is not. Plaintiffs cite defense counsel's statements at the summary disposition hearing in which he pointed out that plaintiffs have not provided industry experts who can define the remediation industry standard regarding the use of ozone generators. Plaintiffs do not cite specific representations made by defendant that the ozone generator was the industry standard. Accordingly, plaintiffs have not shown how summary disposition in their favor was appropriate under MCL 445.903(1)(e).

Next, plaintiffs argue that defendant violated MCL 445.903(1)(s) by failing to reveal a material fact—that ozone generators are destructive and would affect the integrity of the house—that could not have been reasonably known to the consumer and that tends to mislead the consumer. The literature and expert opinions provided by plaintiffs certainly support the fact that, at certain levels, ozone can damage household

materials, and defendant does not dispute this. In fact, McCall testified that he was aware that "very high levels of ozone" could react with natural rubber, but he was unaware what that level would be. Plaintiff Travis, however, testified that in conducting a simple Google search, she learned that ozone could cause damage to household products. This creates a genuine issue of material fact with regard to whether the fact that ozone could damage household materials is a fact that could not reasonably be known by the consumer.

Finally, plaintiffs argue that defendant violated MCL 445.903(1)(cc) in that it positively represented that the machine would eliminate the smoke odor but failed to disclose that the machine could also cause collateral property damage. However, there is a genuine issue of material fact whether defendant positively represented that the machine would in fact eliminate the smoke odor. The statements plaintiffs cite to support their claim on appeal were actually made to plaintiff Travis by State Farm representatives, who indicated they would contact defendant about placing an ozone generator in the house to try to eliminate the smoke odor. Although plaintiff Travis testified that it was her understanding the ozone generator would get rid of the smoke odor, plaintiffs do not point to any statements made directly by defendant that the ozone generator would actually be successful in removing the smoke odor. In fact, plaintiff Brownlow testified that defendant's employee told him that this was the first time defendant had used an ozone generator in a residential house. Accordingly, plaintiffs have not shown how summary disposition in their favor was appropriate. There is a genuine issue of material fact regarding defendant's liability under the MCPA, which is for the jury to decide.

Finally, our holdings that the trial court erred by granting defendant's second motion for summary disposition regarding causation and by dismissing plaintiff Brownlow as a party for lack of standing necessitate reversal of the case evaluation sanctions against both plaintiffs; therefore, we decline to address the issues raised by plaintiffs regarding the case evaluation sanctions.

In Docket No. 325843, we reverse the trial court's order granting summary disposition in favor of defendant and against plaintiff Travis. We also reverse the trial court's order dismissing plaintiff Brownlow as a party, as well as the order awarding defendant case evaluation sanctions against plaintiff Brownlow. In Docket No. 326903, we reverse the trial court's orders granting case evaluation sanctions against plaintiff Travis. We remand the matter for proceedings consistent with our opinion, and we direct that on remand the matter be assigned to a different circuit court judge.

Plaintiffs, having prevailed in full, may tax costs pursuant to MCR 7.219.

GLEICHER, P.J., and MURPHY and OWENS, JJ., concurred.

PEOPLE v HENRY

Docket No. 325144. Submitted April 12, 2016, at Detroit. Decided April 19, 2016, at 9:10 a.m. Leave to appeal denied 500 Mich 931.

Travis J. Henry was convicted of armed robbery by a Genesee Circuit Court jury. Defendant robbed a Halo Burger restaurant in March 2013. Two witnesses, both employees of Halo Burger, testified that defendant wore a blue hoodie and had his hands in his pockets, which were "bulging out." Both witnesses identified defendant in surveillance footage and in a photo lineup. Another witness worked at a nearby Shell gas station and testified that defendant had been at the station not long before the robbery. Defendant was arrested shortly after the robbery, and the police found a blue hoodie, a screwdriver, and currency matching the denominations of some of the money taken from Halo Burger (six $5 bills and thirty-five $1 bills). Following defendant's conviction, the court, Geoffrey L. Neithercut, J., sentenced defendant as a fourth-offense habitual offender to 20 to 40 years of imprisonment. Defendant appealed.

The Court of Appeals *held*:

1. A challenge to the sufficiency of the evidence underlying a conviction requires that the evidence be viewed in the light most favorable to the prosecution and that the Court of Appeals determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. In this case, defendant argued that nothing supported a reasonable belief that he possessed a dangerous weapon. Defendant noted that there was no evidence that he possessed a weapon and that he did not verbally indicate he was armed with a weapon. Under MCL 750.529, there may be sufficient evidence to support an armed-robbery conviction when there is evidence that (1) the defendant actually possessed a dangerous weapon, (2) the defendant possessed some article that would lead a person to reasonably believe that the article was a dangerous weapon, (3) the defendant verbally indicated that he possessed a dangerous weapon, or (4) the defendant otherwise represented that he possessed a dangerous weapon. In this case, the fact that defendant kept his hands in his pockets and bulged the pockets out farther than would be

normal caused the employees of the Halo Burger to believe he might be armed. Although defendant did not actually possess a dangerous weapon or an article that would lead a person to reasonably believe it was a weapon and did not orally represent that he possessed a dangerous weapon, defendant otherwise represented that he was in possession of a dangerous weapon. Thus, there was sufficient evidence to support the armed-robbery conviction.

2. Although evidence of other crimes, wrongs, or acts is inadmissible to show a defendant's character and his or her action in conformity therewith, the evidence may be admissible for purposes other than showing a defendant's propensity toward criminal conduct. Specifically, under MRE 404(b) evidence of a defendant's other acts may be admissible when it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. In this case, the trial court permitted the prosecution to introduce evidence of defendant's robbery of a 7-Eleven store in 2006 to show that defendant had in the past robbed a retail establishment by giving the 7-Eleven employee the impression that defendant possessed a gun and would shoot the employee if not given the money he demanded. Evidence of the 2006 robbery was highly relevant and not offered for the sole purpose of proving that defendant was a bad person. The evidence was presented because it demonstrated that defendant's behavior was aimed at causing his victims to fear that he was armed with a dangerous weapon. Although the evidence was undoubtedly prejudicial, its potential for unfair prejudice did not substantially outweigh its probative value. Therefore, it was not an abuse of discretion for the trial court to allow the admission of evidence of defendant's 2006 robbery.

3. Irrelevant evidence is generally inadmissible. In this case, defendant's presence at a Shell gas station minutes before the Halo Burger robbery was relevant because it showed that defendant was in the area at the time of the robbery. Therefore, the trial court properly permitted admission of the evidence. However, the trial court improperly admitted evidence that defendant had taken his girlfriend's sister's car without permission and that he was driving that car at the time of his arrest. Defendant was not on trial for driving the car without consent, and there was no indication how defendant's use of the car was related to the conduct for which defendant was on trial. Although the trial court erred by permitting the admission of this evidence, the error was harmless in light of the overwhelming evidence that defendant committed the robbery.

4. The prosecutor's questions concerning defendant's failure to request fingerprint analysis or to otherwise present any exculpatory evidence impermissibly shifted the burden of proof to defendant. The prosecution has the burden of proving beyond a reasonable doubt that the defendant committed the crime with which he or she is charged. In this case, the trial court halted the prosecution's line of questioning that tended to shift the burden of proof to defendant, and the court properly instructed the jury that the prosecution bore the burden of proof and that defendant need not prove anything. Jurors are presumed to follow their instructions. Therefore, any error was harmless.

Affirmed.

CRIMINAL LAW — ARMED ROBBERY — EVIDENCE OF A DANGEROUS WEAPON — DEFENDANT OTHERWISE REPRESENTED POSSESSION OF A DANGEROUS WEAPON.

Under MCL 750.529, a defendant is guilty of armed robbery if he or she engages in conduct prohibited under MCL 750.530 and (1) actually possesses a dangerous weapon, or (2) possesses some article that would lead a person to reasonably believe that the article is a dangerous weapon, or (3) orally represents that he or she possesses a dangerous weapon, or (4) otherwise represents that he or she possesses a dangerous weapon; there is no requirement that a victim had a reasonable belief that the defendant was armed with a dangerous weapon for the defendant to be convicted of armed robbery under the fourth scenario.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner* and *Joseph F. Sawka*, Assistant Prosecuting Attorneys, for the people.

Michael A. Faraone PC (by *Michael A. Faraone*) for defendant.

Before: BECKERING, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM. Defendant appeals as of right from his jury trial conviction of armed robbery, MCL 750.529, for which he was sentenced as a fourth-offense ha-

bitual offender, MCL 769.12, to 240 to 480 months' imprisonment. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

On Sunday, March 17, 2013, defendant entered a Halo Burger in Genesee County where Jennifer Thomas was working as a shift manager and Elizabeth Murphy was working as a crew member. At approximately 11:10 a.m., defendant approached Thomas at the counter and demanded all the money that was in the till. Thomas asked defendant whether he was "f***ing serious," and defendant said, "Yes, I am, don't move, don't push a button, give me all the money in your till." Thomas observed that defendant had strawberry blond/reddish facial hair. He was wearing a dark-blue zip-up hooded sweatshirt (hoodie) that had an insignia on the left side. Defendant's hands were in his pockets, but the pockets, as she described them, "bulged forward." Thomas demonstrated for the jury how defendant held his hands in his pockets. She was not sure whether defendant actually had a weapon, but she did not take any chances. Thomas turned over the contents of the register: three $10 bills, six $5 bills, and thirty-five $1 bills.

Murphy also indicated that she observed defendant. He had strawberry-blond facial hair and had his hands in the pockets of his hoodie "bulging forward." Like Thomas, Murphy testified that she assumed defendant had a weapon. She activated the alarm button after defendant left.

The prosecutor presented a witness who placed defendant in the area of the Halo Burger near the time of the robbery. Kuldip Singh testified that he worked at the Shell gas station in Burton and that an individual

matching defendant's description was in his store at approximately 10:45 a.m. that day. The Shell station maintained surveillance cameras, and Singh cooperated in finding an image of the individual, which was later shown to Thomas and Murphy at the Halo Burger. Both Thomas and Murphy separately identified the man in the surveillance photo as the robber. They both also separately (and immediately) chose defendant's image from a photo array shown to them several days later.

An officer on patrol heard about the robbery from dispatch. The alert was accompanied by a description of the robber. The officer proceeded to a common drug location because in his experience, robbers tended to use the proceeds of their crimes for drugs. The officer pulled up near a maroon Grand Prix and noted that the driver's appearance matched the description of the robber. He pulled defendant over, and while defendant was looking for his license, insurance, and registration, the officer observed "quite a bit of money on the front floorboard under the driver's feet . . . up towards the center console." There was also a blue hooded sweatshirt in the back seat. Defendant was arrested. Defendant told officers that he lived in Fenton and that he was coming from his girlfriend's house in Burton and going to his friend's house around the corner. Officers found $75 under the front driver's seat. There was one $10 bill, six $5 bills, and thirty-five $1 bills. There was a screwdriver under the hooded sweatshirt in the middle of the backseat. An officer returned to Halo Burger, where Thomas confirmed that the hoodie taken from the vehicle defendant was driving was the same hoodie the robber had been wearing.

The jury was instructed on armed robbery, unarmed robbery, and larceny from a person. It convicted defen-

dant of armed robbery. Defendant was sentenced as a fourth-offense habitual offender to 240 to 480 months' imprisonment. He appeals as of right.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his conviction of armed robbery because there was no evidence that defendant possessed a weapon or verbally indicated that he had a weapon. Defendant argues that the armed-robbery statute requires that a person have a reasonable belief that the defendant was armed with a dangerous weapon. We disagree with defendant's interpretation.

"We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "Taking the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id*. at 428.

"Statutory interpretation is a question of law that we review de novo." *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003). "[The Court's] goal in interpreting a statute is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we

enforce the statute as written." *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013) (quotation marks omitted).

MCL 750.529 provides, in pertinent part:

> A person who engages in conduct proscribed under section 530[1] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

Therefore, a prosecutor must prove the following to obtain an armed robbery conviction:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he

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[1] MCL 750.530 provides:

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

> or she was in possession of a dangerous weapon. [*People v Gibbs*, 299 Mich App 473, 490-491; 830 NW2d 821 (2013), quoting *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

Defendant argues that MCL 750.529 requires that the victim have a reasonable belief that a defendant was armed with a dangerous weapon. In so doing, defendant ignores the statute's plain language. The clause "possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon" requires that the defendant either (1) actually possess a dangerous weapon, or (2) possess some article that would lead a person to reasonably believe the article is a dangerous weapon. But the following clause in the statute—"*or* who represents orally or otherwise that he or she is in possession of a dangerous weapon"—does not contain the same "reasonable belief" requirement. "The word 'or' is a disjunctive term [and] indicates a choice between two alternatives." *Michigan v McQueen*, 293 Mich App 644, 671; 811 NW2d 513 (2011) (citation omitted). The second clause provides that a defendant may be guilty of armed robbery if he either (1) orally represents that he has a dangerous weapon, or (2) "otherwise represents" that he possesses a dangerous weapon. For these two alternatives, the victim's fear or belief is irrelevant. Thus, a defendant is guilty of armed robbery if he engages in conduct under MCL 750.530 and (1) he actually possesses a dangerous weapon, *or* (2) he possesses some article that would lead a person to reasonably believe that the article is a dangerous weapon, *or* (3) he orally represents that he possesses a dangerous weapon, *or* (4) he otherwise represents that he possesses a dangerous weapon.

Defendant cites *People v Saenz*, 411 Mich 454, 455; 307 NW2d 675 (1981), *People v Jolly*, 442 Mich 458; 502 NW2d 177 (1993), and *People v Johnson*, 206 Mich App 122; 520 NW2d 672 (1994), but these cases all involved the old armed-robbery statute, which provided, in part:

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

The 2004 amendment changed the statute significantly. The old statute required that the robber either be armed with a dangerous weapon or possess some article that would lead the person assaulted to reasonably believe it to be a dangerous weapon. The newer version provides the four alternatives previously discussed. The fourth scenario under the amended statute is at play in this case because neither Thomas nor Murphy saw defendant with a weapon and defendant made no oral representation that he possessed a weapon. Defendant's analysis on this issue is flawed to the extent that he focuses on whether Thomas or Murphy had a reasonable belief that defendant was armed. Instead, the focus must be on whether defendant otherwise represented that he was in possession of a dangerous weapon.

There was sufficient evidence to support defendant's armed-robbery conviction because defendant otherwise represented that he was armed with a dangerous weapon. Thomas testified that defendant's "hands were in his pocket [and it] kind of bulged forward." Thomas "wasn't sure what was in those pockets. . . . I didn't know if he had a weapon." She acknowledged

that she did not tell the 911 operator that defendant had indicated having a weapon because she never saw a weapon and defendant never actually said he had a weapon. Instead, Thomas told the operator that "he had his hands in his shirt and I wasn't taking any chances." She also told the officers who responded to the scene that she "was not taking any chances. The hand motion in the front pockets was enough for me to not know." Thomas further acknowledged that while it would not be unusual for an individual to have his hands in the front pockets of his hoodie, defendant's hands "were in but bulged out further than normally would be." Thomas actually put on the hoodie and demonstrated defendant's posture for the jury.

Murphy also believed that defendant was armed. Like Thomas, Murphy was able to demonstrate defendant's posture for the jury. Murphy testified, "I'm not sure what it is, but I'm thinking a weapon," and she further testified that the robber's hands were clearly "bulging forward." She added that it was not unusual to have one's hands in the pockets of a hoodie but "[u]sually, you know, you'll pull your pockets facing down in your hands, not up to your, you know, to your stomach area. Usually you just put your hands in your pockets and they just lay flat . . . ."

Therefore, although no weapon was displayed and defendant did not orally represent that he was armed, he "otherwise represented" that he was armed by placing his hands in his pockets and pushing them forward. There was sufficient evidence to support defendant's armed-robbery conviction.

B. EVIDENCE OF DEFENDANT'S 2006 ROBBERY

Defendant argues that his 2006 armed robbery of a 7-Eleven store was irrelevant to the 2013 Halo Burger

incident and that evidence of the previous crime greatly prejudiced his case. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to admit other-acts evidence. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). A trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Generally, character evidence cannot be used to show that a defendant acted in conformity therewith because there is a danger that a defendant will be convicted solely on his history of misconduct rather than on his conduct in a particular case. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b) therefore provides:

> 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.

"MRE 404(b) does not prohibit all other-acts evidence that may give rise to an inference about the defendant's character, but only that which is relevant *solely* to the defendant's character or criminal propensity." *People v Jackson*, 498 Mich 246, 276; 869 NW2d 253 (2015) (quotation marks and citation omitted). Generally, MRE 404(b) other-acts evidence is admissible if (1) it is offered for a proper purpose, (2) it is relevant, and (3) its probative value is not substan-

tially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

A proper purpose is one focused on something other than establishing the defendant's character to show his propensity to commit the offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001), citing MRE 401. Under this broad definition, evidence that is useful in shedding light on *any* material point is admissible. *Aldrich*, 246 Mich App at 114 (emphasis added). However, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The prosecution sought to admit evidence of a 2006 incident at a 7-Eleven in which defendant allegedly indicated that he had a gun and that he would shoot the clerk if she did not hand over the money he demanded. The prosecutor argued that the 7-Eleven incident was relevant to defendant's intent "to give the impression that he was armed." It was also evidence of his system in robbing retail establishments. The prosecution also believed that the incident bore a "signature" quality that made it relevant to identity. The trial court ruled, "The prosecutor can use the 404 information about the previous robbery attempt to the extent

where they want to show that [defendant] has an intent to threaten with a weapon. The identity information will not be used."

At trial, Rachel Ann Springer testified that on August 8, 2006, defendant came into the 7-Eleven and told Springer that he wanted all the money in the cash register. Springer asked him if he was serious because she could not believe she was being robbed. She did not see a weapon, but defendant told her, "I will shoot you."

The trial court did not abuse its discretion when it permitted the prosecution to present evidence of the 7-Eleven robbery that took place in 2006. The evidence was offered for a proper purpose and was highly relevant. It was not offered for the purpose of showing that defendant was a bad person. Instead, it was offered to give context to the crime itself. Defendant's behavior demonstrated an intent to place his victims in fear that he was armed with a dangerous weapon. While the evidence was undoubtedly prejudicial, it cannot be said that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, especially in light of defendant's claim that he was not armed and that both Thomas and Murphy were unreasonable in their fear that defendant was armed.

C. OTHER "IRRELEVANT" EVIDENCE

Defendant argues that the trial court erred when it permitted the prosecution to present evidence that defendant was at a Shell gas station just minutes before the Halo Burger robbery because the jury would understand that defendant had attempted to rob the Shell station. Defendant also argues that the trial court erred by allowing the prosecutor to question defendant's former girlfriend about whether defen-

dant's mother had asked her to lie at trial. We hold that the trial court did not abuse its discretion when it permitted the prosecution to present evidence that defendant was at the Shell station, but we agree with defendant that the trial court erred by permitting the prosecutor to question defendant's girlfriend about his mother's alleged behavior. Nevertheless, we find the error harmless in light of the overwhelming evidence of defendant's guilt.

> The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion. However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. [*People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999) (citations omitted).]

In general, "[a]ll relevant evidence is admissible" while "[e]vidence which is not relevant is not admissible." MRE 402. As previously stated, "[e]vidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." *Aldrich*, 246 Mich App at 114. Under this broad definition, evidence that is useful in shedding light on *any* material point is admissible. *Id*. at 114. In determining admissibility, "[t]he relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material. In order to be material, the fact must be within the range of litigated matters in controversy." *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008) (quotation

marks and citations omitted). "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011) (quotation marks and citations omitted).

However, even if a proponent of evidence can demonstrate its relevance, the evidence may still be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice. *Yost*, 278 Mich App at 407. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). "Assessing probative value against prejudicial effect requires a balancing of several factors, including . . . how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects." *Id*.

1. SHELL GAS STATION

Before trial, the prosecutor sought to introduce evidence that just minutes before the Halo Burger robbery, defendant attempted to rob a nearby Shell gas station. During that incident, defendant allegedly wore a hoodie, was holding what appeared to be a knife, and demanded that the proprietor hand over money. When the proprietor reached under the counter, defendant fled. A screwdriver was found nearby. The prosecutor offered the Shell station incident either as res gestae or MRE 404(b) evidence to show evidence of plan and

scheme and pattern of behavior, as well as proof of identity. The trial court ruled:

> I don't like this motion. I see a difficulty in it. The only thing that I know is is that in the Shell station incident, some guy whose image does not show up well on the video, walks in with an object that could be a knife and tries to rob the station and then leaves. Eight and a half minutes later, some guy shows up at the Halo Burger with no weapon, acts like he has a weapon. And I don't know if they're not entirely different crimes, entirely different people. I don't necessarily see a common plan just because the clothing is similar. In one case, we know there's something that resembles a weapon that's waved around, and the other case there is not. I think talk about the earlier events is unfairly prejudicial and it will not be allowed.

At a later hearing, the prosecutor asked to introduce the Shell station incident as proof that defendant was in the area of the Halo Burger, without making any reference to the attempted robbery. The trial court indicated that it did not "mind that" and that the prosecution "may say he was seen at the Shell station. They're not going to talk about what his activities were. They're not going to talk about screwdrivers found in a path."

At a later hearing, the prosecutor advised the trial court that criminal charges had been filed against defendant for the Shell station incident and requested that the two cases be tried together. The trial court indicated that it would "not try them together. The Court will deny the motion for consolidation . . . I think they need to be tried separately because they're different crimes, different victims, and different locations . . . ."

At trial, Singh testified that an individual matching defendant's description was in his store at approximately 10:45 a.m. on the day of the Halo Burger

robbery. The Shell station maintained surveillance cameras and Singh cooperated in finding an image of the individual, which was later shown to Thomas and Murphy at the Halo Burger. There was a seven-mile distance between the Shell station and Halo Burger. The surveillance video from Shell was from approximately 10:45 a.m., and the robbery at Halo Burger occurred at 11:10 a.m.

Contrary to defendant's assertions, the evidence was highly relevant. It not only placed defendant in the vicinity of the Halo Burger at the time of the robbery, but the Shell station incident resulted in surveillance images that allowed the Halo Burger victims (Thomas and Murphy) to identify the robber. It cannot be said that the probative value of the evidence was outweighed by the danger of unfair prejudice, given the limited use of the evidence.

2. KEEN'S TESTIMONY

At trial, Stephanie Keen testified that she and defendant had been in a romantic relationship for a few weeks before the robbery. She spent the night with him at his mother's house the night before the robbery. When she woke up the next morning at 10:00 a.m., defendant was gone. Also missing was Keen's sister's car that Keen had been using while her sister was in Hawaii. Defendant was arrested while driving Keen's sister's car. Keen identified the blue hoodie as the one that defendant was wearing the night before the robbery. The following exchange took place during Keen's direct examination:

> *Q*. Okay. Um, can you tell us whether or not at some point in time his mother called you and asked you to testify to something?

* * *

A. Yes.

Q. She did, okay. And what did his mother ask you to testify to?

Defense counsel objected, arguing that it was hearsay evidence and was irrelevant because "[i]t's what his *mother* may or may not have done." (Emphasis added.) Not addressing the relevancy issue, the trial court ruled, "It's not being offered for the truth of the matter asserted. We can go ahead with it." The exchange continued:

Q. What did his mother ask you to do?

A. To say that I allowed him to use the car.

Q. Say that what?

A. To say I allowed him to use the car.

Q. Was that true?

A. No.

Q. Approximately when was that?

A. It was sometime back in January.

Q. Of this year?

A. Yes.

The evidence was totally irrelevant. Defendant was not on trial for stealing the vehicle or unlawfully driving it away. The fact that he was arrested in Keen's sister's car was not in dispute at trial. Nor was the testimony relevant to Keen's credibility to show her "motivation not to lie," as the prosecution argues. It is true that "[i]f a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact," *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995), but it is unclear how whether

defendant had permission to drive the car touched on anything other than defendant's mother's potential wrongdoing.

Nevertheless, "[a] preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotation marks and citation omitted). "The reviewing court must examine the nature of the error and assess its effect in light of the weight and strength of the untainted evidence." *Phillips*, 469 Mich at 397 (quotation marks and citations omitted). Given the overwhelming evidence that defendant committed the armed robbery, it cannot be said that this bit of evidence was outcome determinative. Both Thomas and Murphy positively identified defendant as the robber. He was driving a car that contained a hoodie matching the description Thomas had given. There were six $5 bills and thirty-five $1 bills, among other currency, that matched the denominations taken from Halo Burger. Because of the overwhelming evidence against defendant, any error in admitting the evidence was harmless.

D. DEFENDANT'S STANDARD 4 BRIEF

Defendant filed a Standard 4 brief under Administrative Order No. 2004-6. However, defendant's brief is bereft of citations to the record or any analysis. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "The appellant himself must

first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted).

Nevertheless, we have thoroughly reviewed each of the issues raised. Save one, there is no merit to any of them. The one issue that deserves at least a brief discussion is defendant's claim that the prosecutor impermissibly shifted the burden of proof to defendant. We find some merit to this claim, as demonstrated by the following exchange between the prosecutor and the lead detective:

> *Q*. Okay, now we've heard about [defense counsel's] position that the prosecution has the burden of proof and . . . it's totally accurate, right?
>
> *A*. Yes.
>
> *Q*. Okay. Beyond a doubt that's fair and reasonable, right?
>
> *A*. Correct.
>
> *Q*. Okay. But um, in your experience as a lawyer (sic), defense attorneys bring forth evidence that favors their client when they have it?
>
> *A*. Absolutely.
>
> *Q*. Now in May of 2013, who represented Mr. Henry?
>
> *A*. Mr. Scott.
>
> *Q*. And at any time between that date and April 1st, 2014, okay, 12½ months, was there any request for fingerprint analysis?
>
> *A*. No.
>
> *Mr. Scott* [defense counsel]: Judge, may we approach again?
>
> (At 12:41 p.m., Bench conference held)
>
> *Mr. Scott*: He's shifting the burden. I'm sorry, he's shifting the burden, Judge.

Mr. Whitesman [prosecutor]: I did not.

Mr. Scott: I don't have to request anything.

Mr. Whitesman: He doesn't.

Mr. Scott: The one thing that I had to request is, is I got some exculpatory evidence.

Mr. Whitesman: He doesn't.

The Court: I'm not going to let you go any further with this.

"A prosecutor may not imply . . . that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). The prosecution appeared to attempt to shift the burden of proof by intimating that defendant could have requested the collection of possible exculpatory evidence. However, while the attempt to shift the burden of proof was improper, it does not appear that defendant was denied a fair trial. The trial court immediately put a stop to that line of questioning. Additionally, following closing argument, the trial court instructed the jury that defendant was presumed innocent and that defendant was not required to prove his innocence: "'The prosecutor has the burden of proving to you beyond a reasonable doubt each and every one of those elements with evidence beyond a reasonable doubt. Of course the Defendant doesn't have to prove a thing because you still presume that he's innocent." Because jurors are presumed to follow their instructions, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), any error was harmless.

Affirmed.

BECKERING, P.J., and OWENS and K. F. KELLY, JJ., concurred.

PEOPLE v REA

Docket No. 324728. Submitted February 9, 2016, at Detroit. Decided April 19, 2016, at 9:15 a.m. Leave to appeal sought.

Gino R. Rea was bound over for trial in the Oakland Circuit Court on a charge of operating a vehicle while intoxicated, MCL 257.625(1), which prohibits a person from operating a vehicle on a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, if the person is operating the vehicle while intoxicated. Defendant had been arrested after he backed his car out of his detached garage on his private driveway, stopped it while the car was still in his side yard or backyard, and drove it back into the garage. He moved to quash the information. The court, Colleen A. O'Brien, J., granted the motion, ruling that the upper portion of defendant's private driveway did not constitute an area generally accessible to motor vehicles. The prosecution appealed.

The Court of Appeals *held*:

Defendant did not operate his vehicle in an area generally accessible to motor vehicles. Under MCL 257.44, a residential driveway is private property. Even assuming that the bottom (or exit) of one's private driveway qualifies as a place open to the general public or a place generally accessible to motor vehicles, the area of defendant's driveway in which he operated his car was not. The general public is not generally permitted to access the portion of a private driveway immediately next to a private residence, which is a place accessible to a small subset of the universe of motor vehicles: those belonging to the homeowner and those using the driveway with permission. Defendant consumed alcohol and drove his car, but only in this private area. The use of the term "generally" in MCL 257.625(1) indicates that the Legislature meant to limit the reach of the statute, and the circuit court properly quashed the information.

Affirmed.

JANSEN, J., dissenting, believed that it was the role of the trier of fact to determine under the particular facts and circumstances of this case whether the upper portion of defendant's driveway

constituted an area that was generally accessible to motor vehicles. The parties agreed regarding what occurred during the incident but contested whether a private driveway is an area generally accessible to motor vehicles as a matter of law under the plain language of MCL 257.625(1) and whether the portion of defendant's driveway on which he operated his vehicle while intoxicated fit that description. No evidence was presented at the preliminary examination regarding the frequency with which other vehicles accessed defendant's driveway. M Crim JI 15.2, the jury instruction concerning the elements of operating while intoxicated, indicates that it is the role of the trier of fact to determine whether a defendant operated a vehicle on an area generally accessible to motor vehicles because that instruction charges the jury with the task of making this determination. Accordingly, Judge JANSEN concluded that the circuit court improperly quashed the information and would have reversed and remanded the case for reinstatement of the charge against defendant and further proceedings.

CRIMINAL LAW — MOTOR VEHICLES — OPERATING WHILE INTOXICATED — PLACES OPEN TO THE GENERAL PUBLIC OR GENERALLY ACCESSIBLE TO MOTOR VEHICLES — PRIVATE DRIVEWAYS.

MCL 257.625(1), part of the Michigan Vehicle Code, MCL 257.1 *et seq*., prohibits a person from operating a vehicle on a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, if the person is operating the vehicle while intoxicated; the portion of a private driveway immediately next to a private residence, however, does not qualify as a place open to the general public or a place generally accessible to motor vehicles for purposes of a charge of violating the statute.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

Timothy Barkovic for defendant.

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

GLEICHER, P.J. The prosecution appeals the circuit court's order dismissing a charge of operating a vehicle while intoxicated, MCL 257.625(1), levied against defendant. Because defendant was not operating his vehicle in an area generally accessible to motor vehicles, we affirm.

I. BACKGROUND

Late one spring night, defendant had a lot to drink and withdrew to his Cadillac sedan to listen to loud music. A neighbor objected to the noise and called the police. Two officers responded. They found defendant seated in his car, the driver's door ajar. The vehicle was parked deep in defendant's driveway, next to his house. An officer instructed defendant to turn down the music. The neighbor complained a second time, and one of the officers returned to the scene. The officer heard no music and could not see the Cadillac.

When the third noise dispatch issued, Northville police officer Ken Delano parked on the street near defendant's home and began walking up defendant's driveway. The door to the detached garage opened, and defendant's vehicle backed out for "about 25 feet" before stopping. At that point the car was still in defendant's side- or backyard. As noted by the officer:

> *Q*. . . . So at all times he was either in his side yard or in his own backyard, correct?
>
> *A*. Yes, sir.

Defendant then pulled the car back into the garage. He was arrested as he walked toward his house.

Here are two photographs depicting defendant's driveway and its relationship to his house:

At no time did defendant's car cross "the front of [the] house," Officer Delano admitted.

The prosecution charged defendant with operating a vehicle while intoxicated, MCL 257.625(1). The statute provides in relevant part:

> A person . . . shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, . . . if the person is operating while intoxicated.

The circuit court granted defendant's motion to quash the information, ruling that "[t]he upper portion of Defendant's private residential driveway" does not constitute an area "generally accessible to motor vehicles."

II. ANALYSIS

We review for an abuse of discretion a circuit court's decision to quash a criminal information and review de novo any underlying questions of statutory interpretation. *People v Lemons*, 299 Mich App 541, 545; 830 NW2d 794 (2013). To bind a defendant over for trial, "the prosecutor must establish probable cause, which requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt on each element of the crime charged." *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006) (quotation marks and citations omitted). Dismissal is appropriate only when no "inference may be drawn establishing the elements of the crime charged" based on the evidence presented. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

Here, the prosecution failed to establish probable cause to believe that defendant "operate[d] a vehicle upon a . . . place open to the general public or generally accessible to motor vehicles . . . ." The term "generally"

means "to or by most people; widely; popularly; extensively[.]" *Webster's New World College Dictionary* (5th ed), p 604. Other dictionaries provide similar definitions. *The American Heritage Dictionary of the English Language* (5th ed), p 731, has the following definition:

> **generally** . . . *adv*. **1.** Popularly; widely; *generally known*. **2a.** As a rule; usually: *The child generally has little to say*. **b.** For the most part: *a generally boring speech*. **3.** Without reference to particular instances or details; not specifically: *generally speaking*.

The *New Oxford American Dictionary* (3d ed), p 722, offers these definitions:

> **generally** . . . **1** [sentence adverb] in most cases; usually: *the term of a lease is generally 99 years*.
>
> **2** in general terms; without regard to particulars or exceptions: *a decade when France was moving generally to the left*.
>
> **3** widely: *the best scheme is generally reckoned to be the Canadian one*.

Common to all three definitions is the concept of regularity, ordinariness, or normality.

In the statute, the adverb "generally" modifies the adjective "accessible."[1] "An adjective must modify a noun or pronoun." *People v Prominski*, 302 Mich App 327, 334; 839 NW2d 32 (2013). "Generally accessible" in the current statute modifies the noun phrase "other place." The statute thereby prohibits intoxicated driv-

[1] "Accessible" is denominated an adjective in all three dictionaries. It means "that can be approached or entered[;] easy to approach or enter," *Webster's New World College Dictionary*, p 8, or "[e]asily approached or entered," *The American Heritage Dictionary*, p 7, or "(of a place) able to be reached or entered: *the town is accessible by bus*[;] *this room is not accessible to elderly people*," *New Oxford American Dictionary*, p 9.

ing upon a highway or upon any "other place . . . generally accessible to motor vehicles . . . ." MCL 257.625(1).

Defendant drove his car from his garage to a point in his private driveway in line with his house. A residential driveway is private property. See MCL 257.44(1) (" 'Private driveway' means any piece of privately owned and maintained property which is used for vehicular traffic, but is not open or normally used by the public."). Even assuming that the *bottom* of one's private driveway (that is, its exit) qualifies as a "place open to the general public or generally accessible to motor vehicles," MCL 257.625(1), reasonable factfinders could not differ on this record that the area of defendant's driveway in which defendant operated his car was not. The "general public" is not "widely" or "popularly" or "generally" permitted to "access" that portion of a private driveway immediately next to a private residence.[2] That part of a private driveway is simply not a "place . . . generally accessible to motor vehicles." *Id*. Rather, it is a place accessible to a small subset of the universe of motor vehicles: those belonging to the homeowner or those using the driveway with permission.[3] That particular area of defendant's driveway is akin to a moat; it is an area that strangers are forbidden to cross but defendant may wade at will. Defendant consumed alcohol and drove, but only in

[2] We note that our analysis would be different had defendant driven intoxicated in the driveway of an apartment building or other community living center, if defendant's property shared its driveway with the neighboring property, or if defendant proceeded to an area of his driveway where he could encounter a member of the general public who was not trespassing.

[3] Again, had a member of the public trespassed upon defendant's rights and driven while intoxicated in this area, a different result might be required.

this private area. Accordingly, charges were not supportable.

The prosecution insists that because the driveway was not barricaded and any visitors or delivery persons could access the driveway, the trier of fact must decide whether the specific area in which defendant drove was "generally accessible to motor vehicles." We are unpersuaded. That other vehicles had the ability to enter the area of defendant's driveway between his house and his garage misses the point. Physical ability is not the touchstone of general accessibility. Had the Legislature intended to include every place in which it is physically possible to drive a car, it could have so provided. However, the plain language of the statute prohibits driving while intoxicated in places where cars are regularly, "widely," and "usually" expected to travel. The area of a private driveway between one's detached garage and house is not such a place.

Moreover, had the Legislature wanted to criminalize driving while intoxicated in one's own driveway, it could have outlawed the operation of a motor vehicle in *any* place "accessible to motor vehicles," omitting the adverb "generally." But the statute uses the word "generally" to modify the word "accessible," and the combined modifier to further describe "other place." The commonly understood and dictionary-driven meanings of the term "generally" in this context compel the conclusion that the Legislature meant to limit the reach of MCL 257.625(1). On this record, no one could reasonably conclude that defendant drove in an area that was open to the general public or was generally accessible to motor vehicles other than to defendant and the members of his household. As such, the circuit court properly quashed the information.

We affirm.

SHAPIRO, J., concurred with GLEICHER, P.J.

JANSEN, J. (*dissenting*). I respectfully dissent because I believe that it is the role of the trier of fact to determine whether defendant's driveway was generally accessible to motor vehicles. Accordingly, I would reverse and remand for reinstatement of the charge against defendant and further proceedings.

The issue in this case involves whether the portion of defendant's driveway on which he drove while intoxicated was "generally accessible to motor vehicles" under MCL 257.625(1). MCL 257.625(1) provides, in relevant part:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated.

The parties contest whether a private driveway is an area generally accessible to motor vehicles as a matter of law under the plain language of the statute and whether the portion of defendant's driveway on which he operated his vehicle while intoxicated was generally accessible to motor vehicles. The prosecution argues that a private driveway is an area generally accessible to motor vehicles as a matter of law, while defendant contends that the upper portion of his private driveway was not generally accessible to motor vehicles. Both parties argue that the language of MCL 257.625(1) supports their position.

I believe that the issue whether the upper portion of defendant's private driveway was generally accessible to motor vehicles is a question of fact for the trier of fact to determine after hearing the evidence in the case. The parties agree regarding what occurred dur-

ing the incident. Defendant drove his vehicle out of his garage and backed it down his driveway approximately 25 feet. He stopped driving his car before it crossed over the point where the fence line began and before it passed the front of his house. The vehicle's back bumper was "pretty close to the front of the house" when the vehicle stopped. Defendant then drove his vehicle back into his garage. Defendant was intoxicated during the incident. Thus, defendant only drove his motor vehicle while intoxicated on the upper portion of his driveway, which was encompassed within the backyard and side yard of his house.

However, the parties do dispute whether the driveway was generally accessible to motor vehicles. The prosecution argues that defendant's driveway was generally accessible to motor vehicles because the driveway was not blocked off and defendant, or any visitors or delivery persons, could access the driveway with a motor vehicle. The prosecution further contends that defendant did not have any no-trespassing signs on his property. In contrast, defendant argues that the area on which he operated his motor vehicle was not generally accessible to motor vehicles because it was in his "backyard/side-yard," was next to his house, and was behind the fence-line of his property. Defendant contends that a reasonable driver would not conclude that he or she had permission to access or use this portion of his driveway.

I believe the trier of fact must determine whether the area on which defendant drove his vehicle while intoxicated was generally accessible to motor vehicles under the particular facts and circumstances of this case. I disagree with the majority's conclusion that the area of defendant's driveway on which he operated his vehicle was akin to a moat that strangers were forbid-

den to cross because it is unclear whether other vehicles were routinely permitted or forbidden to access the portion of defendant's driveway on which he operated his vehicle. The majority concludes that motor vehicles are not widely or generally permitted to access the upper portion of a private driveway immediately next to a private residence, but also notes that there are several scenarios in which a private driveway may constitute an area generally accessible to motor vehicles. In this case, there was no evidence presented at the preliminary examination regarding the frequency with which other vehicles accessed defendant's driveway. Therefore, I conclude that the issue whether the upper portion of the driveway constitutes an area generally accessible to motor vehicles is a question of fact for the trier of fact to determine on the basis of the evidence presented at trial.

M Crim JI 15.2 further supports the conclusion that the issue is one for the trier of fact to determine at trial. M Crim JI 15.2 provides:

> To prove that the defendant operated while intoxicated [or while visibly impaired], the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (1) First, that the defendant was operating a motor vehicle [on or about (*state date*)]. Operating means driving or having actual physical control of the vehicle.
>
> (2) Second, that the defendant was operating a vehicle on a highway or other place open to the public or generally accessible to motor vehicles.
>
> (3) Third, that the defendant was operating the vehicle in the [county / city] of _____.

The jury instruction indicates that it is the role of the trier of fact to determine whether a defendant operated a vehicle on an area generally accessible to motor vehicles because the jury instruction charges the jury

with the task of making this determination. In this case, because there was no testimony regarding what vehicles accessed the driveway and because the prosecution established that vehicles could enter the area, I believe that the issue is one for the trier of fact to determine after examining the evidence presented at trial. Therefore, I conclude that the circuit court improperly quashed the information. Accordingly, I would reverse and remand for reinstatement of the charge against defendant and further proceedings.

PEOPLE v JOHNSON

Docket No. 325857. Submitted March 9, 2016, at Grand Rapids. Decided April 19, 2016, at 9:20 a.m. Leave to appeal denied 500 Mich 951.

Jordan C. Johnson was convicted following a jury trial in the Berrien Circuit Court, Angela M. Pasula, J., of four counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct involving his six-year-old niece. Defendant was sentenced to 25 to 90 years' imprisonment for each of his first-degree criminal sexual conduct convictions and 71 months to 15 years' imprisonment for his second-degree criminal sexual conduct conviction. Before trial, the prosecution filed a notice of intent to use a support person to accompany the six-year-old victim and the victim's 10-year-old brother on the witness stand while they testified, MCL 600.2163a(4), and the notice listed a Labrador retriever as a "canine advocate." At a pretrial scheduling conference, defense counsel stated that he had no objection to the notice, and during defendant's trial, the support animal was permitted, without objection, to accompany the two young witnesses on the witness stand while they testified. Defendant appealed.

The Court of Appeals *held*:

1. The United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, guarantee a defendant the right to effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant. In this case, defendant asserted that his trial counsel was ineffective for failing to object to the use of the support animal. MCL 600.2163a(4) provides that a witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. The term "person" is not defined in the statute. The term, therefore, had to be interpreted on the basis of its ordinary meaning and the context in which it was used. Because a person is one recognized by law as the subject of rights

and duties, a dog is not a person within the meaning of MCL 600.2163a(4). MCL 600.2163a did not provide the trial court with the authority to allow the support animal to accompany the victim and the victim's brother while they testified. Nonetheless, trial courts have long had the inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated. The existence of MCL 600.2163a did not preclude the trial court from using alternative procedures to protect and assist the witnesses while testifying because MCL 600.2163a(20) provides that the protections set forth in MCL 600.2163a are in addition to other protections or procedures afforded to a witness by law or court rule. Much like the use of a screen to make a witness more comfortable while testifying—but much less offensive to the Sixth Amendment Confrontation Clause—the use of a support animal allowed the trial court to ease the situation for the young witnesses while at the same time allowing the jury and defendant to view the witnesses while they testified. It was within the trial court's inherent authority to control its courtroom and the proceedings before it to allow a witness to testify while accompanied by a support animal. Any objection to the trial court's authority to allow the victim and the victim's brother to testify would have been meritless; accordingly, counsel's performance did not fall below an objective standard of reasonableness for failing to object on that basis.

2. Every defendant has a due-process right to a fair trial, which includes the right to be presumed innocent. In certain circumstances, courtroom procedures or arrangements undermine this presumption of innocence because the procedure or arrangement is deemed inherently prejudicial. Whenever a courtroom arrangement is challenged as inherently prejudicial, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play. The use of a support animal did not give rise to primarily prejudicial inferences because it was possible for the jury to make a wide range of inferences from the use of this procedure that were unrelated to defendant. Similar to a victim's use of a protective screen when testifying, a reasonable jury could conclude that the support animal was being used to calm the witnesses' general anxiety about testifying or simply being in an unfamiliar setting. In addition, the use of a support animal did not brand defendant with the mark of guilt, unlike the inherently prejudicial practices of clothing a defendant in his prison outfit or the shackling of a defendant. Instead, the support animal was

merely present to assist the witnesses, and the presence of the animal did not reflect upon defendant's guilt or innocence. The use of the support animal was more neutral—and less prejudicial—than the use of a support person, a procedure deemed permissible by the Legislature; therefore, the use of a support animal was not inherently prejudicial. Nor could defendant show that he was actually prejudiced by the use of the support animal because there was no indication in the record that the support animal was visible to the jury while the witnesses testified or that the support animal barked, growled, or otherwise interrupted the proceedings or made its presence known to the jury. Any objection that the use of the support animal violated defendant's right to due process would have been meritless, and defendant was not entitled to a new trial on that basis.

3. An accused person has a constitutional right to confront the witnesses against him or her. The right to confront one's accusers consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against that defendant at trial, (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter, (3) the witnesses are subject to cross-examination, and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor. Use of the support animal did not deny defendant a face-to-face confrontation with his accuser because the victim and the victim's brother testified on the witness stand without obstruction; the presence of the support animal did not affect the witnesses' competency to testify, nor did it affect the oath or affirmation given to the witnesses; the witnesses were still subject to cross-examination; and the trier of fact was still afforded the unfettered opportunity to observe the witnesses' demeanor. No case-specific finding of good cause or necessity was required for the use of a support animal because the Sixth Amendment Confrontation Clause, US Const, Am VI, was not implicated.

4. MCL 768.29 provides that it shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. There is no requirement for the trial court to make any particular findings when exercising that authority. Therefore, when the use of a support animal is requested, a trial court should allow its use when it is useful to the expeditious and effective ascertainment of

the truth. In employing its discretion, the court should consider the facts and circumstances of each individual witness to determine whether the use of the support animal will be useful to the expeditious and effective ascertainment of the truth. Defendant was not entitled to relief because any objection on the grounds that the trial court failed to make a finding of good cause would have been meritless: it was likely that the trial court would have found that the use of the support animal was useful to the expeditious and effective ascertainment of the truth because the six-year-old witness was the victim of first- and second-degree criminal sexual assault allegedly perpetrated by a family member, the victim and her brother expressed a desire to use the support animal listed on the notice of intent, and the notice of intent indicated that the support animal was to be used to protect and support the witnesses while they testified. Moreover, defendant could not overcome the presumption that his counsel's failure to object to the use of the support animal was sound trial strategy because defendant's theory was that the victim was coached to say that defendant committed the sexual acts, and therefore it very well could have been trial counsel's strategy to allow the support animal to accompany the victim so that the victim would appear calm while testifying, which would make it appear that the victim was coached on what to say at trial.

5. Defendant did not show that, but for his counsel's failure to request a limiting instruction to the jury when the support animal was used, the result of the proceeding would have been different. There were no Michigan jury instructions addressing the use of a support animal, there were no cases addressing what otherwise might have been an appropriate jury instruction when using a support animal, the statute allowing the use of support persons contained no requirement for any particular findings or for instructions to be given to the jury, and the trial court's instruction to the jury to decide the case based solely on the evidence and not to render a decision based on sympathy or bias provided sufficient instruction to ensure that the jury did not rely on the support animal's presence in reaching its verdict.

6. MRE 801(c) provides that hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 802 provides that hearsay is generally not admissible unless an exception to the rule applies. One exception to the hearsay rule is contained in MRE 803(4), which permits admission of statements made for purposes of medical treatment or medical diagnosis in connection with treatment. With regard to

cases of sexual assault, in which the injuries might be latent, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment. An inquiry into the trustworthiness of a child's statements made to a healthcare provider should consider the totality of the circumstances surrounding the declaration of the out-of-court statement and should consider the following factors in determining the trustworthiness of a child's statement: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. In this case, defendant challenged the admission of the victim's statements made to a sexual-assault nurse examiner. The following factors weighed in favor of the trustworthiness of those statements: the victim was six years old, and defendant admitted that the victim was smart, indicating the maturity of the declarant; the record provided that the nurse examiner used open-ended questions and that the purpose of the examination was to make sure that the victim was healthy and safe at home; the victim phrased her statements in a childlike manner that lent credence to the statements' authenticity; evidence suggested that the victim may have still been under distress of the sexual acts because she initially did not want to discuss the acts with the nurse examiner; the examination was held less than one month after the victim's disclosure and more than four months before trial, tending to show that the examination was not for litigation purposes; and there was no evidence that the victim made a mistake in identification of her assailant because the alleged perpetrator was her uncle. Only two factors weighed against a finding that the victim's statements were trustworthy: Child Protective Services initiated the examination, which could demonstrate that the examination was not made for medical treat-

ment or diagnosis, and the victim testified that she did not like it when defendant babysat because he would make her clean and do chores, which could suggest a motive to fabricate. The totality of the circumstances supported the admission of the victim's statements because they were trustworthy, and any objection to the admission of the statements would have been meritless.

7. A criminal defendant is entitled to a neutral and detached magistrate. In this case, defendant could not overcome the heavy presumption of judicial impartiality because defendant was unable to show that the trial judge's opinion of the victim's credibility formed during the preliminary examination and the trial judge's subsequent decision to allow the victim to testify while accompanied by a support animal at trial constituted deep-seated favoritism or antagonism such that the exercise of fair judgment was impossible; accordingly, defendant's trial counsel was not constitutionally ineffective for failing to file a motion to disqualify the trial judge.

8. MCL 769.1k provides, in part, that the court may impose any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty. MCL 769.1k did not provide trial courts with separate statutory authority to impose court costs at sentencing until the enactment of 2014 PA 352, which was a curative measure to amend MCL 769.1k for the purpose of giving trial courts the authority to impose such costs. Binding precedent provided that giving retroactive effect to 2014 PA 352 did not violate the state and federal Ex Post Facto Clauses because the court costs imposed under MCL 769.1k were not a form of punishment, but rather a civil remedy. However, the trial court erred when it ordered defendant to pay a $100 fine because defendant was found guilty of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a), neither of which authorizes the imposition of a fine.

9. The trial court erred when it ordered defendant to pay $900 in restitution for damages caused by a course of conduct that did not give rise to a conviction.

10. Defendant abandoned several unpreserved instances of prosecutorial error—including the prosecutor's use of leading questions and certain errors during the prosecutor's opening statement and closing argument—because defendant provided no caselaw or legal analysis to support his assertion that the prosecutor committed prosecutorial error.

Defendant's convictions and sentences affirmed; order imposing a $100 fine vacated; $900 of the $2,564 restitution order vacated; case remanded to modify the judgment of sentence.

1. TRIAL — WITNESSES — USE OF A SUPPORT PERSON TO ACCOMPANY A TESTIFYING WITNESS — WORDS AND PHRASES — "PERSON."

The term "person" is not defined in MCL 600.2163a(4), which provides, in relevant part, that a testifying witness shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony; it is clear that a dog is not a person within the meaning of MCL 600.2163a(4); MCL 600.2163a does not provide a trial court with the authority to allow a support animal to accompany a testifying witness.

2. TRIAL — WITNESSES — TRIAL COURT'S INHERENT AUTHORITY TO CONTROL PROCEEDINGS — USE OF A SUPPORT ANIMAL TO ACCOMPANY A TESTIFYING WITNESS.

Trial courts have long had the inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated; the existence of MCL 600.2163a does not preclude the trial court from using alternative procedures to protect and assist testifying witnesses; it is within the trial court's inherent authority to control its courtroom and the proceedings before it to allow a witness to testify while accompanied by a support animal.

3. TRIAL — WITNESSES — TRIAL COURT'S AUTHORITY TO CONTROL PROCEEDINGS — USE OF A SUPPORT ANIMAL TO ACCOMPANY A TESTIFYING WITNESS — PROCEDURE TO DETERMINE PERMISSIBLE USE OF A SUPPORT ANIMAL.

MCL 768.29 provides that it shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved; there is no requirement for the trial court to make any particular findings when exercising that authority; when the use of a support animal is requested, a trial court should allow its use when it is useful to the expeditious and effective ascertainment of the truth; in employing its discretion, the trial court should consider the facts and circumstances of each individual witness to determine whether the use of the support animal will be useful to the expeditious and effective ascertainment of the truth.

4. CONSTITUTIONAL LAW — DUE PROCESS — PRESUMPTION OF INNOCENCE — INHERENTLY PREJUDICIAL COURTROOM PROCEDURES — WITNESSES — USE OF A SUPPORT ANIMAL TO ACCOMPANY A TESTIFYING WITNESS.

Every defendant has a due-process right to a fair trial, which includes the right to be presumed innocent; in certain circumstances, courtroom procedures or arrangements undermine this presumption of innocence because the procedure or arrangement is deemed inherently prejudicial; the use of a support animal for a testifying witness in appropriate circumstances is not inherently prejudicial.

5. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — TRIAL — WITNESSES — USE OF A SUPPORT ANIMAL TO ACCOMPANY A TESTIFYING WITNESS.

An accused person has a constitutional right to confront the witnesses against him or her; the right to confront one's accusers consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against that defendant at trial, (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter, (3) the witnesses are subject to cross-examination, and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor; use of a support animal does not deny a defendant the right to confront the witnesses against him or her when the witnesses testify on the witness stand without obstruction, when the presence of the support animal does not affect the witnesses' competency to testify, when the presence of the support animal does not affect the oath or affirmation given to the witnesses, when the witnesses are still subject to cross-examination, and when the trier of fact is still afforded the unfettered opportunity to observe the witnesses' demeanor; when these four separate requirements are met, no case-specific finding of good cause or necessity is required for the use of a support animal because the Sixth Amendment Confrontation Clause is not implicated.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Randy E. Davidson*) and Jordan C. Johnson, *in propria persona*, for defendant.

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

MURRAY, J. Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to 25 to 90 years' imprisonment for each of his first-degree criminal sexual conduct convictions and 71 months to 15 years' imprisonment for his second-degree criminal sexual conduct conviction. We affirm defendant's convictions and sentences, but vacate the order imposing a $100 fine and vacate $900 of the $2,564 restitution order, and remand for the trial court to modify the judgment of sentence accordingly.

I. INTRODUCTION

This case involves a number of challenges to the relatively new courtroom procedure of allowing a witness to be accompanied on the witness stand by a support animal—an animal that provides comfort to a witness while the witness testifies. While no Michigan court has addressed whether a witness may be accompanied by a support animal, other jurisdictions have upheld this procedure as part of a trial court's inherent authority to control the courtroom. For the reasons expressed below, so do we.

II. FACTUAL BACKGROUND

This appeal arises out of defendant's sexual contact with his six-year-old niece. According to the evidence supporting the jury's verdict, from 2011 to 2014, defendant occasionally provided babysitting services for his brother and sister-in-law when other family members

were unavailable to babysit their two children. While babysitting, defendant would take the victim into the bathroom or another room and sexually abuse her. One time, when the victim's 10-year-old brother tried to investigate what was happening when defendant and the victim went into a different room, he was told to "go away."

The victim eventually revealed the sexual abuse to her parents in June or July 2014. The victim's parents were planning on going out, but when the victim heard that defendant would be babysitting, she "became hysterical" and "broke down," crying and screaming. The victim told her parents that she did not want defendant to babysit because defendant put "his penis in her butt." Over the next couple weeks, the victim provided her parents with more details about the sexual encounters with defendant. The victim's mother subsequently took the victim to the family doctor, who did not find any injuries to the victim's butt or vagina, but did make the necessary report to Child Protective Services (CPS).

As a result, CPS called the victim's mother and requested that she take the victim to the hospital to get a full medical examination. At the hospital, Angie Mann, a sexual-assault nurse examiner, performed an examination of the victim. During the examination, the victim initially did not want to talk about the sexual abuse, but she eventually described that defendant would put his fingers in her butt and his penis in her mouth. According to Mann, the victim's "exact words were" that defendant put "his penis in her mouth and he didn't even wash it first." Mann saw a "very thin, pale, vertical line" in the victim's anus, which is consistent with penile penetration and sexual assault.

Defendant denied any sexual contact with the victim. Instead, defendant testified that he would take the victim into another room to discipline her, because if he did not, the victim's brother would watch and laugh. The jury apparently did not believe defendant's version of events, as he was convicted. This appeal then ensued.

III. ANALYSIS

A. THE USE OF A SUPPORT ANIMAL

During defendant's trial a black Labrador retriever named Mr. Weeber was permitted, without objection, to accompany the six-year-old victim and the victim's 10-year-old brother on the witness stand while they testified. Now, on appeal, defendant raises numerous arguments against the use of a support animal. But, as explained below, defendant waived any issues related to the use of the support animal by affirmatively approving the trial court's action. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

Prior to trial, the prosecution filed a notice of intent to use a support person pursuant to MCL 600.2163a(4), which listed, among other things, Mr. Weeber as a "canine advocate." At a scheduling conference prior to trial, defense counsel indicated that he had no objection to the notice, stating, "I think I have to file an objection and I didn't. We did the research on these three notices and . . . [n]o objection." Because defendant affirmatively stated that he had no objection to the use of a support animal, defendant cannot now complain about the use of the support animal while the victim and the victim's brother testified. *Id*. at 504. Defendant's waiver eliminated any error, and appellate review is precluded. *Id*.

Although these issues were waived by defense counsel's affirmative conduct, defendant alternatively argues that he was denied the effective assistance of counsel by his trial counsel's failure to object to the notice of use of a support person that listed Mr. Weeber as a canine advocate. Appellate review of an unpreserved argument of ineffective assistance of counsel, like this one, is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law, *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012), and a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *Trakhtenberg*, 493 Mich at 51. To establish ineffective assistance of counsel, "the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Heft*, 299 Mich App 69, 80-81; 829 NW2d 266 (2012). "[A] defendant [is] prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id*. at 81. "Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (citation and quotation marks omitted). A defendant must also overcome a strong presumption that his counsel's decisions were the result of sound trial strat-

egy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A defendant is not denied the effective assistance of counsel by counsel's failure to make a futile or meritless objection. *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008).

1. STATUTORY AUTHORITY

Defendant first contends that trial counsel was ineffective for failing to object to the use of a support animal because MCL 600.2163a(4) only allows a support *person* to accompany a witness, not a support animal. "The primary goal of statutory construction is to give effect to the intent of the Legislature." *People v McLaughlin*, 258 Mich App 635, 672; 672 NW2d 860 (2003). To do so, we must begin by examining the language of the statute, and if the statute's language is clear and unambiguous, we must enforce the statute as written. *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003). When statutory "terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used." *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013) (citation and quotation marks omitted).

The statute at issue, MCL 600.2163a(4), provides:

> A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be filed with the court and shall be served

> upon all parties to the proceeding. The court shall rule on a motion objecting to the use of a named support person before the date at which the witness desires to use the support person.

Because the term "person" is not defined in the statute, it must be interpreted on the basis of its ordinary meaning while keeping in mind the context in which it is used. *Lewis*, 302 Mich App at 342. To ascertain the ordinary and generally accepted meaning of an undefined term, we may consult dictionary definitions. *Id*. The term "person" is defined by *Merriam-Webster's Collegiate Dictionary* (11th ed) as "one (as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties." Based on this definition—and a good deal of common sense—it is clear that a dog is not a "person" within the meaning of MCL 600.2163a(4). Dogs do not have rights and duties as do humans; in fact, dogs are considered personal property. *Koester v VCA Animal Hosp*, 244 Mich App 173, 176; 624 NW2d 209 (2000). Therefore, MCL 600.2163a did not provide the trial court with the authority to allow Mr. Weeber to accompany the victim and the victim's brother while they testified.

Although MCL 600.2163a did not provide the trial court with that specific authority, we hold that the trial court had the inherent authority to utilize this courtroom procedure. As one panel of this Court has previously held, the existence of MCL 600.2163a does not preclude trial courts from using alternative procedures to protect and assist witnesses while testifying, as the Legislature provided that the protections set forth in MCL 600.2163a are "in addition to other protections or procedures afforded to a witness by law or court rule." MCL 600.2163a(20). See *People v Rose*, 289 Mich App 499, 509; 808 NW2d 301 (2010). While a trial court may rely on MCL 600.2163a to afford witnesses certain

protections, it is well established that trial courts "have long had the inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated." *Rose*, 289 Mich App at 509, citing MRE 611(a); see also MCL 768.29.

The authority and discretion afforded to trial courts to control the course of trial is, in fact, very broad. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). For example, included in this authority, among other abilities, is the ability for a trial court to shackle a defendant during trial, *People v Dunn*, 446 Mich 409, 425-427; 521 NW2d 255 (1994), to shackle a witness while he testifies, *Banks*, 249 Mich App at 257, to impose time limitations on the examination of witnesses, *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992), implied overruling on other grounds by *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994), to bind and gag an "unruly, disruptive, rude, and obstreperous" defendant when repeated warnings to the defendant are ineffective, *People v Conley*, 270 Mich App 301, 309; 715 NW2d 377 (2006), citing *People v Kerridge*, 20 Mich App 184, 186-188; 173 NW2d 789 (1969), to remove an uncooperative defendant from the courtroom until he agrees to conduct himself properly, *Illinois v Allen*, 397 US 337, 343-344; 90 S Ct 1057; 25 L Ed 2d 353 (1970), and to allow jurors to ask questions of the witnesses, *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972).

In addition to the above examples, this inherent authority also includes the ability to employ procedures that assist a witness when testifying, such as the use of a witness screen to prevent the witness from seeing the defendant, *Rose*, 289 Mich App at 509, the use of "anatomically correct" dolls to help a witness

demonstrate a sexual offense,[1] *People v Garvie*, 148 Mich App 444, 450-451; 384 NW2d 796 (1986), and the use of two-way interactive videoconferencing, *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996); MCR 6.006(C). Much like the use of a screen to make a witness more comfortable when testifying—but much less offensive to the Sixth Amendment Confrontation Clause—the use of a support animal allows the trial court to ease the situation for a traumatized or fearful young witness while at the same time allowing the jury and the defendant to view the witness while testifying. We therefore hold that it is within the trial court's inherent authority to control its courtroom and the proceedings before it to allow a witness to testify while accompanied by a support animal. MCL 768.29; MRE 611(a).[2] Thus, any objection to the trial court's *authority* to allow the victim and the victim's brother to be accompanied by the support animal while they testified would have been meritless. Accordingly, counsel's

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[1] MCL 600.2163a(3) now provides a trial court with the specific authority to utilize this procedure.

[2] Other jurisdictions have likewise expressly held that a trial court's decision to allow a support animal to accompany a witness while testifying was within the trial court's authority to control courtroom proceedings. *People v Tohom*, 109 AD3d 253, 267; 969 NYS2d 123 (2013) (holding that the trial court's inherent authority allowed it to permit the use of a support animal); *People v Spence*, 212 Cal App 4th 478, 517; 151 Cal Rptr 374 (2012) (general rule of evidence giving the trial court power to set reasonable controls upon the mode of interrogation of child witnesses allowed the use of a support animal); *People v Chenault*, 227 Cal App 4th 1503, 1517; 175 Cal Rptr 3d 1 (2014); *State v Devon D*, 150 Conn App 514, 543; 90 A3d 383 (2014) (court has inherent authority to utilize a support animal to assist testifying victims); *State v Jacobs*, 2015 Ohio 4353, ¶ 27; ___ NE3d ___ (Ohio App, 2015) (rule of evidence gave the trial court authority to utilize a support animal for a child victim's testimony); *State v Dye*, 178 Wash 2d 541, 553; 309 P3d 1192 (2013) (courts have power to control trial proceedings, including the use of a support animal).

performance did not fall below an objective standard of reasonableness for failing to object on this basis. *Unger*, 278 Mich App at 257.

2. DUE PROCESS

While "we recognize that a trial court is entitled to control the proceedings in its courtroom, it is not entitled to do so at the expense of a defendant's constitutional rights." *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993). Thus, we next address defendant's contention that trial counsel should have objected to the notice of a support person on the basis that allowing the young witnesses to testify while accompanied by the support animal violated his constitutional right to due process.

"Every defendant has a due process right to a fair trial, which includes the right to be presumed innocent." *Rose*, 289 Mich App at 517. In certain circumstances, courtroom procedures or arrangements undermine this presumption of innocence because the procedure or arrangement is deemed inherently prejudicial. *Id*. With regard to challenges of an inherently prejudicial courtroom procedure, the United States Supreme Court has explained that

> [w]henever a courtroom arrangement is challenged as inherently prejudicial . . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play." [*Holbrook v Flynn*, 475 US 560, 570; 106 S Ct 1340; 89 L Ed 2d 525 (1986) (citation omitted).]

"[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Id*. at 572. However, an inherently prejudicial procedure will not be upheld if

the procedure was not necessary to further an essential state interest. *Id*. at 568-569.

When determining whether a practice is inherently prejudicial, a court will focus on whether "the practice gives rise primarily to prejudicial inferences or whether it is possible for the jury to make a wider range of inferences from the use of the procedure." *Rose*, 289 Mich App at 518. Similar to a victim's use of a protective screen when testifying, a reasonable jury could conclude that the support animal is being used to calm the witness's general anxiety about testifying or simply being in an unfamiliar setting. *Id*. at 520. Thus, the practice does not give rise to *primarily* prejudicial inferences, as it is possible for the jury to make a wide range of inferences from the use of this procedure that are unrelated to defendant. *Id*. In addition, the use of a support animal is unlike the inherently prejudicial practices of clothing a defendant in his prison outfit or the shackling of a defendant, as the use of a support animal does not "brand[] a defendant with the mark of guilt." *Id*. Instead, the support animal is merely present to assist the witness, and the presence of the animal does not reflect upon the guilt or innocence of a defendant. Therefore, the use of a support animal does not create "an unacceptable risk . . . of impermissible factors coming into play." *Holbrook*, 475 US at 570 (citation and quotation marks omitted).

Fortunately, our nation is a union of independent states, and so we can, when appropriate, turn to decisions of our sister states for guidance. At least two other courts have similarly held that allowing a support animal to accompany a witness while testifying is *less* prejudicial than allowing a support person—which is statutorily permitted in this state—to accompany the witness. *People v Tohom*, 109 AD3d 253, 272-273;

969 NYS2d 123 (2013); *People v Chenault*, 227 Cal App 4th 1503, 1515; 175 Cal Rptr 3d 1 (2014). Specifically, the *Tohom* court stated:

> In fact, permitting a comfort dog to accompany a child victim to the stand during testimony can be considered less prejudicial than allowing "support persons." As explained in *Using Dogs for Emotional Support of Testifying Victims of Crime*, an article by Marianne Dellinger for the Animal Law Review of Lewis and Clark Law School:
>
> > While dogs may signal the innocence of a witness, any signal from a dog will be much weaker than that emitted from an adult attendant. An adult, especially one who can understand the entirety of the case, including its legal underpinnings, may be seen by a jury to add credibility to the arguments of the plaintiff's witness. In contrast, a dog is "neutral" and does not understand any of the legal and factual arguments. *It serves the limited function of physically and emotionally standing by the testifying witness*[.] [*Tohom*, 109 AD3d at 272-273 (citation and quotation marks omitted).]

These decisions are consistent with our conclusion that the use of a support animal is more neutral, and thus less prejudicial, than the use of a support person—a procedure deemed permissible by our Legislature. The use of a support animal in appropriate circumstances is therefore not inherently prejudicial.

Since the challenged practice is not inherently prejudicial, defendant is required to show that he was actually prejudiced by the practice. *Holbrook*, 475 US at 571. This he cannot do. The record indicates that Mr. Weeber was brought in by the victim and sat at her feet while she testified and that the same procedure occurred when the victim's brother testified. There is no indication that Mr. Weeber was visible to the jury while the witnesses testified or that he barked,

growled, or otherwise interrupted the proceedings or made his presence known to the jury. Therefore, any objection on the basis that this practice violated defendant's right to due process would have been meritless. Defendant is not entitled to a new trial on this basis.

3. PROCEDURAL PROTECTIONS

Defendant, relying on *Chenault*, 227 Cal App 4th 1503, next argues that his counsel was ineffective for failing to request various procedural protections if the support animal was used. Specifically, defendant contends counsel was ineffective (1) when counsel allowed the use of the support animal despite the fact that the trial court made no case-specific finding of "good cause," and (2) for failing to request a limiting instruction. We address each of these arguments in turn.

a. FINDINGS

As mentioned above, defendant cites *Chenault*—a case involving the use of a support dog—in support of his argument that there are necessary findings a trial court must make before allowing a witness to utilize a special procedure when testifying. However, before discussing *Chenault*, we find it necessary to review the leading United States Supreme Court precedents on what case-specific findings, if any, are required when a special procedure is used to assist a witness when he testifies.

The first instructive case is *Coy v Iowa*, 487 US 1012; 108 S Ct 2798; 101 L Ed 2d 857 (1988). In *Coy*, the defendant was arrested and charged with sexually abusing two underage girls while they were camping in their backyard. *Id*. at 1014. The prosecution requested that the complaining witnesses be allowed to testify

from behind a screen, which would allow the defendant to see the witnesses, but would prevent the witnesses from seeing the defendant. *Id*. at 1014-1015. In assessing whether the procedure violated the defendant's right to confrontation, the Court stated that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id*. at 1016. Justice Scalia, writing for the Court, determined that a face-to-face confrontation is guaranteed because it "is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' " *Id*. at 1019.

When turning to the facts in *Coy*, the Court held that it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id*. at 1020. Nevertheless, the Court did not expressly rule out the use of special procedures when the procedure infringed upon a defendant's right to confrontation. In fact, the Court held that there may be exceptions to the Confrontation Clause, but those exceptions "would surely be allowed only when necessary to further an important public policy." *Id*. at 1021. The Court rejected the prosecution's argument that such a necessity was established by "a legislatively imposed presumption of trauma" when it stated that "something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.' " *Id*. (citation omitted). Because there had "been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception," *id*. at 1021, and the Court remanded the case for a harmless-error review, *id*. at 1022.

Approximately two years later, the Court issued *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990). In *Craig*, the defendant was charged with physically and sexually abusing a six-year-old child who attended the defendant's kindergarten center. *Id*. at 840. The prosecution requested that the child be allowed to testify by means of one-way closed-circuit television. *Id*. The trial court permitted the use of the procedure after it received evidence and made a finding, pursuant to the relevant statute, that the child witness would suffer serious emotional distress to the extent that the child would not be able to reasonably communicate. *Id*. at 842-843.

The United States Supreme Court held that the procedure did not violate the defendant's right to confrontation. The Court noted that the Confrontation Clause does not require "an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant," *id*. at 847, and that Supreme Court precedent established only "a *preference* for face-to-face confrontation," *id*. at 849 (citation and quotation marks omitted). This preference, according to the Court, "must occasionally give way to considerations of public policy and the necessities of the case." *Id*. (citation and quotation marks omitted). Although the right to a face-to-face confrontation is not absolute, the Court noted that it cannot be easily dispensed, making clear that a special procedure may only be used if the prosecution shows that it is "necessary to further an important state interest." *Id*. at 852. The Court held that there was a "compelling" state interest "in the protection of minor victims of sex crimes from further trauma and embarrassment." *Id*. (citation and quotation marks omitted). Because the prosecution was able to demonstrate that there was an important state interest, it was required to make an

adequate showing of necessity. *Id*. at 855. With regard to the findings of necessity to justify the use of a special procedure, the Supreme Court stated:

> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify[.]" [*Id*. at 855-856 (citations omitted).]

Although both *Coy* and *Craig* involved Confrontation Clause issues, and our case does not, these Supreme Court cases nevertheless provide some insight into that Court's treatment of procedures that assist a witness in testifying in open court.

Having reviewed the pertinent Supreme Court cases, we next turn to the case more heavily relied on by defendant—*Chenault*. In *Chenault*, 227 Cal App 4th at 1516-1517, the California Court of Appeals assessed the practice of allowing a young witness to testify while accompanied by a support animal. The defendant in *Chenault*, relying on *Coy* and *Craig*, argued that the trial court abused its discretion when it did not require

individualized showings of necessity before allowing a young victim to testify while accompanied by a support dog. *Id*. at 1516. The *Chenault* court concluded that a case-specific finding that an individual needs the presence of a support dog, as outlined in *Coy* and *Craig*, was not required because the Confrontation Clause was not implicated. *Id*. at 1516-1517. The Court reached this holding because "unlike testimony on a one-way closed circuit television, [the use of a support person or support animal] does not deny a face-to-face confrontation," which is the principle concern of the Confrontation Clause. *Id*. at 1516 (citation and quotation marks omitted).

Although the *Chenault* court determined that no case-specific finding was required to ensure compliance with constitutional safeguards, the court did conclude that a trial court was required to find that the presence of the support dog would assist or enable the witness to testify without undue harassment or embarrassment and provide complete and truthful testimony, in accordance with a California statute requiring a trial court to "*take special care to protect [a witness under the age of 14] from undue harassment or embarrassment*." *Id*. at 1514, 1520. The *Chenault* court concluded that the trial court did not abuse its discretion in allowing the young witness to testify while accompanied by the support animal because the record revealed the trial court's implicit findings. *Id*. at 1517-1518, 1520-1521.

Initially, we agree with *Chenault* that the required findings pursuant to *Coy* and *Craig* are not required in this instance because the Confrontation Clause is not implicated. As stated in *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001):

> The right to confront one's accusers consists of four separate requirements: (1) a face-to-face meeting of the

> defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor.

Here, the use of a support dog did not implicate the Confrontation Clause because it did not deny defendant a face-to-face confrontation with his accuser as the victim and the victim's brother testified on the witness stand without obstruction. In addition, the presence of the dog did not affect the witnesses' *competency* to testify, did not affect the oath or affirmation given to the witnesses, the witnesses were still subject to cross-examination, and the trier of fact was still afforded the unfettered opportunity to observe the witnesses' demeanor. Accordingly, defendant's right to confrontation was not implicated by use of the procedure, and no case-specific finding was required to ensure compliance with the Confrontation Clause. We therefore reject defendant's argument that the trial court was *required* to make findings of good cause or necessity before it allowed the use of the support animal.

While the Confrontation Clause is not implicated in this case, as a practical matter it will be the better practice for a trial court to make some findings regarding a decision to use or not use a support animal. Other jurisdictions that have addressed the use of a support animal are split on whether the trial court is required to make explicit findings of necessity even when the Confrontation Clause is not implicated. For example, in *State v Dye*, 178 Wash 2d 541, 553; 309 P3d 1192 (2013) (citation and quotation marks omitted), the court rejected the assertion that the prosecution was

required to demonstrate "substantial need" or "compelling necessity" because the trial court "is in the best position to analyze the actual necessity" of the special procedure and held that a trial court's decision will not be reversed unless the record fails to reveal a party's reasons for needing a support animal, or when the record indicates that the trial court failed to consider those reasons. Similar to *Dye*, the court in *Tohom* did not require any explicit findings before allowing the use of a support animal because the statute authorizing the trial court to allow the special procedure did not "set forth any 'necessity' criterion" for a court to consider when exercising its discretion. *Tohom*, 109 AD3d at 266. Likewise, the *Jacobs* court did not require a trial court to make explicit findings; it only required courts to consider the facts and circumstances of the case. *State v Jacobs*, 2015 Ohio 4353, ¶ 27; ___ NE3d ___ (Ohio App, 2015). In contrast to those cases, the Connecticut Appellate Court determined that the trial court, when exercising its inherent authority to control its courtroom, was required to make an explicit finding that "*there was a need for* [the use of the support animal] to be implemented." *State v Devon D*, 150 Conn App 514, 550; 90 A3d 383 (2014).

Lastly, the *Chenault* court held that a trial court was required to find that the use of a support animal would assist or enable the witness to testify without undue harassment or embarrassment, in compliance with the California statute governing a trial court's ability to "*take special care*" of child witnesses. *Chenault*, 227 Cal App 4th at 1514, 1517. Although the court recognized that express findings on the record were the preferred practice, the court determined that it would not reverse a trial court's decision to use the procedure if sufficient evidence was on the record, as implicit findings were adequate. *Id*. at 1520.

In our state, the Legislature has addressed the issue of a trial court's authority to control trial proceedings. MCL 768.29 provides, in part:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

MCL 768.29 makes clear that it is "the duty of the judge to control all proceedings during the trial . . . with a view to the expeditious and effective ascertainment of the truth." But it is also clear that there is no requirement for a trial court to make any particular findings when exercising that power. Thus, when the use of a support animal is requested, a trial court should allow its use when it is useful to the expeditious and effective ascertainment of the truth. In employing its discretion, the court should consider the facts and circumstances of each individual witness to determine whether the use of the support animal will be useful to the expeditious and effective ascertainment of the truth.

Turning to defendant's ineffective assistance of counsel argument, defendant is not entitled to relief because any objection on the grounds that the trial court failed to make a finding of "good cause" would have been meritless. As discussed above, a trial court's decision to allow the procedure will be reversed only when the procedure was not useful to the expeditious and effective ascertainment of the truth. The six-year-old victim was the victim of first- and second-degree criminal sexual conduct, which was allegedly[3] perpetrated by the victim's family member, her uncle. Addi-

[3] Allegedly at the time of trial. On appeal from a conviction, the defendant is no longer presumed innocent. *People v Peters*, 449 Mich 515, 519; 537 NW2d 160 (1995).

tionally, the victim and the victim's brother expressed a desire to use the special procedure because they elected to be accompanied by Mr. Weeber instead of their mother or father, who were listed as support persons on the prosecution's notice of intent. Furthermore, the notice of intent indicated that the support animal was to be used to protect and support the witnesses while they testified. Given the witnesses' young age, it is likely that the trial court would have found that the use of the support dog was useful to the expeditious and effective ascertainment of the truth and that any objection to the contrary would have been meritless.[4]

Defendant also cannot overcome the presumption that counsel's failure to object was sound trial strategy. At trial, the defense's theory was that the victim was "coached" to say that defendant committed these sexual acts. In fact, during closing argument, defense counsel argued that the victim was able to "spit back, so to speak, her script," and that she kept "saying the same thing that we think was fed to her by these other people, her parents or whatever." Thus, it very well could have been trial counsel's strategy to allow the support animal to accompany the victim while testifying so that she would appear calm while testifying, which would make it appear that she was coached on what to say at trial. Consequently, defendant has not overcome the strong presumption that counsel's performance was sound trial strategy.

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[4] When a witness will be testifying while accompanied by a support animal, it may be wise for the witness and support animal to get situated on the witness stand outside the presence of the jury. *Chenualt*, 227 Cal App 4th at 1519. Once situated and the jury returns to the courtroom, the trial court should inform the jury that the witness will be accompanied by a support animal while testifying. *Id*.

b. LIMITING INSTRUCTION

Defendant next contends that a limiting instruction should have been provided to the jury when the support animal was utilized. Defendant's attorney failed to request one, and according to defendant, this rendered his counsel ineffective. He is wrong.

There are no Michigan jury instructions addressing the use of a support animal. Nor are there any cases addressing what otherwise may be an appropriate jury instruction when using support animals. And, as already pointed out, the statute allowing the use of support persons contains no requirement for any particular findings or instructions to be given to the jury. Consequently, we are hard-pressed to conclude that counsel was ineffective in failing to ask for an instruction that does not yet exist in Michigan. This is particularly so when, as explained below, the trial court provided a sufficient instruction to ensure that the jury did not rely on the support animal's presence in reaching its verdict.[5]

Indeed, even assuming counsel's performance was deficient for failing to request a specific instruction regarding the use of the support dog, defendant was not prejudiced because the jury instruction provided by the trial court informed the jury to decide the case based solely on the evidence and not to render a

[5] We do note that the *Chenault* court provided a good example of an instruction for use in these situations. Depending, of course, on the circumstances confronting the trial court, a court may consider instructing the jury that it (1) "should disregard the dog's presence and decide the case based solely on the evidence presented, [(2)] should not consider the witness's testimony to be any more or less credible because of the dog's presence, and [(3)] should not be biased either for or against the witness, the prosecution, or the defendant based on the dog's presence." *Chenault*, 227 Cal App 4th at 1518.

decision based on sympathy or bias.[6] Because we presume jurors follow their instructions, *People v Mahone*, 294 Mich App 208, 218; 816 NW2d 436 (2011), the jury should have disregarded the presence of the dog while deliberating since the dog was not part of the evidence. Accordingly, defendant has not shown that "but for defense counsel's error[], the result of the proceeding would have been different." *Heft*, 299 Mich App at 81.

B. ADMISSIBILITY OF HEARSAY STATEMENTS

Defendant next argues that the trial court abused its discretion when it admitted inadmissible hearsay. However, this issue has also been waived, precluding appellate review. *Kowalski*, 489 Mich at 503. Prior to trial, the prosecution filed a notice of intent to use statements that the victim made to Mann during a physical examination, arguing that the statements

[6] In this case, the trial court informed the jury that the witnesses would be accompanied by a "therapy dog from the prosecutor's office." Defendant takes issue with the trial court's use of the term "therapy dog." Though we are not overly concerned with the nomenclature used for these support dogs, we note that at least one court has stated that "[t]he preferred term for a dog used in a courthouse setting to provide comfort to a witness is facility dog," but also recognized that the cases and literature utilize other appropriate terms, such as "testimony dogs, courthouse dogs, companion dogs, therapy dogs, service dogs, comfort dogs, therapy assistance dogs, support canines, and therapeutic comfort dogs," because "these terms imply canine functions in providing comfort or reducing anxiety." *Devon D*, 150 Conn App at 538 n 10 (citation and quotation marks omitted). However, we agree with defendant that the term "therapy dog" is not the most appropriate, particularly because the term could imply that the witness was undergoing therapy as a result of the sexual assault. Nonetheless, the trial court also indicated that the dog was from the prosecutor's office, thus signaling to the jury that the dog was not the witnesses' own therapy dog, but rather one provided by the prosecution to assist the witnesses with providing testimony. Therefore, no error occurred, and any objection to the trial court's use of the term therapy dog would have been meritless.

were admissible under MRE 803(4). At a scheduling conference prior to trial, defense counsel indicated that he had researched the issue and had no objection to the notice. Given that defendant clearly indicated that he had no objection to the hearsay statements, defendant waived this issue, and the waiver eliminated any error. *Id*.

Alternatively, defendant argues that his trial counsel should have filed an objection to exclude the victim's hearsay statements made to Mann because they were not trustworthy, and was ineffective in not doing so. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally not admissible unless an exception to the rule applies. MRE 802. One exception to the hearsay rule is contained in MRE 803(4), which permits admission of "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment . . . ." MRE 803(4). "Particularly in cases of sexual assault, in which the injuries might be latent . . . a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." *Mahone*, 294 Mich App at 215.

In *People v Meeboer (After Remand)*, 439 Mich 310, 315; 484 NW2d 621 (1992), the Court examined the application of MRE 803(4) to hearsay statements made to medical providers by child victims of sexual abuse. The *Meeboer* Court held that an inquiry into the trustworthiness of a child's statements made to a healthcare provider should "consider the totality of circumstances surrounding the declaration of the out-

of-court statement," and identified the following factors in determining the trustworthiness of a child's statement:

> (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Id*. at 324-325 (citations omitted).]

In the present case, the victim was six years old, and defendant admitted that she was "smart," indicating the maturity of the declarant. The record indicates that Mann used open-ended questions when eliciting the statements from the victim and that the purpose of the examination was to make sure the victim was "healthy" and safe in her home. Additionally, Mann opined that the victim phrased her statements in a childlike manner because she emphasized the fact that defendant did not wash his penis before putting it in her mouth, which would be in contrast to an adult who would likely emphasize the actual act of penetration.

The evidence also suggests that the victim may have still been under distress of the sexual acts because she

initially did not want to discuss the acts with Mann. The examination was held on August 5, 2014, less than one month after the victim's disclosure and more than four months prior to trial, tending to show that the exam was not for litigation purposes. There was also no evidence that the victim made a mistake in identification because the person identified as the perpetrator was her uncle, someone with whom she was familiar. These factors all weigh in favor of finding that the victim's statements to Mann were trustworthy. In contrast, only two factors weigh against a finding that the victim's statements were trustworthy. First, the record indicates that CPS initiated the examination, which could demonstrate that the medical examination was not intended for medical treatment or diagnosis. Second, testimony was presented that the victim did not like it when defendant babysat because he would make them clean and do chores, thus suggesting a motive to fabricate. After a review of the relevant factors, the totality of the circumstances support the admission of the victim's statements because they were trustworthy, indicating that any objection to the admission of the hearsay statements would have been meritless. Consequently, defendant's trial counsel was not constitutionally ineffective. *Unger*, 278 Mich App at 257.

C. JUDICIAL BIAS

We also disagree with defendant that his trial counsel was ineffective for failing to file a motion to disqualify the trial judge because she was biased. "A criminal defendant is entitled to a 'neutral and detached magistrate.' " *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011), quoting *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

"A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Jackson*, 292 Mich App at 598 (citation and quotation marks omitted). "Judicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging bias 'unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible.' " *Id.*, quoting *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Here, defendant argues that the trial judge was biased because she found the victim to be credible at the preliminary examination. However, "[m]erely proving that a judge conducted a prior proceeding against the same defendant does not amount to proof of bias for purposes of disqualification." *People v White*, 411 Mich 366, 386; 308 NW2d 128 (1981). Further, the trial judge's opinion of the victim's credibility was formed during the trial process (the preliminary examination), which is an insufficient ground for proving bias unless the defendant can show that there was " 'deep-seated favoritism or antagonism such that the exercise of fair judgment [was] impossible.' " *Jackson*, 292 Mich App at 598, quoting *Wells*, 238 Mich App at 391. Defendant points to the fact that the trial judge subsequently allowed the victim to testify with a support animal at trial to demonstrate that the trial court was not able to exercise fair judgment, but nothing reflects that this ruling was made out of deep-seated favoritism or antagonism. Instead, the ruling was made primarily because of the young victim's age. Thus, defendant cannot overcome the heavy presumption of judicial impartiality, which means that any motion to dis-

qualify the trial judge would have been meritless. Accordingly, defendant was not denied the effective assistance of counsel.

D. COURT COSTS AND FINE

Defendant also takes issue with the trial court's order requiring him to pay $600 in court costs and a $100 fine. Because defendant failed to object when the trial court ordered him to pay court costs and the fine, the issue is unpreserved. *People v Konopka (On Remand)*, 309 Mich App 345, 356; 869 NW2d 651 (2015). An unpreserved challenge to a trial court's imposition of court costs is reviewed for plain error affecting a defendant's substantial rights. *Id*. In order for a defendant to establish plain error, he must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 769.1k, as interpreted by *People v Cunningham*, 496 Mich 145, 158; 852 NW2d 118 (2014), did not provide trial courts with separate statutory authority to impose court costs at sentencing. In response to the *Cunningham* decision, the Legislature enacted 2014 PA 352, which was a curative measure to address the authority of courts to impose costs under MCL 769.1k. *Konopka*, 309 Mich App at 354-355, 357. The amended version of MCL 769.1k applies to court costs ordered before June 18, 2014, and after October 17, 2014, the effective date of the amendatory act. *Id*. at 355, 357. MCL 769.1k(1)(b) now provides:

> The court may impose any or all of the following:
>
> (*i*) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

(*ii*) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

(*iii*) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law, any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:

(A) Salaries and benefits for relevant court personnel.

(B) Goods and services necessary for the operation of the court.

(C) Necessary expenses for the operation and maintenance of court buildings and facilities.

Although defendant contends that giving retroactive effect to 2014 PA 352 would violate the state and federal Ex Post Facto Clauses, this Court in *Konopka* held that 2014 PA 352 does not violate the state and federal Ex Post Facto Clauses because the "court costs imposed under MCL 769.1k(1)(b)(*iii*) are not a form of punishment," but instead are intended to be a civil remedy. *Id*. at 370, 373. To the extent defendant argues that *Konopka* was wrongly decided, this Court is bound by that decision. MCR 7.215(J)(1).

Defendant also argues that the trial court erred when it imposed upon him a $100 fine. As mentioned above, MCL 769.1k allows the trial court to impose "[a]ny fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty." MCL 769.1k(1)(b)(*i*). Here, defendant was found guilty of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a), neither of which authorizes the imposition of a fine. Therefore, as the

prosecution concedes, the trial court erred when it ordered defendant to pay a $100 fine.

E. RESTITUTION

We agree—as does the prosecution—that the trial court erred when it ordered defendant to pay $900 in restitution for damages caused by a course of conduct that did not give rise to a conviction. See *People v McKinley*, 496 Mich 410, 419-420; 852 NW2d 770 (2014). The trial court shall reduce the restitution order by $900.

F. PROSECUTORIAL ERROR

In defendant's Standard 4 brief, he argues several unpreserved instances of prosecutorial error, including the prosecutor's use of leading questions and certain errors during the prosecutor's opening statement and closing argument. However, defendant has abandoned these issues by providing no caselaw or legal analysis to support his assertion that the prosecutor engaged in prosecutorial error. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (citation and quotation marks omitted). Even assuming that the issue was not abandoned, defendant is not entitled to relief.

MRE 611(d)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." However, a prosecutor has considerable leeway to ask leading questions to child wit-

nesses. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). In order to demonstrate that reversal is warranted for the prosecution asking leading questions, it is necessary to show "some prejudice or patterns of eliciting inadmissible testimony." *Id*. at 588 (citation and quotation marks omitted).

In this case, the prosecutor's use of leading questions was necessary to develop the victim's testimony. The victim was three years old at the time the sexual acts occurred and was only six years old at the time she testified. It is clear from her testimony that she was distraught and needed guidance to develop her testimony. Many times the victim asked for clarification or did not understand the questions that were asked by the prosecutor. Given that leading questions were necessary to develop the victim's testimony, no plain error occurred. Moreover, reversal is not required as defendant has not shown any prejudice or patterns of eliciting inadmissible testimony by the prosecutor's use of leading questions.[7]

Lastly, defendant raises numerous instances of alleged prosecutorial error during opening statements and closing arguments. To determine whether prosecutorial error has occurred, this Court looks to whether the defendant received a fair and impartial trial. *Id*. at 586. The appropriate time for a prosecutor to state what evidence will be submitted and what he intends to prove at trial is during opening statements. *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011).

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[7] In addition, defendant complains of leading questions at his preliminary examination. However, a preliminary examination is not a constitutionally based procedure, and any errors that occur at a preliminary examination will be deemed harmless if the defendant is subsequently convicted at an otherwise fair trial. *People v Hall*, 435 Mich 599, 602-603, 611-613; 460 NW2d 520 (1990). Defendant has not shown that he was denied a fair trial, and he is not entitled to relief.

When a prosecutor states that evidence will be submitted, and the evidence is not presented, reversal is not warranted if the prosecutor did so acting in good faith. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). With regard to closing arguments, "[a] prosecutor may not make a factual statement to the jury that is not supported by the evidence," but a prosecutor "is free to argue the evidence and all reasonable inferences arising from it as [it] relate[s] to . . . [the] theory of the case." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Furthermore, a prosecutor may not inject into trial his personal beliefs or opinions of a defendant's guilt. *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010).

After a review of the record, we conclude that most of the alleged instances of prosecutorial error were arguments that were supported by facts (or the reasonable inferences from these facts) in evidence. To the extent any prosecutorial error did occur during opening statements and closing arguments, defendant is unable to establish that he was prejudiced. The trial court subsequently instructed the jury to base the verdict solely on the evidence that was presented and that the attorney's arguments were not evidence. This instruction cured any prosecutorial error that may have occurred during opening statements and closing arguments. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Relief is not warranted.

We affirm defendant's convictions and sentences, but we remand for the trial court to modify the judgment of sentence consistently with this opinion. We do not retain jurisdiction.

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

LEWIS v FARMERS INSURANCE EXCHANGE

Docket No. 324744. Submitted April 8, 2016, at Detroit. Decided April 19, 2016, at 9:25 a.m.

Valencia Lewis filed a complaint in the Macomb Circuit Court against Farmers Insurance Exchange. Lewis sought personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries she suffered as a pedestrian when she was struck by a motor vehicle in a hit-and-run accident in October 2012. Lewis was not insured under a no-fault policy at the time of the accident. However, Lewis claimed PIP benefits under a no-fault policy issued to Tamekiah Gordon. At the time of the accident, Lewis lived with Gordon and Gordon's son. Lewis argued that she was entitled to PIP benefits under Gordon's no-fault policy because she and Gordon were cousins by marriage—Lewis's paternal aunt was married to Gordon's paternal uncle. Farmers filed a motion for summary disposition, and the court, Mark S. Switalski, J., denied the motion. The court explained that it was required to broadly construe the remedial no-fault act in favor of coverage and that a liberal construction supported its ruling that Lewis and Gordon were relatives. Farmers appealed.

The Court of Appeals *held*:

1. Marriage of one person's aunt to another person's uncle does not make the two persons relatives for purposes of the no-fault act. That is, the blood relatives of one spouse are not related by affinity to the blood relatives of the other spouse. According to MCL 500.3114(1), PIP benefits are available to "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." A relative, for purposes of the no-fault act, is a person related by marriage, consanguinity, or adoption. In this case, Lewis and Gordon were not related by blood or adoption and were not married to each other. Consequently, PIP benefits were available to Lewis only if she was related to Gordon by affinity. A person related by affinity to another person is related only because of marriage—they are not related by blood or adoption. That Lewis's aunt was married to Gordon's uncle did not establish a relationship by affinity between Lewis and Gor-

don. Although some caselaw has expanded the group of persons related by affinity to include stepsiblings, those related by marriage do not include cousins by marriage, in part because such relationships are significantly more attenuated than are the relationships between a stepsibling and his or her parents' families and other stepsiblings. Therefore, the trial court erred when it ruled that Lewis and Gordon were related for purposes of Gordon's no-fault insurance policy.

2. No-fault insurance policies may provide coverage beyond that required by the act. General rules of contract interpretation apply to the interpretation of a no-fault insurance policy. When terms have a definite legal meaning and appear in a written contract, the parties are presumed to have intended that those terms have their proper legal meaning. In this case, the insurance policy authorized payment to the insured or any of the insured's family members. The term "family member" was defined in the policy as a person related to the insured by blood, marriage, or adoption who lives in the same household. This definition was substantively identical to the definition of "relative" as it is understood for purposes of MCL 500.3114(1). There was no indication that the parties contemplated a different understanding of the term "family member." Therefore, because Lewis and Gordon were not relatives by marriage, neither were they family members by marriage. The trial court erred by ruling that Lewis was entitled to benefits because she was Gordon's cousin by marriage.

Reversed and remanded.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — RELATIVES — AFFINITY.

Under MCL 500.3114(1) of the no-fault act, MCL 500.3101 *et seq*., personal protection insurance benefits may be recovered by a relative of the insured domiciled in the same household; for purposes of MCL 500.3114(1), a relative is a person related by affinity, blood, or adoption; the relationships that qualify as affinity relationships are the relationships existing between a spouse and the blood relatives of the other spouse; two persons are not related by affinity when one person's aunt is married to the other person's uncle; that is, marriage does not cause the blood relatives of one spouse to become related by affinity to the blood relatives of the other spouse.

Applebaum & Stone, PLC (by *Katrina A. Murrel* and *Robin A. Miserlian*), for Valencia Lewis.

Hewson & Van Hellemont, PC (by *Robert D. Steffes* and *Nicholas S. Ayoub*), for Farmers Insurance Exchange.

Before: MURRAY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM. In this action for personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., defendant appeals by leave granted[1] the trial court's order denying its motion for summary disposition against plaintiff Valencia Lewis and plaintiff R & R Transportation, LLC.[2] We reverse and remand for entry of an order granting summary disposition in favor of defendant.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of plaintiff's claim for PIP benefits—under a no-fault policy issued by defendant to plaintiff's purported relative, Tamekiah Gordon—for injuries plaintiff suffered as a pedestrian during a hit-and-run car accident on October 26, 2012. On that date, plaintiff was a resident of Harrison Township, Michigan, and lived in a townhouse with Gordon and DeQuail Johnson, Gordon's son. At the time, neither plaintiff nor Johnson owned a motor vehicle covered by no-fault insurance. Gordon, however, owned a Ford Expedition that was insured under a no-fault policy issued by defendant.

Under the general definitions section in Gordon's no-fault policy, "family member" was defined as fol-

[1] *Lewis v Farmers Ins Exch*, unpublished order of the Court of Appeals, entered July 29, 2015 (Docket No. 324744).

[2] Although it intervened in the trial court, R & R did not file a brief or otherwise appear in the instant appeal. Accordingly, further references in this opinion to "plaintiff" are to Lewis alone.

lows: "**Family member** means a person related to you [the named insured] by blood, marriage or adoption who is a resident of your household." Additionally, Part III of the policy, which governed PIP coverage, provided, in pertinent part:

> We [Farmers] agree to pay in accordance with the **Code** [i.e., Chapter 31 of the Michigan Insurance Code, which is the no-fault act, MCL 500.3101 *et seq.*] the following benefits to or for an **insured person** . . . .
>
> * * *
>
> **Insured person** as used in this part means: you or any **family member** . . . .

Approximately 10 months after the accident, plaintiff initiated the instant action, asserting that defendant failed to pay PIP benefits to which she was entitled. The basis of her claim was that, under the terms of Gordon's policy and MCL 500.3114(1), which provides that PIP benefits can be recovered by "the person named in the policy" or "a *relative . . . domiciled in the same household*," plaintiff qualified as a "relative" who was "domiciled in the same household" as Gordon at the time of the accident, entitling her to PIP benefits under Gordon's policy. (Emphasis added.)

In October 2013, defendant filed an answer to plaintiff's complaint. Along with its answer, defendant asserted, as an affirmative defense, that it was not first in priority to pay the no-fault benefits at issue.

Discovery ensued, spanning roughly 11 months. Plaintiff was deposed twice, and both times she was questioned about her relationship to Gordon. During her first deposition, plaintiff described Gordon as her sister. However, at the second deposition, plaintiff described Gordon as her cousin:

> *Q*. [I]s she [Gordon] related to you?
>
> *A*. Yes.

Q. What is her relationship?

A. My cousin.

Q. When you say "cousin[,]" is there a blood relationship there? Is she the daughter of [one of your parents' siblings]?

A. No.

Q. So when you say "cousin[,]" she is a good friend of yours[,] correct?

A. No, we was [sic] married into the family.

Q. Okay. She is your cousin by marriage?

A. Yes.

Q. Okay. Explain to me how is she a cousin by marriage?

A. Her uncle is my uncles [sic].

Q. Her uncle was your uncle?

A. Yeah.

Q. I'm sorry. You['ve] got to clarify this for me. . . . Who is your uncle? What do you mean?

A. How can I put it? My aunt married--

Q. Wait. Your aunt. Now . . . I think of my mother's good friend as my aunt. When you say "aunt" is that your mother['s sister] or your father's sister?

A. My father's sister.

Q. Your father's sister. Okay. That's your aunt.

A. Right.

* * *

Q. Okay. . . . Your aunt is married to [whom]? How is that connection there?

A. [Gordon]'s father[,] his brother is married to my aunt, my father's sister.

Q. So [Gordon]'s uncle . . . the brother of [Gordon]'s father[,] is married to your aunt?

A. Exactly.

Q. Okay. So on October 26th, 2012 [the date of the accident] was your father's sister still married to [Gordon]'s uncle?

A. Yes.

Q. Are they still married?

A. Yes.

Contrary to her testimony during the first deposition, plaintiff admitted at the second deposition that Gordon was not her blood relative, deeming Gordon her "cousin by marriage."[3]

In September 2014, defendant filed a motion for summary disposition under MCR 2.116(C)(10). Defendant argued that, given plaintiff's testimony at the second deposition, no genuine issue of material fact existed regarding the relationship between plaintiff and Gordon. Defendant further argued that (1) plaintiff was admittedly unrelated to Gordon by blood, (2) plaintiff was also, as a matter of law, unrelated to Gordon by affinity (i.e., by marriage), and (3) therefore, plaintiff did not qualify as Gordon's relative under MCL 500.3114(1). Finally, defendant argued that because plaintiff was not Gordon's relative, she was not entitled to PIP benefits under Gordon's policy.

In response, plaintiff argued that she and Gordon were "cousins by affinity," which is a degree of familial relation. Plaintiff also argued that both the no-fault act and the language of Gordon's policy were unclear regarding "the degree of relation that relatives must share in order to collect [PIP] benefits under [a] relative's insurance policy." Therefore, according to plaintiff, summary disposition in favor of defendant was

[3] She continued to rely on this relationship as the basis of her claim for the rest of the proceedings.

improper because there was a genuine issue of material fact regarding whether plaintiff was entitled to PIP benefits under Gordon's policy, and that question had to be decided by the trier of fact.

The trial court decided the matter without entertaining oral argument. Although the trial court briefly examined the definition of "family member" in Gordon's policy, its analysis focused primarily on the meaning of the term "relative" in MCL 500.3114(1). Noting that the no-fault act does not define "relative," the trial court determined that it must give the term its plain and ordinary meaning. After reviewing dictionary definitions and relevant authority regarding relationships by affinity, the trial court concluded that plaintiff and Gordon were "cousin[s] by marriage." Observing that it was required to construe the no-fault act liberally in favor of coverage, the trial court then held that "plaintiff is a 'relative' of Gordon according to the plain language of MCL 500.3114(1) and the subject policy language." Accordingly, the trial court denied defendant's motion for summary disposition.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court may only consider, in the light most favorable to the party opposing the motion, "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties . . . .' " *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10),

"[s]ummary 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." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

Additionally, "[i]ssues of statutory construction are questions of law, which [this Court] review[s] de novo." *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 253; 819 NW2d 68 (2012). Likewise, this Court reviews de novo, as a question of law, "the construction and interpretation of an insurance contract[.]" *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

> The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement. The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written. [*Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529-530; 740 NW2d 503 (2007) (citations omitted).]

III. ANALYSIS

"An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the [no-fault] act." *Corwin*, 296 Mich App at 254 (quotation marks and citation omitted; alteration in original); see also MCL 500.3105(1). Insurance

contracts in conflict with the no-fault act must be construed when reasonably possible "in a manner that renders them 'compatible with the existing public policy as reflected in the no-fault act,' " *Corwin*, 296 Mich App at 257 (citation omitted), but no-fault policies may expand coverage beyond "the mandatory coverages required" by the act, see *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 44; 664 NW2d 776 (2003).

The trial court's decision in this case was based not only on its interpretation of MCL 500.3114(1), but also on its determination that Gordon qualifies as a family member under the insurance policy. Accordingly, our analysis of this issue requires two separate, but related, inquiries: (1) whether plaintiff qualifies as a relative of Gordon for purposes of MCL 500.3114(1); and (2) if the policy provides broader coverage than that required under MCL 500.3114(1), whether plaintiff qualifies as a family member as that term is used in the policy.

We conclude that plaintiff qualifies neither as a relative under MCL 500.3114(1) nor as a family member under the insurance policy.

A. MCL 500.3114(1)

PIP benefits are recoverable by "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." MCL 500.3114(1). See *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 174; 858 NW2d 765 (2014). For purposes of MCL 500.3114(1), a relative is a person related "by marriage, consanguinity, or adoption." *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342, 345; 708 NW2d 131 (2005), overruled on other grounds by *Spectrum Health Hosps v Farm Bureau Mut Ins Co of*

Mich, 492 Mich 503 (2012). See also *Allstate Ins Co v Tomaszewski*, 180 Mich App 616, 621; 447 NW2d 849 (1989) ("In the insurance context, courts have held that 'relative' means not only blood relative but also relative by marriage.").

It is undisputed that Gordon and plaintiff were not married, were not related by blood, and were not related by adoption at the time of the accident. Thus, the issue here is whether plaintiff qualifies as Gordon's relative by marriage, i.e., "by affinity." See *Black's Law Dictionary* (10th ed) (defining "relative by affinity" as "[s]omeone who is related solely as the result of a marriage and not by blood or adoption"). See also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "affinity" as a "relationship by marriage").

Michigan statutes and caselaw have long recognized the fundamental difference between consanguineous (blood) relatives, i.e., individuals related because they share the blood of a common ancestor, and relatives by affinity, i.e., individuals related by marriage. See, e.g., *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012) ("[T]he context in which the term 'by blood' is used in [MCL 750.520b(1)(b)(*ii*)] indicates that it is meant as an alternative to the term 'by affinity.' "); *Berdan v Milwaukee Mut Life-Ins Co*, 136 Mich 396, 402; 99 NW 411 (1904) ("By marriage, one party thereto holds, by affinity, the same relation to the kindred of the other that the latter holds by consanguinity.") (quotation marks and citations omitted); *Mann v Hyde*, 71 Mich 278, 281-282; 39 NW 78 (1888) (explaining that a decedent's sister-in-law was not a blood relative but was, instead, related to the decedent only by affinity). In *Zajaczkowski*, the Michigan Supreme Court reaffirmed this distinction, defining affinity as

> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband. [*Zajaczkowski*, 493 Mich at 13-14, quoting *Bliss v Caille Bros Co*, 149 Mich 601, 608; 113 NW 317 (1907) (quotation marks omitted).]

In other words, when a couple marries, each spouse becomes related by affinity to the other spouse's blood relatives by the same degree.

However, the meaning of "relative by marriage" adopted by the trial court in this case extended affinity principles a step further. The trial court decided that, because plaintiff's paternal aunt is married to Gordon's paternal uncle, plaintiff and Gordon are "cousins by affinity." Thus, the trial court implicitly decided that marriage creates affinity relationships not only between a spouse and the blood relatives of the other spouse, but also between the blood relatives of one spouse and the blood relatives of the other.

We recognize that Michigan caselaw may provide limited support for such an extension of affinity principles beyond their traditional confines. See, e.g., *People v Armstrong*, 212 Mich App 121, 128-129; 536 NW2d 789 (1995); *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995) (stating the liberal rule of construction applicable to the no-fault act, i.e., "[T]he [no-fault] act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it"). However, given the Supreme Court's analysis in *Zajaczkowski* and its reliance on *Bliss*, we conclude that the trial court's interpretation of MCL 500.3114(1) was erroneous.

In *Armstrong*, 212 Mich App 121, this Court construed affinity as the word is used in the second-degree criminal sexual conduct statute, MCL 750.520c(1) ("The actor is related by blood or affinity . . . to the victim."). At issue in that case was whether a victim of sexual assault and her stepbrother, who was the perpetrator of the assault, qualified as relatives by affinity under MCL 750.520c(1), despite the fact that they did not qualify as relatives under the Michigan Supreme Court's definition of affinity in *Bliss*, 149 Mich at 608 (the definition recently reiterated by the Michigan Supreme Court in *Zajaczkowski*, 493 Mich at 13-14). *Armstrong*, 212 Mich App at 122-129. Citing a 1950 decision of the Washington Supreme Court,[4] the *Armstrong* Court concluded that "the term 'affinity' is not capable of precise definition" and further stated that "at common law, whether someone was related to another by affinity depended upon the legal context presented." *Id*. at 125. Ultimately, the *Armstrong* Court concluded that, within the statutory context at issue in that case, "the relation between a stepbrother and a stepsister" was one of affinity. *Id*. at 128.

However, based on our Supreme Court's more recent opinion in *Zajaczkowski* and its reliance on *Bliss*, we conclude that this Court's expanded definition of affinity in *Armstrong* is not controlling in this case. In support of its conclusion that the Michigan Supreme Court's definition of affinity, as announced in *Bliss*, did not mandate its decision, the *Armstrong* Court relied on three distinct conclusions of law: (1) "the term 'affinity' is not capable of precise definition," (2) "at common law, whether someone was related to another by affinity depended upon the legal context presented," and (3) "in *Bliss*, our Supreme Court expressly limited the applica-

[4] *In re Bordeaux' Estate*, 37 Wash 2d 561; 225 P2d 433 (1950).

bility of the definition of affinity that it adopted" to "the factual and legal context" of *Bliss*. *Armstrong*, 212 Mich App at 125-126. The first two of those conclusions were supported solely by citation of the Washington Supreme Court opinion. However, although this Court may rely on cases from other jurisdictions as persuasive authority, they are not binding. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). More importantly, since *Armstrong* was decided, the Michigan Supreme Court's *Zajaczkowski* decision reaffirmed the *Bliss* definition of affinity, without mentioning the limiting language emphasized by the *Armstrong* Court. See *Zajaczkowski*, 493 Mich at 13-14. Therefore, even though *Zajaczkowski* construed the first-degree criminal sexual conduct statute, MCL 750.520b(1)(b)(*ii*), rather than the no-fault act, we conclude that the Michigan Supreme Court's approval of the *Bliss* definition of affinity in *Zajaczkowski* demonstrates that this remains the commonly understood meaning of affinity under Michigan law. This definition, accordingly, must be applied in this case.[5] See *Allard v Allard*, 308 Mich App 536, 552; 867 NW2d 866 (2014), lv gtd 497 Mich 1040 (2015) (holding that the Court of Appeals has "no power to modify . . . our Supreme Court's prior definition").

Therefore, "relative," in the context of MCL 500.3114(1), means a person related "by marriage, consanguinity, or adoption." *Allen*, 268 Mich App at 345. For purposes of MCL 500.3114(1), a relationship by blood is an alternative to a relationship by marriage, i.e., by affinity. Consistent with the Michigan

[5] We also note that plaintiff's relationship with Gordon is significantly more attenuated than the stepsibling relationship at issue in *Armstrong*, which gave rise to the Court's limited expansion of affinity principles.

Supreme Court's decision in *Zajaczkowski*, we conclude that in this statutory context, a relationship by affinity or marriage consists of

> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband. [*Zajaczkowski*, 493 Mich at 13-14, quoting *Bliss*, 149 Mich at 608.][6]

The use of this definition is especially appropriate given the *Bliss* Court's further discussion of the reasons why it adopted this definition and declined to adopt another rule:

> *The other and further rule stated, obiter*, . . . to the effect

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[6] Notably, plaintiff quotes this definition in her brief on appeal. This definition is also consistent with the definition of "relative by affinity" in *Black's Law Dictionary* (10th ed): "A person is a relative by affinity (1) to any blood or adopted relative of his or her spouse, and (2) to any spouse of his or her blood and adopted relatives. Based on the theory that marriage makes two people one, the relatives of each spouse become the other spouse's relatives by affinity."

Other jurisdictions have similarly recognized this conceptualization of relationships by marriage or affinity. See, e.g., 41 Am Jur 2d, Husband and Wife, § 4, pp 16-17; *Sjogren v Metro Prop & Cas Ins Co*, 703 A2d 608, 611 (RI, 1997); *Criminal Injuries Compensation Bd v Remson*, 282 Md 168, 183; 384 A2d 58 (1978) ("Affinity is relationship by marriage. It is the connection between a spouse and the blood relatives of the other spouse. . . . [T]he meaning of affinity as the tie between one spouse and the blood relatives of the other spouse is the overwhelming view throughout the country."). But see *Flitton v Equity Fire & Cas Co*, 824 P2d 1132, 1133-1134 (Okla, 1992) (noting that the insurance policy at issue did not use the term "affinity" and concluding that the insured's stepbrother was covered as a "family member" under the policy); *Sigel v New Jersey Mfr Ins Co*, 328 NJ Super 293, 296-297; 745 A2d 602 (2000) (following the reasoning in *Flitton* and holding that two stepsiblings were "related by marriage," as that term was used in the insurance policy at issue).

> that 'relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife,' is based upon very remote, and is opposed to the weight of modern, authority. *We must decline to hold that the fact that two men, unrelated, marry wives who are second cousins, establishes between them a relation by affinity.* [*Bliss*, 149 Mich at 609 (emphasis added).]

Plaintiff seeks PIP benefits from defendant on the theory that she qualifies as Gordon's relative by marriage. However, plaintiff's purported relationship with Gordon, through the marriage of plaintiff's paternal aunt to Gordon's paternal uncle, does not fall within the common understanding of relative by affinity under Michigan law. Rather, their relationship is akin to the example in *Bliss*. Accordingly, like the Court in *Bliss*, we find that two women who are completely unrelated by consanguinity but who had other blood relatives marry each other, in this case their respective aunt and uncle, do not share a relationship of "cousins by affinity" that satisfies the definition of relative for purposes of MCL 500.3114(1).

Thus, the trial court erred.

B. "FAMILY MEMBER" UNDER THE INSURANCE POLICY

As discussed, no-fault insurance policies may expand coverage beyond "the mandatory coverages required" by the act. See *Wilkie*, 469 Mich at 44. Therefore, if the language of the policy expanded the scope of PIP coverage beyond that required by MCL 500.3114(1), and if plaintiff falls within that expanded scope of coverage, we must affirm the trial court's decision. See *Neville v Neville*, 295 Mich App 460, 470; 812 NW2d 816 (2012) ("This Court . . . will not reverse when a trial court reaches the right result for a wrong reason.").

"Because a no-fault insurance policy is a contract, the general rules of contract interpretation apply." *Fuller v GEICO Indemnity Co*, 309 Mich App 495, 498; 872 NW2d 504 (2015). "Clear and unambiguous provisions of an insurance policy must be enforced according to their plain meanings." *Id*. "As a general rule, where terms having a definite legal meaning are used in a written contract, the parties to the contract are presumed to have intended such terms to have their proper legal meaning, absent a contrary intention appearing in the instrument." *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005) (quotation marks and citations omitted).

As stated, Part III of the policy at issue, which governs PIP coverage, provides that PIP benefits are payable "to or for an **insured person**." "**Insured person**," as used in Part III, is defined as the named insured "or any **family member**[.]" The general definitions section of the policy provides, "**Family member** means a person related to you [the named insured] by blood, marriage or adoption who is a resident of your household."

The definition of "family member" in the policy is substantively identical to the definition of "relative" contemplated by this Court in *Allen* for purposes of MCL 500.3114(1). See *Allen*, 268 Mich App at 345 (requiring that a relative be related to the insured "by marriage, consanguinity, or adoption"; it was not enough that the claimant and the insured resided in the same house). Accordingly, we conclude that the insurance policy does not expand coverage beyond that required by the no-fault act, see *Wilkie*, 469 Mich at 44; the term "family member" under the policy should be construed in the same manner as "relative" for pur-

poses of MCL 500.3114(1). Stated differently, because there is no indication to the contrary, we presume that the parties intended for the terms "family member" and "related by marriage" in the policy to have the same meaning as "relative" and "related by marriage" for purposes of MCL 500.3114(1). Further, because "related by marriage" is not defined in the insurance policy, and there is no indication that the parties intended for this term to deviate from the proper legal meaning of "by marriage" or "by affinity," we presume that the parties intended that the term "have [its] proper legal meaning." *Prentis Family Foundation*, 266 Mich App at 58 (quotation marks and citations omitted).

Therefore, for the same reasons discussed earlier in this opinion, the trial court erred by construing the term "family member" as used in the policy in a manner that includes plaintiff's relationship with Gordon.

IV. CONCLUSION

Because established Michigan law does not recognize the purported "cousins by marriage" relationship between plaintiff and Gordon, the trial court erred by holding that plaintiff was Gordon's "relative"; plaintiff was not entitled to PIP benefits under MCL 500.3114(1) or the no-fault policy issued by defendant.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant.

MURRAY, P.J., and STEPHENS and RIORDAN, JJ., concurred.

PEOPLE v CLARK

Docket No. 322852. Submitted March 8, 2016, at Grand Rapids. Decided April 19, 2016, at 9:30 a.m.

Tyrone M. Clark pleaded guilty in the Ottawa Circuit Court of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), with a sentence enhancement as a repeat drug offender, MCL 333.7413(2). In 2005, defendant was convicted in federal court of certain felonies for which that court sentenced him to a term of years in prison followed by a three-year term of supervised release as allowed under 18 USC 3583(a). At the sentencing hearing in this case, defendant inaccurately indicated on the record that he was on parole from the 2005 federal convictions when he committed the instant offenses, rather than on federal supervised release. Relying on MCL 768.7a(2), which states that the sentence imposed for any felony committed while on parole for a previous offense must be consecutive to the remaining portion of the term of imprisonment imposed for that previous offense, the court, Jon H. Hulsing, J., ordered defendant's sentence to run consecutively to the sentence imposed by the federal court for the federal conviction. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. Michigan uses an indeterminate sentence scheme in which a defendant receives a minimum sentence and a maximum sentence. The sentencing court has no authority to modify a sentence once a valid indeterminate sentence has been imposed. Instead, the Parole Board has authority to grant parole to qualified prison inmates after serving a portion of an indeterminate prison term, and the board may rescind parole for cause up until the prisoner is discharged from parole. In contrast, federal law uses a determinate sentence scheme in which a defendant is sentenced to a fixed term. Unlike parole in Michigan, which replaces a portion of a defendant's prison sentence, federal supervised release is a separate term imposed by a federal court at the initial sentencing, and it is served following the completion of a definite term in prison.

2. In Michigan, consecutive sentences may be imposed only if specifically authorized by statute. Under MCL 768.7a(2), if a

person is convicted and sentenced to a term of imprisonment for a felony committed while on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense begins to run when the remaining portion of the term of imprisonment imposed for the previous offense expires. MCL 768.7a(2) is clear and unambiguous; it authorizes consecutive sentencing only when a felony is committed while on parole from a sentence for a previous offense, and it must not be judicially amended by reading the statute to include felonies committed while on federal supervised release for a previous conviction. In other words, the statutory provision does not authorize a trial court to impose a consecutive sentence on a person who is convicted and sentenced for a felony committed while on federal supervised release for a previous conviction. Because defendant was on federal supervised release when he committed the offenses in this case and not on parole, the trial court erred by ordering defendant's sentence to run consecutively to the remaining portion of his federal sentence.

3. Defendant failed to preserve his claim that he is entitled under MCL 769.11b to jail credit for the time he was on supervised release or in prison for his previous federal conviction. Defendant failed to establish plain error occurred that affected his substantial rights when the trial court did not award sentence credit; he did not specify the number of days to which he believed he was entitled and was unable to demonstrate that he was incarcerated before sentencing in this case as a result of a denial of or inability to furnish bond.

Reversed and remanded.

O'CONNELL, P.J., dissenting, disagreed with the majority's analysis of MCL 768.7a(2). Because supervised release is defined as federal parole in *Black's Law Dictionary* (10th ed) and both terms are imposed because the defendant committed a previous offense, the Legislature intended MCL 768.7a(2) to authorize consecutive sentencing when a defendant commits a later felony while on federal supervised release for a previous federal conviction. Judge O'CONNELL would have affirmed defendant's sentence.

CRIMINAL LAW — SENTENCING — CONSECUTIVE-SENTENCING STATUTE — NO APPLICATION FOR FEDERAL SUPERVISED RELEASE.

Under MCL 768.7a(2), if a person is convicted and sentenced to a term of imprisonment for a felony committed while on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense begins to run when the remaining portion of the term of imprisonment imposed for the previous

offense expires; MCL 768.7a(2) does not authorize a court to impose a consecutive sentence when a defendant commits a crime while he or she is on federal supervised release for a previous federal conviction; a federal term of supervised release is not the same as parole for purposes of MCL 768.7a(2).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Assistant Prosecuting Attorney, for the people.

Dory A. Baron for defendant.

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

MARKEY, J. Defendant appeals by leave granted a judgment of sentence in which the trial court ordered defendant, as a repeat drug offender, MCL 333.7413(2), to serve 38 to 240 months in prison for his plea-based conviction of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*). The court ordered the sentence to be served consecutively to a federal sentence he was serving for a previous conviction. Defendant argues that because his federal supervised release did not constitute "parole" under MCL 768.7a(2), the trial court erred by ordering that his sentence in this case run consecutively to the federal sentence. Defendant also asserts the trial court erred by not awarding him credit for the time he served before sentencing. We agree in part and remand for resentencing.

I. SUMMARY OF FACTS AND PROCEEDINGS

As a result of a police investigation between July 2013 and September 2013, defendant was charged with delivering less than 50 grams of cocaine,

MCL 333.7401(2)(a)(*iv*), and possession of marijuana, MCL 333.7403(2)(d). The prosecution notified defendant that these charges were subject to second-offense sentence enhancement pursuant to MCL 333.7413(2).

At the time of defendant's arrest, he was on federal supervised release because of his 2005 conviction for possession of cocaine and being a felon in possession of a firearm. Defendant was sentenced on these federal offenses to 110 months in federal prison followed by a three-year term of supervised release.[1] Defendant remained incarcerated until his term of supervised release began on August 16, 2012; the term was scheduled to expire on August 5, 2015.

On February 28, 2014, defendant pleaded guilty in the present case to delivery of less than 50 grams of cocaine, second offense, in exchange for the dismissal of the possession-of-marijuana charge. The prosecutor also agreed to not bring further charges in this case (e.g., fleeing and eluding). In establishing a factual basis for his plea, defendant admitted that he delivered cocaine to another individual on July 2, 2013, and that he had a prior conviction of possession of marijuana. The trial court accepted defendant's guilty plea.

At his sentencing proceeding on May 14, 2014, defendant admitted that he had been on "parole" at the time he committed the charged offense. But defendant also stated that he believed the recommended sentence was "absurd" because he was never informed about a "mandatory consecutive sentence." The trial court explained to defendant that Michigan law required "any

[1] 18 USC 3583(a) provides that in all cases a federal court may, and in certain cases must, when "imposing a sentence to a term of imprisonment for a felony or a misdemeanor, . . . include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment . . . ."

offense committed while on parole status . . . be consecutive to parole." Thus, when imposing sentence, the trial court explained that the ordered period of imprisonment "begins upon the conclusion of [the sentence for] the crime for which you were on parole."

On May 23, 2014, defendant moved *in propria persona* for resentencing on the basis that he was not on parole at the time of sentencing. The trial court denied defendant's motion on May 29, 2014. In denying the motion, the trial court noted that defendant's presentence investigation report (PSIR) confirmed that defendant "was on parole status" when he committed this offense. The PSIR also states that defendant was sentenced in federal court to 20 months' imprisonment as a result of a "parole violation" for his involvement in the instant offense.

Defendant filed a delayed application for leave to appeal in this Court on July 23, 2014. On August 27, 2014, this Court denied leave to appeal "for lack of merit in the grounds presented." Defendant subsequently filed an application for leave to appeal in the Michigan Supreme Court, which issued an order directing the prosecutor to file an answer to defendant's application. After plaintiff did so, the Court considered defendant's application for leave to appeal and remanded to this Court "for consideration as on leave granted." *People v Clark*, 498 Mich 880 (2015).

II. ANALYSIS

A. PRESERVATION OF ISSUES

To preserve a sentencing issue for appeal, a defendant must raise the issue "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." MCR 6.429(C);

see also *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). In a motion for resentencing, defendant argued that he was not subject to consecutive sentencing because he was not on "parole" at the time the offense was committed. Therefore, this issue is preserved.

However, defendant's sentence-credit argument is unpreserved because he did not request credit for time served at sentencing or object to the trial court order that denied him sentence credit. See *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005).

B. STANDARD OF REVIEW

A consecutive sentence cannot be imposed under Michigan law in the absence of statutory authority. *People v Chambers*, 430 Mich 217, 222; 421 NW2d 903 (1988). Therefore, whether a trial court may impose consecutive sentences is a question of statutory interpretation, which is reviewed de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003).

With respect to defendant's argument regarding sentence credit, this Court's review is limited to plain error affecting substantial rights because the issue was not preserved. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Relief is available only when (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected substantial rights, meaning it affected the outcome of the proceedings. *Id*. Additionally, reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*. (quotation marks and citation omitted).

C. DISCUSSION

Because we conclude that a federal term of "supervised release" is not the same as "parole" under Michigan's criminal justice system, we necessarily conclude that MCL 768.7a(2) does not provide statutory authority for defendant's sentence to run consecutively to the federal sentence for which he was on supervised release when he committed the instant offense. Consequently, we remand this case to the trial court for resentencing. With respect to defendant's argument that the trial court erred by denying him sentence credit, however, defendant has failed to establish plain error warranting relief.

The PSIR states that defendant was sentenced to "110 months with 3 years SRT" for his federal convictions. A three-year term of supervised release is consistent with the provisions of 18 USC 3583(b). Despite this reference to supervised release, the remainder of the PSIR refers only to defendant's being on "federal parole." Likewise, at sentencing, the parties—including defendant—used the term "federal parole," as opposed to supervised release when discussing his status at the time he committed the instant offense. The parties agree that this was a mischaracterization in that at the time he committed the instant offense, defendant was on federal supervised release with respect to his federal convictions.

There is currently no binding caselaw addressing whether a consecutive sentence may be ordered under MCL 768.7a(2) for an individual who was on federal supervised release, as opposed to parole, at the time of the offense. A number of unpublished opinions of this Court have suggested that parole and federal supervised release are not identical. See, e.g., *People v Kirk*, unpublished opinion per curiam of the Court of Ap-

peals, issued July 10, 2014 (Docket No. 314416), p 6 ("Presuming, *without deciding*, that the trial court clearly erred when it found that [the defendant] was on parole rather than supervised release . . . .") (emphasis added); *People v Shaw*, unpublished opinion per curiam of the Court of Appeals, issued July 2, 1999 (Docket No. 210717), p 4 (reviewing the defendant's argument "under the assumption that he was not subject to . . . consecutive sentencing on account of his federal supervised release status"). And one former justice of our Supreme Court opined in her dissent from an order denying a defendant's application for leave to appeal that the same argument advanced by defendant in this case was meritorious in that case. See *People v Williams*, 463 Mich 942 (2000) (CORRIGAN, J., dissenting) ("[The] defendant argues that MCL 768.7a(2) . . . does not prescribe consecutive sentencing for a state offense he committed while on 'supervised release' rather than 'parole' from a federal term of imprisonment. The plain text of the statute supports [the] defendant's view.").

In Michigan, a consecutive sentence may be imposed only if specifically authorized by statute. *Chambers*, 430 Mich at 222; *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006). When the trial court ordered defendant's current delivery of cocaine sentence to run consecutively to his federal sentence, it relied on MCL 768.7a(2), which provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on *parole* from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense. [Emphasis added.]

When interpreting statutes, our primary goal is to "ascertain and give effect to the intent of the Legislature." *People v Armisted*, 295 Mich App 32, 37; 811 NW2d 47 (2011). This Court first reviews the specific language of the statute because the Legislature is presumed to have intended the meaning that it plainly expressed. *Id*. Unless a word or phrase is a term of art or defined by the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning. MCL 8.3a; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). A dictionary may be consulted regarding the common, generally accepted meaning of a word. *Id*. at 151-152; *People v Spann*, 250 Mich App 527, 530; 655 NW2d 251 (2002). When the statutory language is clear and unambiguous, this Court assumes the Legislature intended the plain meaning it expressed, and we enforce the statute as written. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Otherwise, a statute is subject to judicial construction only when it is ambiguous, i.e., either two provisions irreconcilably conflict or a provision is equally susceptible to more than one meaning. *Gardner*, 482 Mich at 50 n 12. If judicial construction is appropriate because of ambiguity, we must construe the statutory language reasonably, keeping in mind the apparent purpose of the statute. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). Finally, nothing may be read into an unambiguous statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011).

The parties do not dispute the general meaning of MCL 768.7a(2) insofar as it mandates a consecutive sentence for a later offense when that offense is committed while the individual is on parole for a previous offense. See *People v Phillips*, 217 Mich App 489,

498-499; 552 NW2d 487 (1996) (interpreting MCL 768.7a(2) and holding that the sentence of a defendant convicted of a felony while on *parole* for a federal offense must be served consecutively to the remainder of the federal offense). The parties only dispute whether a sentence of supervised release for a previous federal conviction comes within the meaning of the term "parole" as used in the Michigan consecutive-sentencing statute: defendant argues that the term "parole" does *not* include federal supervised release, while plaintiff argues that it does. We note that while the *Phillips* Court determined MCL 768.7a(2) applied to individuals on parole from federal offenses, the opinion did not address federal supervised release. For the reasons discussed in this opinion, we conclude that the two terms are not interchangeable.

There is a basic difference between Michigan's criminal justice system and the federal criminal justice system. Michigan, in general, employs an indeterminate sentencing scheme when a person is convicted of a crime that requires imprisonment. See *People v Lockridge*, 498 Mich 358, 380 n 18; 870 NW2d 502 (2015). An "indeterminate sentence" is one " 'of an unspecified duration, such as one for a term of 10 to 20 years.' " *Id*., quoting *People v Drohan*, 475 Mich 140, 153 n 10; 715 NW2d 778 (2006),[2] in turn quoting *Black's Law Dictionary* (8th ed). "[U]nder an indeterminate scheme, a defendant receives a minimum sentence and a maximum sentence. In Michigan, for instance, the law provides that the maximum portion of a defendant's indeterminate sentence must be the 'maximum penalty provided by law . . . .' " *People v Harper*, 479 Mich 599, 612; 739 NW2d 523 (2007), quoting MCL 769.8(1).

[2] Abrogated on other grounds in *Lockridge*, 498 Mich 358.

Once a Michigan judge imposes a valid indeterminate sentence of imprisonment with the Department of Corrections (DOC), the sentencing court has no authority to modify the sentence. *People v Holder*, 483 Mich 168, 170, 177; 767 NW2d 423 (2009). Rather, the DOC Parole Board is vested with the authority to grant "parole" to qualified prison inmates. *In re Parole of Bivings*, 242 Mich App 363, 372; 619 NW2d 163 (2000); MCL 791.231 *et seq*. The Parole Board has the discretion to grant or deny parole and to discharge the prisoner if the prisoner satisfactorily completes the terms of parole. *People v Idziak*, 484 Mich 549, 584-585; 773 NW2d 616 (2009). Parole is a conditional release; a paroled prisoner remains technically in the custody of the DOC but is permitted to leave the confinement of prison. *Holder*, 483 Mich at 172-173; *People v Raihala*, 199 Mich App 577, 579; 502 NW2d 755 (1993). Until a prisoner is discharged from parole, the Parole Board may rescind parole for cause if a parole violation has been proven by a preponderance of the evidence, MCL 791.240a, and may amend an existing order of parole, MCL 791.236(3). *Holder*, 483 Mich at 173. Parole in Michigan has been described by our Supreme Court as follows:

> "The purpose of a parole is to keep the prisoner in legal custody while permitting him to live beyond the prison inclosure [sic] so that he may have an opportunity to show that he can refrain from committing crime. It is a conditional release, the condition being that if he makes good he will receive an absolute discharge from the balance of his sentence; but if he does not make good he will be returned to serve his unexpired time. The absolute discharge is something more than a release from parole. It is a remission of the remaining portion of his sentence. Like a pardon, it is a gift from the executive, and like any other gift it does not become effective until it is delivered and accepted. After delivery it cannot be recalled." [*Id*. at 174,

quoting *In re Eddinger*, 236 Mich 668, 670; 211 NW 54 (1926) (emphasis omitted); see also *Raihala*, 199 Mich App at 579.]

Thus, under Michigan law, "parole" is consistent with the definition of that term in *Black's Law Dictionary* (10th ed): "The conditional release of a prisoner from imprisonment before the full sentence has been served." It is also consistent with the first pertinent definition of "parole" in *Merriam-Webster's Collegiate Dictionary* (11th ed) of "a conditional release of a prisoner serving an indeterminate or unexpired sentence." A prisoner becomes "*parole eligible*" after serving the minimum term of his or her indeterminate sentence, and the Parole Board then has jurisdiction to determine "whether the prisoner is *worthy* of parole." *Idziak*, 484 Mich at 559 (emphasis in original). So, parole is inherently a part of the original sentence imposed by the trial court. *Id*. at 559 n 7. But once sentenced to imprisonment, the prisoner is under the jurisdiction of the DOC and the Parole Board. *Holder*, 483 Mich at 174-176; *In re Parole of Bivings*, 242 Mich App at 372-373.

In contrast to Michigan, a person convicted of a federal crime may be ordered to serve a determinate prison sentence. See *Lockridge*, 498 Mich at 371; *United States v Booker*, 543 US 220, 231-232; 125 S Ct 738; 160 L Ed 2d 621 (2005). "[U]nder a determinate scheme, conviction for an offense typically exposes a defendant to a sentence of a fixed term lying in a standard range for that offense." *Harper*, 479 Mich at 611. "Thus, a determinate system is a sentencing system in which the defendant receives a certain and fixed sentence and is subject to serving that precise sentence. An indeterminate system is a sentencing system in which the defendant receives a singular

maximum sentence, and, in some systems such as Michigan's, may be released on parole before serving that maximum." *Lockridge*, 498 Mich at 410 n 7 (MARKMAN, J., dissenting). "Supervised release is a unique method of post-confinement supervision invented by the Congress for a series of sentencing reforms . . . ." *Gozlon-Peretz v United States*, 498 US 395, 407; 111 S Ct 840; 112 L Ed 2d 919 (1991). "Supervised release" replaced "special parole," which was repealed by the sentencing reforms that Congress enacted. *Id*. at 397. "Special parole," similar to parole under Michigan law, "was 'a period of supervision served upon completion of a prison term' and administered by the United States Parole Commission." *Id*. at 399 (citation omitted). "Supervised release" is imposed by the sentencing court at the initial sentencing to be served following the completion of a definite term of prison confinement. 18 USC 3583(a); 18 USC 3624(e). Unlike parole in Michigan, when a federal court imposes a term of supervised release that follows a determinate prison term, it retains jurisdiction to modify, terminate, extend, or revoke that term of supervised release. 18 USC 3583(e).

In sum, even though the purpose of each is similar, there are significant differences between parole—under the plain meaning of that term and as practiced in Michigan—and federal supervised release. The most noteworthy difference is that an individual on parole is not sentenced to a term of parole but rather, after serving a portion of an indeterminate prison sentence, he or she becomes eligible and may be granted parole by the Parole Board. *Idziak*, 484 Mich at 559, 584-585. Successful completion of parole and discharge has the effect of remitting the remaining portion of the previously imposed prison sentence. *Holder*, 483 Mich at 173. On the other hand, supervised release is imposed

at the initial sentencing to be served following completion of imprisonment and is similar to a period of probation that the sentencing court maintains jurisdiction to modify, terminate, extend, or revoke "and require the defendant to serve in prison all or part of the term of supervised release . . . ." 18 USC 3583(e)(3); see also *People v McCuller*, 479 Mich 672, 739; 739 NW2d 563 (2007) (KELLY, J., dissenting) (comparing supervised release to probation by indicating that the former "is imposed in addition to imprisonment, rather than instead of it"), and *Johnson v United States*, 529 US 694, 725; 120 S Ct 1795; 146 L Ed 2d 727 (2000) (Scalia, J., dissenting) ("Unlike parole, which replaced a portion of a defendant's prison sentence, supervised release is a separate term imposed at the time of initial sentencing."). Because MCL 768.7a(2) clearly and unambiguously refers only to parole, we must enforce the statutory provision as written. *Gardner*, 482 Mich at 50. We may not amend the statute by reading into it the term "supervised release." *Breidenbach*, 489 Mich at 10.

Our conclusion is further supported by the principle that "[t]he Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws." *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001). Supervised release was created by Congress in 1984 when it enacted the Sentencing Reform Act of 1984 (SRA). See 18 USC 3551 *et seq*.; *Gozlon-Peretz*, 498 US at 397, 399-400, 408. The SRA provisions regarding supervised release became effective on November 1, 1987. *Id*. at 398, 400 n 4, 403. The SRA "provide[d] for the total revamping of the sentencing procedures in the federal judicial system," and "[i]t replace[d] a system of indeterminate sentences and the possibility of parole with determinate sentencing and no parole." *Walden v United States Parole Comm*, 114

F3d 1136, 1138 (CA 11, 1997). In 1988, after the enactment of the SRA and the effective date of its provisions regarding supervised release, Michigan's Legislature amended MCL 768.7a to include MCL 768.7a(2). 1988 PA 48, effective June 1, 1988; *Idziak*, 484 Mich at 557-558. Thus, the SRA was already in existence when MCL 768.7a(2) was enacted. Because the Legislature is presumed to be aware of existing laws, *Rahilly*, 247 Mich App at 112, this Court may presume that the Legislature was aware of federal supervised release, yet did not include it in the language of MCL 768.7a(2). In comparison, the Legislature more recently included the term "supervised release" alongside the word "parole" when it provided standards for a petition to discontinue sex offender registration. See MCL 28.728c(12)(d) and (13)(e)[3] (requiring that the "petitioner successfully completed his or her assigned periods of supervised release, probation or parole"). Had the Legislature intended to do so, it could have added supervised release to MCL 768.7a(2). Accordingly, we conclude that the trial court erred by ordering that defendant's sentence run consecutively to his federal sentence.

Defendant also argues that he is entitled to credit for time served with respect to his sentence for the instant offense. However, because defendant failed to include this issue in his statement of issues presented, he has not properly presented this argument for appeal. See *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Additionally, defendant's argument is vague in that he does not specify the number of days for which he believes he is entitled to sentence credit, and he fails to explain why he is entitled to credit. "An appellant may not merely announce his position and

[3] As amended by 2011 PA 18, effective July 1, 2011.

leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (quotation marks, brackets, and citation omitted).

To the extent defendant's argument is based on his being on supervised release or incarcerated for his federal convictions, we find it without merit. MCL 769.11b governs a defendant's entitlement to sentence credit. It provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Under this statute, a defendant is entitled to jail credit only when the defendant is incarcerated before his or her conviction "because of being denied or unable to furnish bond for [that] offense of which he is convicted . . . ." *Id.*; *People v Prieskorn*, 424 Mich 327, 343-344; 381 NW2d 646 (1985). The statute "neither requires nor permits sentence credit in cases . . . where a defendant is released on bond following entry of charges arising from one offense and, pending disposition of those charges, is subsequently incarcerated as a result of charges arising out of an unrelated offense or circumstance . . . ." *Prieskorn*, 424 Mich at 340; see also *Idziak*, 484 Mich at 562-563 (holding that the jail credit statute does not apply when a parolee commits a felony while on parole and is convicted and sentenced to a new term of imprisonment). Stated differently, under MCL 769.11b, when a parolee is "required to

remain in jail pending . . . resolution of [a] new criminal charge for reasons independent of his eligibility for or ability to furnish bond for the new offense, the jail credit statute does not apply." *Idziak*, 484 Mich at 567.

In this case, defendant advances no argument regarding the specific number of days for which he believes he is entitled to jail credit for this offense. He also fails to support his argument with any showing that he was incarcerated before sentencing in this case as a result of a denial of or inability to furnish bond. MCL 769.11b. Accordingly, defendant has failed to establish plain error occurred that affected his substantial rights. *Carines*, 460 Mich at 763.

We reverse and remand for resentencing. We do not retain jurisdiction.

MURRAY, J., concurred with MARKEY, J.

O'CONNELL, P.J. (*dissenting*). At issue in this case is whether federal "supervised release" falls within the meaning of "parole" for the purposes of MCL 768.7a(2). Because I conclude that it does, I would affirm.

We review de novo questions of statutory interpretation. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). However, because defendant did not preserve this issue, he is only entitled to relief if he can establish that a plain error affected his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 768.7a(2) provides that a person who commits a felony while on parole is subject to consecutive sentencing for the new crime:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the

> term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

We may consult a dictionary definition to determine the commonly understood meaning of undefined terms. *People v Spann*, 250 Mich App 527, 530; 655 NW2d 251 (2002). "Supervised release" is defined as "[f]ederal parole, which may be imposed in addition to a prison term." *Black's Law Dictionary* (10th ed), p 1481. In both cases, the sentence has been imposed "for a previous offense." And a defendant on federal supervised release is prohibited from committing state crimes, 18 USC § 3583(d), as is a defendant on parole, see MCL 791.238(5).

Because supervised release is defined as federal parole and both are imposed for the same reason, i.e., the defendant committed a previous offense, I would conclude that the Legislature intended the MCL 768.7a reference to "on parole" to include federal supervised release. To the extent that supervised release and parole are different (whether the release is in addition to or a replacement of incarceration), I conclude that this distinction is without difference for the common understanding of MCL 768.7a. Defendant has not shown a plain error affecting his substantial rights.

I would affirm.

PEOPLE v BUSH

Docket No. 326658. Submitted April 12, 2016, at Grand Rapids. Decided April 21, 2016, at 9:00 a.m.

Troy E. Bush was charged in the Kalamazoo Circuit Court, Gary C. Giguere, J., with one count of first-degree home invasion, MCL 750.110a(2); one count of assault with a dangerous weapon, MCL 750.82(1); and one count of resisting or obstructing a police officer, MCL 750.81d(1). The victim alleged that defendant forcefully entered her bedroom and assaulted her. Defendant had entered the home with the permission of the victim's adult son, who also resided in the home. Before trial, defendant sought leave to appeal an order granting the prosecution's motion in limine for a special jury instruction pertaining to defendant's charge of first-degree home invasion, which the Court of Appeals, SAWYER, P.J., and HOEKSTRA, J. (SHAPIRO, J., dissenting), denied in an unpublished order, entered July 16, 2015 (Docket No. 326658). The special jury instruction directed that a "breaking" occurs under MCL 750.110a(2) when a defendant who has lawful access to a building, but has no right to enter an inner portion of that building, uses force to gain entry to the inner portion of the building. Defendant sought leave to appeal in the Supreme Court, arguing that the term "dwelling" as defined by MCL 750.110a(1)(a) did not encompass a room within the dwelling, and therefore a person could not be convicted of home invasion for breaking into an inner room of a dwelling if that person was already lawfully present in the dwelling. In lieu of granting leave, the Supreme Court remanded the case to the Court of Appeals for consideration of the jury-instruction issue as on leave granted. 498 Mich 900 (2015).

The Court of Appeals *held*:

Pursuant to MCR 2.512(D)(2), pertinent model jury instructions must be provided in each action in which jury instructions are given if the model instructions are applicable, accurately state the applicable law, and are requested by a party. In the absence of a pertinent standard jury instruction, the trial court may give a special jury instruction if the instruction properly informs the jury of the applicable law. In this case, defendant was

charged with first-degree home invasion. Under MCL 750.110a(2), the elements of first-degree home invasion are: (1) the defendant either breaks and enters a dwelling or enters a dwelling without permission; (2) the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling actually commits a felony, larceny, or assault; and (3) while the defendant is entering, present in, or exiting the dwelling, either (a) the defendant is armed with a dangerous weapon, or (b) another person is lawfully present in the dwelling. MCL 750.110a(1)(a) defines the word "dwelling" to mean a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter. MCL 750.110a(1)(a) does not further define the terms "structure," "shelter," or "abode," and dictionary definitions of those terms made it plainly evident that the term dwelling as defined by MCL 750.110a(1)(a) refers to the whole of a structure or shelter used as a place of residence. Importantly, MCL 750.110a(1)(a) does not specifically indicate that a dwelling also includes the dwelling's inner parts. In the absence of any indication from the Legislature that the term dwelling included the inner portions thereof, defendant could not be convicted of home invasion for entering an internal room of a dwelling that he was already lawfully within. CJI2d 25.2a (which is now contained in M Crim JI 25.2a), the model jury instruction for first-degree home invasion under MCL 750.110a(2), accurately stated the law regarding first-degree home invasion. The reason that CJI2d 25.2a did not cover a factual scenario in which a person lawfully enters a home, but then breaks and enters or enters without permission an interior room within the home, is because such a fact pattern does not fall within the proscribed conduct under the plain language of MCL 750.110a(2). While published Michigan caselaw addressing a similar criminal statute and unpublished caselaw addressing the home-invasion statute ran counter to the determination that a defendant could not be convicted of home invasion for entering an internal room of a dwelling that he was already lawfully within, the caselaw was not binding on the Court of Appeals and did not examine the plain language of the respective statutes. The trial court erred by granting the prosecution's request to provide the special jury instruction because the proposed instruction did not properly inform the jury of the applicable law.

Reversed and remanded.

BREAKING AND ENTERING — INTERIOR ROOMS WITHIN A DWELLING — WORDS AND PHRASES — "DWELLING."

MCL 750.110a(2) proscribes the unlawful breaking and entering or entering without permission of a dwelling; MCL 750.110a(1)(a) defines the word "dwelling" to mean a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter; the term dwelling as defined by MCL 750.110a(1)(a) refers to the whole of a structure or shelter used as a place of residence; a defendant cannot be convicted of home invasion for entering an internal room of a dwelling that he or she was already lawfully within.

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

Joseph C. McCully, Jr., for defendant.

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

GADOLA, J. Following an incident that occurred on November 17, 2014, at a home in Portage, Michigan, defendant was charged with one count of first-degree home invasion, MCL 750.110a(2); one count of assault with a dangerous weapon (felonious assault), MCL 750.82(1); and one count of resisting or obstructing a police officer, MCL 750.81d(1). Before trial, defendant sought leave to appeal an order granting the prosecution's motion for a special jury instruction relative to his charge of first-degree home invasion, which this Court denied. *People v Bush*, unpublished order of the Court of Appeals, entered July 16, 2015 (Docket No. 326658). Defendant then sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration of the jury-instruction issue as on leave granted. *People v Bush*, 498 Mich 900 (2015). For the

reasons set forth in this opinion, we reverse the trial court's order granting the prosecution's motion and remand the case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The circumstances underlying the charges in this case were set forth in the prosecution's motion for a special jury instruction. According to the alleged victim, Melissa Partain, on November 17, 2014, she barricaded herself in an upstairs bedroom of her home using a dresser after defendant sent her threatening text messages. Thereafter, defendant came upstairs and kicked the bedroom door open, forced the dresser out of the way, then entered the room and assaulted Partain. Partain indicated that she did not give defendant permission to be in the home.

The prosecutor also stated in his motion that Partain's adult son, Jason Switzer, who also resided in the home, would testify that he asked defendant to come over on November 16, 2014, to fix a bathtub and that defendant entered the home with Switzer's permission. Switzer indicated that he heard his mother and defendant talking on the evening of November 16, 2014, and the morning of November 17, 2014. Switzer left the home at 3:15 p.m. on November 17, 2014, and returned at around 6:00 p.m. to find the police at the home investigating the incident.

Defendant stated in an affidavit that the home was his primary residence until his arrest on November 17, 2014, and that he received mail at the home, kept clothes and tools at the home, and occasionally spent the night at the home, sleeping on a couch in the basement. Defendant explained that on November 16, 2014, Switzer asked him to come to the house to repair

bathroom plumbing, and he stayed at the house until his arrest. According to defendant, the plumbing access panel for the bathtub was in the closet of the bedroom that Partain allegedly barricaded herself in, and at no time did he force his way into the bedroom by kicking the door open or forcing a dresser out of the way.

Before trial, the prosecution filed a motion requesting a special jury instruction on the home-invasion charge. In the motion, the prosecution recited the standard jury instruction found in CJI2d 25.2a[1] and

[1] CJI2d 25.2a, which is now contained in M Crim JI 25.2a, provides the following:

> (1) The defendant is charged with home invasion in the first degree. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (2) First, that the defendant broke into a dwelling. It does not matter whether anything was actually broken; however, some force must have been used. Opening a door, raising a window, and taking off a screen are all examples of enough force to count as a breaking. Entering a dwelling through an already open door or window without using any force does not count as a breaking.
>
> (3) Second, that the defendant entered the dwelling. It does not matter whether the defendant got [his / her] entire body inside. If the defendant put any part of [his / her] body into the dwelling after the breaking, that is enough to count as an entry.
>
> *[Choose (4)(a) or (4)(b) as appropriate.]*
>
> (4) Third,
>
> (a) that when the defendant broke and entered the dwelling, [he / she] intended to commit *[state offense]*.
>
> (b) that when the defendant entered, was present in, or was leaving the dwelling, [he / she] committed the offense of *[state offense]*.
>
> (5) Fourth, that when the defendant entered, was present in, or was leaving the dwelling, either of the following circumstances existed:
>
> (a) [he / she] was armed with a dangerous weapon, and/or
>
> (b) another person was lawfully present in the dwelling.

asserted that the standard instruction was insufficient to "cover a fact pattern where a person lawfully enters the home, but then breaks into a room within the home to which he had no permission [to enter]." Citing *People v Clark*, 88 Mich App 88, 91; 276 NW2d 527 (1979), *People v Toole*, 227 Mich App 656; 576 NW2d 441 (1998), and *People v Mosher*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2014 (Docket No. 312996), the prosecution argued that there was sufficient authority to support the proposition that when a defendant gains lawful access to a building, but has no right to enter an inner portion thereof, the defendant's use of force to gain entry into an inner portion is sufficient to constitute a "breaking" for purposes of the home-invasion statute. Accordingly, the prosecution requested the following special jury instruction: "Where a [d]efendant [g]ains access to a building without breaking, but has no right to enter an inner portion of that building, the defendant's use of force to gain entry into that inner portion is a breaking."

Defendant objected to the prosecution's motion, arguing that "[t]he reason the Standard Jury Instruction does not cover the fact pattern where a person lawfully enters the home[,] but then breaks into a room within the home to which he had no permission [to enter] is [because] this fact pattern does not fit the elements of [MCL 750.110a(2)], regardless of degree." Defendant reasoned that the term "dwelling," as defined by MCL 750.110a(1)(a), did not encompass "[a] room within the dwelling," and therefore a person could not be convicted of home invasion for breaking into an inner room of a dwelling if that person was already lawfully present in the dwelling. Following

a hearing on the matter, the trial court granted the prosecution's motion.

II. STANDARD OF REVIEW

This Court reviews de novo a claim of instructional error involving a question of law. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Likewise, this Court reviews de novo issues of statutory interpretation and construction. *People v Loper*, 299 Mich App 451, 463; 830 NW2d 836 (2013).

III. ANALYSIS

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *Dobek*, 274 Mich App at 82. "The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law." *Id*. "Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *Id*. Pursuant to MCR 2.512(D)(2), pertinent model jury instructions "must be given in each action in which jury instructions are given" if the model instructions "are applicable," "accurately state the applicable law," and "are requested by a party." The Michigan Court Rules do not limit the power of trial courts to give "additional instructions on applicable law not covered by the model instructions" as long as the additional instructions are "concise, understandable, conversational, unslanted, and nonargumentative" and are "patterned as nearly as practicable after the style of the model instructions." MCR 2.512(D)(4). See also *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001) ("When

the standard jury instructions do not adequately cover an area, the trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence.").

The home-invasion statute, MCL 750.110a, provides, in pertinent part, the following:

> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

Therefore, the elements of first-degree home invasion are: (1) the defendant either breaks and enters a dwelling or enters a dwelling without permission; (2) the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling actually commits a felony, larceny, or assault; and (3) while the defendant is entering, present in, or exiting the dwelling, either (a) the defendant is armed with a dangerous weapon, or (b) another person is lawfully present in the dwelling. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).

As the prosecution acknowledged, CJI2d 25.2a accurately states the law as it pertains to a typical first-degree home-invasion prosecution in which a defen-

dant breaks and enters a dwelling, as defined by MCL 750.110a(1)(a). Accordingly, the trial court was required to give the instruction in this case. MCR 2.512(D)(2).[2] However, as the prosecution also acknowledged, neither CJI2d 25.2a nor any other standard instruction covers the situation alleged to be present in this case, in which "a person lawfully enters the home, but then breaks into a room within the home to which he had no permission [to enter]." In the absence of a standard jury instruction, the trial court may only give a special jury instruction if the instruction properly informs the jury of the applicable law. MCR 2.512(D)(4); *Bouverette*, 245 Mich App at 401-402. The question, then, is whether MCL 750.110a(2) allows the prosecution of a person who, while lawfully inside a dwelling, accesses an inner portion of the dwelling that he or she does not have permission to enter. Stated another way, we must determine whether the word "dwelling" as used in MCL 750.110a is meant to separately include each of the internal components of the dwelling in addition to the exterior or "envelope" of the "dwelling."

When interpreting statutes, the first step is to look at the statutory text. *Loper*, 299 Mich App at 464. "The Legislature is presumed to have intended the meaning it plainly expressed, and clear statutory language must be enforced as written." *Id*. If the plain and ordinary meaning of statutory language is clear, judicial construction is neither required nor permitted. *Id*. Courts may resort to dictionary definitions to ascertain the plain and ordinary meaning of words that are not defined by statute. *People v Armstrong*, 212 Mich App

[2] Alternatively, if the prosecution's theory is that the defendant entered the dwelling without permission, M Crim JI 25.2c is the appropriate instruction. See Use Note 1 to M Crim JI 25.2a.

121, 127; 536 NW2d 789 (1995). If a word is defined by statute, the word must be applied in accordance with its statutory definition. *People v Giovannini*, 271 Mich App 409, 413; 722 NW2d 237 (2006).

MCL 750.110a(2) proscribes the unlawful breaking and entering or entering without permission of a "dwelling." MCL 750.110a(1)(a) defines the word "dwelling" to mean "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." Although the word "dwelling" must be construed in accordance with its statutory definition, *Giovannini*, 271 Mich App at 413, the inquiry does not end here. The statute does not further define the terms "structure," "shelter," or "abode," which are found within the statutory definition of "dwelling," so it is appropriate to refer to the dictionary definitions of these terms. *Armstrong*, 212 Mich App at 127. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "structure" as "something (as a building) that is constructed" and defines "shelter" as "something that covers or affords protection." Further, "abode" means "the place where one abides : HOME." *Merriam-Webster's Collegiate Dictionary* (11th ed). When viewed in the context of these additional definitions, it is plainly evident that the term "dwelling" as defined by MCL 750.110a(1)(a) refers to the whole of a structure or shelter used as a place of residence. Importantly, MCL 750.110a(1)(a) does not specifically indicate that a "dwelling" also includes the dwelling's inner parts. In the absence of any indication from the Legislature that the term "dwelling" includes the inner portions thereof, we agree with defendant's statutory argument that he could not be convicted of home invasion for entering an internal room of a dwelling that he was already lawfully within.

Notwithstanding the plain language of MCL 750.110a, however, published Michigan caselaw addressing a similar criminal statute, MCL 750.110, as well as unpublished caselaw addressing the home-invasion statute, run counter to this interpretation. In *Clark*, 88 Mich App 88, and *Toole*, 227 Mich App 656, this Court addressed the scope of MCL 750.110, which proscribes breaking and entering, with the intent to commit a felony or a larceny therein, of any "tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car." In *Clark*, 88 Mich App at 90-91, the defendant gained access to a boiler room, which abutted the kitchen of a restaurant, through "two warped doors that could not be locked" and thereafter broke into the kitchen by creating a hole in the wall that separated the two rooms. Challenging the sufficiency of the evidence underlying his conviction, the defendant argued that "breaking an interior wall to enter the main part of a building after initially entering without breaking into the outer room is not a 'breaking' as contemplated by the statute." *Id*. at 91. This Court rejected the defendant's argument, relying on cases from other jurisdictions that stood for the proposition that "a breaking of an inner portion of a building constitutes the requisite element for burglary." *Id*. at 91-92, citing *Bowie v State*, 401 SW2d 829, 831 (Tex Crim App, 1966); *Cartey v State*, 337 So 2d 835, 837 (Fla Dist Ct App, 1976); *State v Cookson*, 293 A2d 780 (Me, 1972); and 43 ALR 3d 1147.

In *Toole*, 227 Mich App at 658-659, this Court relied on *Clark* to reject a defendant's challenge to the sufficiency of the evidence supporting his breaking and entering conviction. The evidence established that the defendant was seen inside a college classroom moments before a theft was discovered in an adjacent

storage room that had a "keep out" sign posted on the door. *Id*. at 657, 659. The defendant was then seen carrying a computer monitor that was missing from the storage room. *Id*. at 657-658. The defendant argued that there was insufficient evidence to support his conviction under MCL 750.110 "because he was lawfully in the building, which was open to the public, and only opened an inner door of the building." *Id*. at 658. This Court acknowledged that the defendant had a right to enter the building and that, under Michigan law, "[t]here is no breaking if the defendant had the right to enter the building." *Id*. at 659, citing *People v Brownfield (After Remand)*, 216 Mich App 429, 432; 548 NW2d 248 (1996). Nonetheless, relying on *Clark*, this Court held that the defendant's entry into the storage room was sufficient to support his conviction because "a breaking of an inner portion of a building constitutes the requisite element for burglary." *Toole*, 227 Mich App at 659.

Finally, in *Mosher*, unpub op at 1-2, a defendant was convicted of first-degree home invasion after he was given permission to enter the victim's attached garage, but then entered the living area of the victim's home without permission. The defendant argued that there was insufficient evidence to support his conviction under MCL 750.110a(2) because the attached garage was part of the "dwelling" as defined by MCL 750.110a(1)(a), and once he lawfully entered the garage, he "obtained permission to enter the entire dwelling." *Id*. at 1. This Court acknowledged that the home and attached garage "constituted one 'dwelling' within the meaning of MCL 750.110a," but concluded after examining *Clark* and *Toole* that "where a defendant gains access to a building without breaking, but has no right to enter an inner portion of that building, the defendant's use of force to gain entry into that inner

portion is a breaking." *Id*. at 3. Accordingly, this Court held that the defendant's lawful presence in the dwelling did not preclude his conviction under MCL 750.110a(2) because the evidence established that he entered an interior portion of the dwelling without permission before assaulting the victim. *Id*.

Neither *Clark* nor *Mosher*[3] is binding on this Court, and *Clark* and *Toole* both dealt with a statute, MCL 750.110, that is not implicated in this case. Moreover, in *Clark*, the Court did not examine the plain language of MCL 750.110 to determine that the defendant's entry without permission into an interior room of a building that the defendant was otherwise lawfully within violated MCL 750.110, but rather relied on cases from other jurisdictions to reach its conclusion. *Clark*, 88 Mich App at 91-92, citing *Bowie*, 401 SW2d 829; *Cartey*, 337 So 2d 835; *Cookson*, 293 A2d 780. Likewise, the *Toole* Court did not examine the plain language of MCL 750.110, but instead relied on this Court's holding in *Clark*. The *Mosher* Court did not examine the plain language of MCL 750.110a, but relied on the holdings in *Clark* and *Toole*. Upon reviewing the plain language of the home-invasion statute, it is evident that the term "dwelling" as used in MCL 750.110a(2) refers to the whole structure or shelter used as a place of residence.[4] Once a defendant enters a dwelling with permission, he cannot unlawfully enter the same dwelling where he is already lawfully pres-

[3] Pursuant to MCR 7.215(J)(1), a decision of the Court of Appeals published before November 1, 1990, is not binding on this Court. Further, pursuant to MCR 7.215(C)(1), unpublished opinions are not binding. See also *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004).

[4] Indeed, this Court in *Mosher*, unpub op at 3, recognized as much when it concluded that "the garage and living area of the victim's home constituted one 'dwelling' within the meaning of MCL 750.110a."

ent. This becomes clear when one considers that a "dwelling," under the definition of the term the Legislature supplied, includes a "structure" used as a "place of abode." MCL 750.110a(1)(a). Nowhere did the Legislature define this term to include the component parts of the structure. If instead the Legislature wanted to include interior rooms within "a structure or shelter that is used permanently or temporarily as a place of abode," MCL 750.110a(1)(a), as "dwellings" for purposes of MCL 750.110a(2), it could have done so, and might still do so, but thus far has not.

Accordingly, the reason CJI2d 25.2a does not cover a factual scenario in which a person lawfully enters a home, but then breaks and enters or enters without permission an interior room within the home, is because such a fact pattern does not fall within proscribed conduct under the plain language of MCL 750.110a(2).[5] Therefore, the trial court erred by granting the prosecution's request to provide the special jury instruction because the instruction did not properly inform the jury of the applicable law.

Reversed and remanded for further proceedings consistent with this opinion.

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

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[5] We further note that a conclusion that unauthorized entry into an interior room of a dwelling constitutes first-degree home invasion under MCL 750.110a(2) would raise a host of problematic questions. For instance, if multiple residents live in the same dwelling, who sets the limits as to which rooms can or cannot be entered? Once a person obtains permission to enter an interior portion of a dwelling, can that permission be revoked? And if so, how must the revocation be communicated? What if a person who has general permission to be in a dwelling enters an interior room without permission, intending to commit a larceny therein, and another person is lawfully within the dwelling, but not within the room itself?

In re HICKS

Docket No. 328870. Submitted April 6, 2016, at Detroit. Decided April 26, 2016, at 9:00 a.m. Affirmed in part, vacated in part, and remanded ___ Mich ___.

The Department of Health and Human Services (DHHS) filed a petition in the Wayne Circuit Court, Family Division, to terminate the parental rights of the respondent-mother to her two minor children. Respondent is a cognitively impaired young woman who relinquished custody of her two-month-old daughter to the DHHS after her family support system fell apart, and the DHHS subsequently took respondent's newborn son into care. The child-protective proceedings persisted for more than three years, and case notes throughout the proceedings revealed that respondent's cognitive impairment was readily apparent to the DHHS. However, the DHHS waited 13 months to secure a psychological evaluation to determine whether reasonably accommodated services were necessary or whether such services would offer respondent any potential benefit. Following a psychological evaluation revealing that respondent fell into the low and extremely low range of intelligence on various assessments, the DHHS did not secure services geared toward assisting a cognitively impaired parent but instead ordered that respondent earn a GED, find employment, and find suitable housing. When respondent failed to meet these goals, the court, Christopher D. Dingell, J., terminated respondent's parental rights to her two children under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g), determining that the grounds leading to adjudication had not been remedied and could not be remedied within a reasonable time and that respondent had failed to provide proper care and custody for the children. Respondent appealed.

The Court of Appeals *held*:

1. Parents have a fundamental liberty interest in the care, custody, and management of their children, a right that does not evaporate simply because they have not been model parents. In Michigan, a court may terminate a person's parental rights when clear and convincing evidence supports at least one ground for termination under MCL 712A.19b(3). Before the court may consider termination, however, the DHHS must exert reasonable

efforts to maintain the child in his or her parents' care, MCL 712A.18f(1) and (4), and make reasonable efforts to reunite the child and family, MCL 712A.19a(2). Reasonable efforts at reunification are made through a case service plan, MCL 712A.18f(3), and the requirement that the DHHS make reasonable efforts at reunification stems from federal law, 45 CFR 1356.21(b), which provides that state agencies must make reasonable efforts to maintain the family unit so as to remain eligible for foster-care maintenance payments. Neither federal nor state statutes define the reasonable efforts necessary to reunify the family unit, and Michigan courts have not expressly defined the parameters of necessary services.

2. When a disabled parent is a party to child-protective proceedings, Section 504 of the Rehabilitation Act of 1973, 29 USC 794, and Title II of the Americans with Disabilities Act of 1990 (ADA), 42 USC 12131 *et seq.*, control the nature of the services that must be provided. These acts provide that qualified disabled persons shall not be subjected to discrimination on the basis of their disabilities and shall not be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity or any program or activity receiving federal financial assistance. Any claim that the DHHS is violating the ADA must be raised in a timely manner so that any reasonable accommodations can be made. Accordingly, if a parent believes that the DHHS is unreasonably refusing to accommodate a disability, the parent should claim a violation of his or her rights under the ADA either when a service plan is adopted or soon afterward. The court may then address the parent's claim under the ADA. When a disabled person fails to make a timely claim that the services provided are inadequate to his or her particular needs, that person may not argue that the DHHS failed to comply with the ADA at a dispositional hearing regarding whether to terminate his or her parental rights. Any claim that the parent's rights under the ADA were violated must be raised well before a dispositional hearing regarding whether to terminate his or her parental rights, and the failure to timely raise the issue constitutes a waiver. In this case, respondent did not raise an ADA challenge at the time the case service plan was adopted, nor did she wait until the termination hearing. Respondent requested specialized services for the developmentally disabled on January 15, 2014, and the court ordered such services. On August 13, 2014, respondent expressed concern that the DHHS was not providing the necessary services, and respondent continuously repeated her concerns thereafter, but specialized services were never provided. Given that the termination hearing took place

nearly a year after respondent first expressed her concern, respondent's challenges were not waived.

3. When faced with a parent with a known or suspected intellectual, cognitive, or developmental impairment, neither the court nor the DHHS may sit back and wait for the parent to assert his or her right to reasonable accommodations. Rather, the DHHS must offer evaluations to determine the nature and extent of the parent's disability and to secure recommendations for tailoring necessary reunification services to the individual. The DHHS must then endeavor to locate agencies that can provide services geared toward assisting the parent to overcome obstacles to reunification. If no local agency catering to the needs of such individuals exists, the DHHS must ensure that the available service providers modify or adjust their programs to allow the parent an opportunity to benefit equally to a nondisabled parent. If it becomes clear that the parent will only be able to safely care for his or her children in a supportive environment, the DHHS must search for potential relatives or friends willing and able to provide a home for all. And if the DHHS shirks these duties, the circuit court must order compliance. Moreover, consistent with MCL 712A.19a(6), if there is a delay in providing the parent reasonably accommodated services or if the evidence supports that the parent could safely care for his or her children within a reasonable time given a reasonable extension of the services period, the court would not be required to order the filing of a termination petition merely because the child has been in foster care for 15 out of the last 22 months. In the event that reasonable accommodations are made, but the parent fails to demonstrate sufficient benefit such that he or she can safely parent the child, then the court may proceed to termination. If honest and careful evaluation reveals that no level or type of services could possibly remediate the parent to the point that he or she could safely care for the child, termination need not be unnecessarily delayed. Yet, such assessment may not be based on stereotypes or assumptions or an unwillingness to make the required effort to accommodate the parent's needs.

4. The DHHS failed to make reasonable efforts at reunification in this case. The DHHS workers were on notice of respondent's cognitive impairments at the onset of the child-protective proceedings, yet the DHHS waited 13 months to secure psychological evaluations for respondent and failed to provide the necessary accommodated services or implement the psychologist's recommendations. Although the psychological evaluation revealed that respondent fell into the low and extremely low

range of intelligence on various assessments, the DHHS never provided respondent with specialized services for the cognitively impaired and instead ordered that respondent earn a GED, find employment, and find housing; in other words, the DHHS ordered respondent to climb mountains that she could not possibly surmount. Additionally, the record was devoid of information regarding the content of the parenting classes, job training, and GED preparation courses in which respondent participated because the DHHS presented no witnesses from any service provider to describe these services or respondent's progress. Accordingly, there was no way to know whether the limited accommodations that the DHHS recommended were even implemented in practice.

Circuit court order terminating respondent's parental rights vacated; case remanded for reconsideration following the provision of necessary accommodated services in light of respondent's cognitive impairment.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — REASONABLE ACCOMMODATIONS — PARENTS WITH KNOWN OR SUSPECTED COGNITIVE IMPAIRMENTS.

Before a court may consider terminating a person's parental rights, the Department of Health and Human Services generally has a statutory duty to make reasonable efforts to keep the child in his or her parents' care and to make reasonable efforts to reunify the family through a case service plan; when the department knows or suspects a parent has an intellectual, cognitive, or developmental impairment, the case service plan must include reasonable accommodations to provide the parent a meaningful opportunity to benefit (MCL 712A.18f; MCL 712A.19a(2); MCL 712A.19b).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Lesley Carr Fairrow*, Assistant Attorney General, for the Department of Health and Human Services.

Child Welfare Appellate Clinic (by *Vivek S. Sankaran* and Jessica Shaffer (under MCR 8.120(D)(3))) for respondent.

William Ladd for the minor children.

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

GLEICHER, P.J. Respondent-mother is a cognitively impaired young woman. When respondent's family support system fell apart, she relinquished custody of her two-month-old daughter to the Department of Health and Human Services (DHHS). Subsequently, the DHHS took respondent's newborn son into care. Although the child-protective proceedings persisted for more than three years and the DHHS was well aware of respondent's special needs, the case service plan never included reasonable accommodations to provide respondent a meaningful opportunity to benefit. Absent such accommodations, the DHHS failed in its statutory duty to make reasonable efforts to reunify the family unit. And absent reasonable efforts, the DHHS lacked clear and convincing evidence to support the statutory grounds cited in the termination petition. We therefore vacate the circuit court's order terminating respondent's parental rights to her two minor children and remand for reconsideration following the provision of necessary accommodated services.

I. FACTUAL AND PROCEDURAL HISTORY

Psychological testing revealed that respondent has a full scale IQ of 70, placing her in the second percentile and "within [the] borderline range of intellectual functioning." Her verbal comprehension index is 66, within the extremely low range. Her scores related to perceptual reasoning, processing speed, and working memory are equally low. Caseworkers commented on the overt appearance of respondent's impairment upon meeting her as well as noting her difficulty in communicating on the telephone, her shyness and hesitancy, and her

flat affect. Child Protective Services (CPS) had been intermittently involved in respondent's life since she was seven years old. Despite this early intervention and respondent's obvious cognitive or developmental impairments, she never received special-education services as a child.

Respondent's mother, CB, is also cognitively impaired. For many years, CB's mother lived with CB and her four children to assist in running the household. Following the grandmother's death, the family's well-being dramatically declined. In November 2011, CPS intervened and removed CB's minor children from her care. At that time, respondent (by then an adult), her boyfriend (AH), and CB's boyfriend, Steven Butler, a registered child sex offender, also lived in the home. Respondent's younger sister accused Butler of rape, but CB did not end their relationship.[1] A CPS worker advised the pregnant respondent that she would be required to make other living arrangements upon her child's birth, but CPS provided no services or assistance to the young, disabled mother.

Respondent's daughter, DH, was born on January 29, 2012.[2] CB subsequently threatened to evict respondent and the infant. On April 10, 2012, respondent appeared at the CPS office. She told CPS worker Cordell Huckaby that she was about to be homeless and felt overwhelmed by trying to care for two-month-old DH on her own. Huckaby reported that respondent "displayed abnormal behavior that presented concerns that she may have some untreated mental health

[1] In the proceedings related to CB's parental rights, respondent asserted that Butler had raped her when she was 18 years old.

[2] Shortly after DH's birth, a protective order was entered precluding AH's contact with his daughter, leaving respondent to care for the child alone.

issues." Huckaby spent more than four hours with respondent. With CB's help, Huckaby contacted various family members and friends to find housing for respondent and DH. Respondent's grandmother in Cleveland, Ohio, offered mother and baby a home, as did a local family friend. Respondent declined both placements, and the DHHS took DH into care on an emergency basis and placed her with a nonrelative.

The circuit court did not adjudicate respondent unfit for another ten months; respondent bore no fault for this delay. In the meantime, due to a series of CPS and DHHS errors, respondent was denied parenting time. Huckaby was the only official present at the initial child-protective hearings. He indicated that parenting-time sessions had to be arranged through the DHHS caseworker. However, Huckaby was uncertain of the caseworker's identity. When respondent attempted to contact the DHHS to arrange visits, her messages received no follow-up.

In late October 2012, the DHHS finally assigned a caseworker, Beth Houle, who appeared willing and able to assist respondent. Houle initially had difficulty connecting with respondent, noting that "she was extremely hard to understand when she left messages." Houle arranged for supervised parenting-time sessions starting December 12, 2012.

An adjudication trial was finally conducted on January 28, 2013, and Houle created an "Updated Service Plan" for respondent. This plan was actually the first service plan provided. Despite that DH had been in care for 10 months and CPS had been involved with respondent since November 2011, no services had yet been offered. Under the January 2013 case service plan, respondent was required to undergo a psychological evaluation, participate in therapy and parenting

classes, visit the child for three hours each week, earn her GED, and find employment and suitable housing. Respondent, pregnant with her second child, was then bouncing between the homes of various relatives.

Respondent gave birth to her son, EB, on February 7, 2013. An aunt offered to give respondent and the baby a home, but the DHHS deemed the placement inappropriate. Accordingly, the DHHS immediately took EB into care and placed him with his sister. At the preliminary hearing regarding EB's placement, a CPS worker, Jacqueline Baskerville, acknowledged that respondent has "emotional . . . and cognitive . . . issues--impairments." The February 13, 2013 petition to take EB into care recited, "According to Hutzel Hospital social worker Vernice Muldrew, [respondent] was given a psychiatric evaluation and it was determined that she should reside in an adult foster care home as she will need assistance with her daily care."

Despite the recommendation that respondent be placed in adult foster care, she found herself living in a homeless shelter upon her hospital release. During a February 19, 2013 interview with DHHS worker Joseph Emerinini, respondent expressed confusion as to why her children were in care, apparently forgetting that she had requested DH's placement. Emerinini elaborated:

> [Respondent] appears to have some intellectual impairments. [Respondent] has difficulties in making decisions . . . . When leaving voice messages she is hard to understand, slurring words and during one message appeared to be coaxed by someone on what to say. [Respondent] only has completion of 9th grade education and has a hard time understanding simple tasks. [Respondent] . . . was not able to write in complete sentences.

While respondent could read to some extent, Emerinini described her comprehension level as low.

Case notes throughout the report also revealed Houle's concerns about respondent's capacity and abilities. On February 26, 2013, Houle informed respondent's therapist, Shelita Richmond, that respondent "is in need of guidance and understanding of how to be independent and self sufficient[.]" Houle described respondent as "quiet" and as needing specific direction because she would not do anything beyond the instructions given. Houle advised the parenting-class coordinator that respondent "appears to have some cognitive delays and does not understand some things presented to her, and things need to be explained to her in simple terms."

The circuit court judge assigned to the matter also seemed to recognize respondent's impairment given the manner in which he spoke to respondent on the record. For example, at the adjudication trial in relation to EB, the court instructed:

> [Respondent], you need to speak up as if you're mad at me so this nice young lady in front of me can prepare a transcript; okay?
>
> And oh, by the way, I only eat attorneys; okay?
>
> * * *
>
> I'm going to ask you to do something that's really very rude. Your attorney is going to ask you questions. Could you answer them facing this nice young lady in front of me so she can prepare a good transcript of this.

The only time that respondent said anything beyond "yes" or "no" at any proceeding was at that trial. An attorney asked respondent whether she suffered from depression, and respondent indicated, "When I get around people I be mad."

Respondent was not evaluated by a psychologist and psychiatrist for purposes of the case service plan until

May 2013. Before that time, and without benefit of knowledge of respondent's cognitive abilities, the DHHS referred her for parenting classes and therapy. The agency also referred respondent to Focus Hope for GED preparation classes as well as employment and job skills training with no concept of whether she could benefit from those services. Houle did note that the initiation of the various services had to be staggered because "[i]t appears that too much given to [respondent] at a time is overwhelming for her." Houle also secured the appointment of a "parent partner" for respondent. However, that individual never testified at any hearing, and the record is devoid of information regarding any assistance that person may have provided.

As noted, testing revealed that respondent had "low cognitive functioning." The psychologist reported that respondent's scores and lack of "insight" revealed that "she may be limited in her ability to independently manage more complex activities of daily living." The psychologist recommended "behavioral therapy that utilizes in-session role-playing to address concerns." The psychologist further opined, "It may be beneficial to administer a measure of adaptive functioning to determine specific strengths and weaknesses with regard to activities of daily living." Neither recommendation was ever implemented.

Instead, for the next two years, the DHHS continued to provide services geared toward a parent of average cognitive functioning.[3] Richmond provided more hands-on assistance during therapy sessions. She ac-

[3] Counsel for the DHHS had no objection to extending the case beyond the traditional 15-month period, acknowledging that respondent required additional time to benefit from services because of her cognitive impairment.

tively worked with respondent in her search for employment, Section 8 housing, and Social Security Disability (SSD) income. None of these attempts was fruitful. Houle was sensitive to respondent's needs, but Houle did not seek out specialized wraparound services designed to assist the cognitively impaired.

The DHHS continued to search for an appropriate relative who could provide housing and parenting assistance to respondent. Respondent moved in with her uncle, his girlfriend, and their children in May 2013, and she remained in their home for nearly the entirety of the proceedings. Although respondent's uncle was willing to provide additional assistance to respondent, he was not willing to have the children placed in his home. Respondent's grandmother in Cleveland, Ohio, indicated that respondent and the children could be placed with her. However, given her advanced age, the grandmother asserted that respondent would be entirely responsible for the children's care. The DHHS found respondent ill-equipped to handle that responsibility.

The DHHS eventually transitioned respondent's services to Michigan Rehabilitation Services, Northeast Guidance Center, and then CareLink. Although these agencies provide in-depth services to the cognitively impaired, respondent was not referred for that type of assistance. Instead, respondent merely continued in parenting classes and therapy through these providers. In the summer of 2014, Yasmin Gibson replaced Houle as the caseworker assigned to the case. After that assignment, respondent's prospects quickly went downhill. Even two months after her assignment, Gibson knew very little about the status of respondent's case. Gibson did not understand the level of respondent's impairment and had made no follow-up

with respondent's service providers. She also abruptly discontinued assisting respondent in her bid to secure Section 8 housing and SSD income.

Given the change in DHHS personnel, respondent's attorney, Julie Gilflix, took a more proactive role. She requested that the DHHS transfer respondent's services to the Neighborhood Service Organization (NSO), which would provide intensive services even beyond the child-protective proceedings. NSO "provides comprehensive support services" to "persons with intellectual or developmental disabilities," including "[r]eferrals to skill building programs" and services to assist disabled persons to "join in the work, play and worship of society," in addition to a program specifically designed to assist "developmentally disabled parents raising their children."[4] Gilflix expressed concern that the DHHS had not provided her client "intense services" and was "not working with her individually" or "looking at her individual needs." Gilflix was dismayed that Gibson assumed respondent could independently find a job when she "need[ed] assistance in reading" and completing the necessary applications. The circuit court dismissed Gilflix's concerns, stating, "I really don't think workers should be in the business of taking parents by the hand."

At a November 7, 2014 hearing, Gibson finally indicated that she was investigating the possibility of transferring respondent's services to NSO. For the next six months, Gibson made excuses and blamed the agencies for providing inaccurate information on how to secure the proper type of services for respondent. Finally, at a May 20, 2015 hearing, after which the

[4] See Neighborhood Service Organization, *Life Choices* <http://www.nso-mi.org/life-choices.html> [https://perma.cc/W58F-K4BH].

circuit court ordered the DHHS to file a termination petition, Gibson reported that NSO denied respondent's application for services because the agencies that had been providing services throughout the proceedings could have been providing intensive wraparound services for the cognitively impaired all along. Apparently neither Gibson nor Houle had ever investigated that possibility or referred respondent for the correct type of services.

On June 18, 2015, more than three years after DH had been taken into care, and despite that the DHHS had never secured services geared toward assisting a cognitively impaired parent, the DHHS filed a supplemental petition seeking termination. The petition cited that respondent had never taken her GED or secured housing or income. The DHHS continued that respondent had not benefited from services to the point that she could safely parent her children.

Gibson was the only witness at the termination hearing. The DHHS did not call any service providers or respondent's therapist. The department presented absolutely no evidence, beyond Gibson's assertions, regarding whether specialized services would have assisted respondent in safely parenting her children. By the time of the termination hearing, respondent had moved in with her grandmother in Cleveland. Accordingly, Gibson opined that further services would be impossible. In closing argument, Gilflix challenged Gibson's claims, noting that "reasonable efforts have not been made" and that respondent's residence in Cleveland was not permanent. Despite these pleas, the circuit court terminated respondent's parental rights under MCL 712A.19b(3)(c)(*i*) (grounds leading to adjudication have not been remedied and cannot be remedied within a reasonable time) and (g) (failure to provide proper care and custody).

II. LEGAL BACKGROUND

Parents have a "fundamental liberty interest . . . in the care, custody, and management of their child[ren]," a right that "does not evaporate simply because they have not been model parents." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). In Michigan, a court may terminate a person's parental rights when clear and convincing evidence supports at least one ground elucidated in MCL 712A.19b(3). Before the court may consider termination, however, the DHHS must exert "reasonable efforts" to maintain the child in his or her parents' care, MCL 712A.18f(1) and (4), and make "reasonable efforts to reunite the child and family," MCL 712A.19a(2).[5] Reasonable efforts at reunification are made through a case service plan. See *In re Mason*, 486 Mich 142, 156; 782 NW2d 747 (2010); MCL 712A.18f(3). The need to make "reasonable efforts" stems from federal law. Pursuant to 45 CFR 1356.21(b) (2015), to remain eligible for foster-care maintenance payments under Title IV-E, state agencies "must make reasonable efforts to maintain the family unit."

The reasonableness of the efforts provided affects the sufficiency of the evidence supporting the grounds for termination. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). However, neither federal nor state statutes define the "reasonable efforts" necessary to reunify or maintain the family unit. We know from our Supreme Court's differentiation of "reasonable"

[5] The statute provides that reasonable reunification efforts are not required in limited circumstances, such as when the parent has been convicted in the killing or serious injury of the child's sibling, has had his or her parental rights terminated to the child's sibling, is a registered sex offender, or if aggravated circumstances exist under MCL 722.638(1) or (2). MCL 712A.19a(2).

from "active" efforts under the Indian Child Welfare Act that "reasonable efforts" include a DHHS worker "making a referral for services and attempt[ing] to engage the family in services." *In re JL*, 483 Mich 300, 322 n 15; 770 NW2d 853 (2009). Our courts have not expressly defined the parameters of necessary services.

This system is complicated when the parent involved in a child-protective proceeding suffers from some type of disability. According to *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, National Council on Disability (September 27, 2012), p 90: "Systematic discrimination by state courts, child welfare agencies, and legislatures against parents with disabilities and their families" has led to the removal of children from the care of disabled parents "with alarming frequency."[6] Parents with intellectual and psychiatric disabilities face the steepest obstacles, experiencing discrimination based on stereotyping, "lack of individualized assessments," and the failure to provide the types of services needed for the individual to benefit. U.S. Department of Health and Human Services and U.S. Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* (2015), p 2.[7] This discrimination is not new and has previously been approved by our country's highest court. In *Buck v Bell*, 274 US 200, 207; 47 S Ct 584; 71 L Ed 1000 (1927), Justice Oliver Wendell Holmes, Jr., lauded

[6] Available at <http://www.ncd.gov/rawmedia_repository/89591clf_384e_4003_a7ee_0a14ed3e11aa.pdf> (accessed April 18, 2016) [https://perma.cc/7WF2-SHPQ].

[7] Available at <http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf> (accessed April 18, 2016) [https://perma.cc/27CA-GKSR].

forced sterilization of the mentally incompetent, "who are manifestly unfit [to] continu[e] their kind." As a result of institutional discrimination, parents with intellectual disabilities "lose[] children at a rate of 40 percent to 80 percent." *Rocking the Cradle*, p 263. And termination is often based on the fact that the parent does "not receive services that address the effects of their disability on parenting." Judge David L. Bazelon Center for Mental Health Law, *Termination of Parental Rights of Parents with Mental Disabilities* (2008), p 1.[8]

When a disabled parent is a party to child-protective proceedings, Section 504 of the Rehabilitation Act of 1973, 29 USC 794, and Title II of the Americans with Disabilities Act of 1990 (ADA), 42 USC 12131 *et seq*., control the nature of the services that must be provided. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132. Section 504 of the Rehabilitation Act similarly provides that qualified disabled persons shall not, "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 USC 794(a). In adopting these acts, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Sch Bd of Nassau Co, Florida v Arline*, 480 US 273, 284; 107 S Ct 1123; 94 L Ed 2d 307 (1987).

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[8] Available at <http://ndrn.org/images/Documents/Issues/Community_integration/NDRN_TPR_paper_2008.pdf> [https://perma.cc/J4YE-ZKZW].

As stated by this Court in *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000):

> [T]he ADA . . . require[s] a public agency, such as the Family Independence Agency (FIA), *to make reasonable accommodations* for those individuals with disabilities so that all persons may receive the benefits of public programs and services. Thus, the reunification services and programs provided by the FIA must comply with the ADA. . . . [W]e discern no conflict between the ADA and Michigan's Juvenile Code. Under MCL 712A.18f(4), before entering an order of disposition, the court must determine whether the FIA has made "reasonable efforts" to rectify the conditions that led to its involvement in the case. Thus, the state legislative requirement that the FIA make reasonable efforts to reunite a family is consistent with the ADA's directive that disabilities be reasonably accommodated. In other words, *if the FIA fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family*. [Citation omitted; emphasis added.]

According to the federal Departments of Health and Human Services and Justice, "[t]wo principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity." *Protecting the Rights of Parents and Prospective Parents with Disabilities*, p 4. In this vein, 28 CFR 35.130(b) (2015) provides:

> (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
>
> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others[.]

* * *

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

* * *

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

45 CFR 84.4 (2015) provides substantively identical protection to "qualified handicapped" individuals.

Taken together, [the various provisions of 28 CFR 35.130(b), and by extension 45 CFR 84.4,] are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on

> presumptions as to what a class of individuals with disabilities can or cannot do. [28 CFR Part 35, Appendix B, § 35.130 (2015).]

III. PRESERVATION

Before we reach the substance of this case, we must resolve whether respondent preserved her challenge to the level of services provided.

As discussed in *Terry*, 240 Mich App at 26:

> Any claim that the FIA is violating the ADA must be raised in a timely manner . . . so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, *either when a service plan is adopted or soon afterward*. The court may then address the parent's claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to her particular needs, she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate her parental rights. In such a case, her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court's task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA.[5]

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[5] Any claim that the parent's rights under the ADA were violated *must be raised well before a dispositional hearing regarding whether to terminate her parental rights*, and the failure to timely raise the issue *constitutes a waiver*. The focus at the dispositional hearing must be on the parent's rights to the child and the best interests of the child under the Juvenile Code, and the parties and the court should not allow themselves to be distracted by arguments regarding the parent's rights under the ADA. Given that the court must consider whether reasonable

> efforts were made to reunite the family, precluding specific reference to the ADA at the dispositional hearing is not likely to make any difference in terms of the outcome. [Emphasis added.]

Gilflix did not raise an ADA challenge at the time the case service plan was adopted. Neither did she wait until the termination hearing. On January 15, 2014, Gilflix inquired whether the DHHS could provide "one-on-one parenting help" for respondent, and caseworker Houle promised to investigate this option. Gilflix specifically expressed concern that the DHHS was not providing the type of services necessary to accommodate her client's disability on August 13, 2014, and continuously repeated her concerns thereafter. Gilflix requested that respondent receive specialized services for the developmentally disabled, the court ordered such services, and caseworker Gibson engaged in a series of errors ensuring that the services were never provided. The DHHS did not file its supplemental petition seeking termination until 10 months after Gilflix's specific request for ADA-compliant services. The termination hearing took place on July 27, 2015, nearly a year after Gilflix first expressed her concern. Given the length of time between Gilflix's objection and the termination proceedings, respondent's challenges are not waived under *Terry*.[9]

We note, however, that experts have challenged the legitimacy of requiring parents to raise an ADA defense so long before the termination hearing. "[F]amily court cases do not always proceed . . . smoothly," and

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[9] Respondent also argues that her trial counsel was ineffective in failing to raise her ADA challenge earlier in the proceedings. As we conclude that counsel did not waive review of this issue, we need not consider this claim.

the need to file an objection may not be apparent until later in the proceedings. Cecka, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 Va J Soc Pol'y & L 112, 126 (2007). A court might order reasonable accommodation in services, but the DHHS's failure to provide such accommodations may not immediately leap to counsel's attention. *Id*. at 128. Moreover, the introduction of waiver principles is misplaced because a parent who raises such an objection "is not attempting to litigate the violation in family court"; rather, the parent is challenging the evidentiary support for the termination. *Id*. at 125.

IV. REASONABLE ACCOMMODATIONS

We now turn to the question of how reasonable accommodations are made in child-protective proceedings. The DHHS directs that its workers "must recognize the individuality of all clients and their needs, as well as the extent of their capacities for self-determination" and "tailor[]" services "to meet each client's needs and to recognize the unique aspects of each case." State of Michigan Department of Health and Human Services, *Services General Requirements Manual*, SRM 101, p 2.[10] The DHHS gives its workers "examples of reasonable efforts," including emergency caretakers, daycare and homemaker services, counseling, emergency shelter and financial assistance, parenting classes, self-help groups, mental-health and substance-abuse services, "home-based family services," and vocational training. Michigan Department of Health and Human Services, *Children's*

[10] The February 1, 2013 version of this section is available at <http://www.mfia.state.mi.us/OLMWEB/EX/SR/Public/SRM/101.pdf#pagemode=bookmarks> (accessed April 18, 2016) [https://perma.cc/HF44-2336].

Foster Care Manual, FOM 722-06, pp 10-11.[11] The DHHS acknowledges, "It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about a parent's ability to protect and care for his/her children." *Id*. at 15. The lack of investigation and services leaves "a 'hole' in the evidence" upon which the circuit court must base its ultimate decision. *In re Rood*, 483 Mich 73, 127; 763 NW2d 587 (2009) (opinion by YOUNG, J.).

The *Children's Foster Care Manual*'s section on "special accommodations" makes no specific mention of how to assist mentally, developmentally, or cognitively disabled parents, giving individualized attention only to accommodations for the deaf and non-English speakers. FOM 722-06F.[12] Nationwide, "[l]ittle focus has been directed at providing parenting support and services as part of general support for people with intellectual disabilities . . . ." *Rocking the Cradle*, p 263. In "most jurisdictions," reunification services "often do not address the parent's disability fully." Smith, *Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges*, 5 Charlotte L Rev 377, 401 (2014). Not having standards or a specialized protocol to deal with cognitively impaired parents creates a serious challenge for courts and caseworkers given that, as in this case, "[s]ocial workers are apt to have little or no training or experience in teaching mentally retarded adults; worse,

[11] The February 1, 2014 version of this section is available at <http://dhhs.michigan.gov/OLMWEB/EX/FO/Public/FOM/722-06.pdf#pagemode=bookmarks> (accessed April 18, 2016) [https://perma.cc/DY6M-CAFT].

[12] The May 1, 2015 version of this section is available at <http://web.archive.org/web/20160222112326/http://mfia.state.mi.us/OLMWEB/EX/FO/Public/ FOM/722-06F.pdf> [https://perma.cc/GSM5-CDAC].

research indicates that many may have no interest in the subject." Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv L Rev 1201, 1224 (1990).

Several government and scholarly sources are helpful in defining the types of reasonable accommodations that nevertheless must be made. The focal point of any reasonable accommodation analysis must be whether the services were individualized. Persons with intellectual disabilities "are markedly diverse as a group." *Id*. at 1213. Their conditions arise from different sources, they exhibit various symptoms, and they operate at varying levels of competence. *Id*. at 1213-1215. Accordingly, "[i]ndividuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence." *Protecting the Rights of Parents and Prospective Parents with Disabilities*, p 4. The bar for reunification need not be lowered; rather, "services must be adapted to meet the needs of a parent . . . who has a disability to provide meaningful and equal access to the benefit." *Id*. at 5.

Another common theme is that of interdependence, rather than forcing a parent to demonstrate the ability to independently parent a child. As noted in *Presumptions of Justice*, 103 Harv L Rev at 1253, "The law's insistence that the mentally retarded parent be measured 'standing alone' . . . fails to take seriously the social experience of many mentally retarded persons." Those with intellectual disabilities are often socialized to depend on family, peers, and service providers to achieve maximum success. *Id*. at 1253-1254; *Unfit Through Unfairness*, 5 Charlotte L Rev at 387-388. In this vein, "[s]uccessful intervention strategies for mentally retarded parents might include foster placements of both parent and child, group homes, temporary

live-in training programs, and parent-child day care centers." *Presumptions of Justice*, 103 Harv L Rev at 1256.

Experts also recommend the use of agencies and service providers experienced in dealing with persons with intellectual disabilities. Specialized agencies provide complete life-training services, the benefits of which spill over into the child-protective proceedings. Accordingly, the DHHS could coordinate reunification services with such providers. *Protecting the Rights of Parents and Prospective Parents with Disabilities*, pp 15-16; Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 Cal L Rev 1415, 1474 (1995). Specially trained personnel available at these agencies understand that goals must be defined "in terms of concrete tasks" that are easier to "comprehend and master." *Presumptions of Justice*, 103 Harv L Rev at 1234. They recognize that instructions must be simplified and that visual aids, "repetition, routine, and feedback" are vital. Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J Contemp Health L & Pol'y 387, 424-425 (2000). The education and experience of the workers will also limit the extent to which parents with an intellectual disability are "judged against conventional norms for behavior." *Presumptions of Justice*, 103 Harv L Rev at 1228. As noted in *Presumptions of Justice*, for the untrained, "inarticulateness is perceived as stubbornness or stupidity; shyness or uncertainty, as indifference; and fear and insecurity, as aggression." *Id*.

The concept of giving disabled parents additional time to benefit from services is also of import. State

and federal law generally requires the responsible agency to seek termination of a parent's rights if the child has been in foster care for 15 out of the previous 22 months. MCL 712A.19a(6); 42 USC 675(5)(E); 45 CFR 1356.21(i) (2015). Under Michigan law, the state may delay filing a termination petition when "[c]ompelling reasons" exist or when the DHHS has not provided the family "with the services the state considers necessary." MCL 712A.19a(6)(b) and (c). These "time lines are often challenging—if not impossible—to comply with" for parents with certain disabilities. *Rocking the Cradle*, p 103. Parents with intellectual disabilities require the opportunity to make "steady but slow progress." *Id*. Using the exceptions in federal and state statutes supports the needs of the parent without compromising the needs of the child. *Protecting the Rights of Parents and Prospective Parents with Disabilities*, p 14.

Michigan caselaw is sparse regarding the level of services necessary to reasonably accommodate a disabled parent. *In re Newman*, 189 Mich App 61; 472 NW2d 38 (1991), exemplifies our cases involving the *absence* of reasonable efforts. There, the children were taken into care based on unsafe and filthy conditions in the home. *Id*. at 63. The state assigned an aide to assist the cognitively impaired mother in learning how to maintain a clean home. *Id*. at 66. The DHHS's predecessor knew when the aide was assigned that the mother, "because of her limited intellectual capacity, need[ed] hands-on instruction, most probably repeatedly." *Id*. The aide purchased cleaning supplies for the mother but "stopped going into the house because it was so dirty." *Id*. As noted by this Court:

> This was the person who was supposed to help respondents remedy this problem, but she refused. How then can

> we say there is no reasonable likelihood that the conditions in the home would not be rectified within a reasonable time when the one person who could have helped respondents remedy the conditions refused to do so? [*Id*.]

In re Boursaw, 239 Mich App 161; 607 NW2d 408 (1999), concerned a mother suffering from mental illness. She was provided intensive mental-health services throughout the proceedings, and her therapist opined that with additional time, she might be able to safely parent her child. *Id*. at 172. This Court found the lower court's termination decision "premature" as the evidence supported that the mother might be able to parent her child within a reasonable time. *Id*. at 177. *Boursaw* implies that psychiatric treatment might require time beyond the normal statutory limits of a child-protective proceeding and that a parent's rights cannot be arbitrarily terminated at the end of a set period.

Terry, 240 Mich App at 16, involved a "developmentally disabled" mother. The mother sought out services from "the Developmental Disabilities program at Genesee County Community Mental Health," which coordinated its services with those provided in the child-protective proceedings. *Id*. at 17. As in this case, the respondent experienced difficulty "in following through with tasks such as finding housing." *Id*. She lacked positive parenting role models as she had been abused as a child. *Id*. The respondent's therapist believed she could attain "basic parenting skills" with "an additional two to three years" of training, "but that she would always need assistance during difficult or stressful periods." *Id*. The caseworker opined that the "[r]espondent needed someone to live with her, not just oversee her progress." *Id*. at 18-19. Unfortunately, the respondent had no friends or family who could provide that support. *Id*. at 19.

Although this Court deemed waived the respondent's challenge to the level of services provided in *Terry*, *id*. at 27, the panel noted that it would have rejected her claims in any event:

> It is undisputed that respondent was provided with extensive services, and there is no evidence that she was denied any services that are available to parents with greater cognitive abilities. The caseworkers were aware of respondent's intellectual limitations and would repeat instructions multiple times and remind her when tasks had to be completed. Respondent received assistance through [Genesee County Community Mental Health] to address both personal and parenting problems in a program that was tailored to developmentally disabled persons. An arrangement under which respondent lived in the children's foster home was attempted but proved unsuccessful. Petitioner had no other services available that would address respondent's deficiencies while allowing her to keep her children. The ADA does not require petitioner to provide respondent with full-time, live-in assistance with her children. See *Bartell v Lohiser*, 12 F Supp 2d 640, 650 (ED Mich, 1998). [*Id*. at 27-28.]

A handful of unpublished opinions of this Court have also addressed whether reasonable accommodations were made in providing services to a disabled parent.[13] In *In re Rice*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 2013 (Docket No. 315766), p 2, this Court found reasonable accommodations when a psychologist evaluated the respondent and recommended tailored services, each service provider was notified regarding the respondent's special needs, and the providers expressly indicated that they modified their services for the respondent with "methods such as repetition and role modeling."

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[13] Unpublished Court of Appeals opinions are not binding, but may be considered persuasive or instructive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

This Court also found that reasonable accommodations were made in *In re Ali-Maliki*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket No. 321420). In that case, the DHHS provided services to the cognitively impaired mother for more than four years. *Id*. at 2-3. These services included "individual therapy, parenting classes, two evaluations at the Clinic for Child Studies, two psychological evaluations, a psychiatric evaluation, supervised visitations, family therapy, Wraparound services, a parenting coach, and a parent partner. She also received services from an infant mental health specialist." *Id*. at 3. The respondent was given the opportunity to parent her children while living with her parents who provided assistance, but even that proved too much. *Id*. at 1. This Court ultimately agreed with the circuit court's assessment that reasonable efforts had been made, but that "the evidence amply demonstrates that respondent's limited cognitive abilities could not be accommodated to the degree necessary to enable her to parent the five children, four of whom have severe special needs." *Id*. at 4.

In *In re White*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2012 (Docket No. 305411), p 2, the developmentally disabled and cognitively impaired mother ceded custody of her children to CPS in part "because she was overwhelmed." The record demonstrated that the respondent started receiving services "long before the children were removed." *Id*. at 4. And during the proceedings, the DHHS "provided respondent with family-reunification services to correct her parenting skills and coping deficits; she received psychological evaluations, parent-child bond evaluations, in-home parent classes, in-home parent coaching from an infant mental-health

specialist, in-home community-living support services for home management, and supervised parenting time." *Id*. at 2-3. These services were modified to accommodate the respondent's special needs. "She received hands-on demonstrations and proctoring that were consistent with the evaluating psychologist's recommendations." *Id*. at 4. As the respondent had not benefitted from the extended, intensive services, this Court affirmed the circuit court's termination decision. *Id*. at 4-5.

In another case, however, this Court found termination supported when "it became apparent that there were no services available that could help respondent-appellant parent his children because he was not capable of attaining the requisite level of parenting skills needed to parent the children." *In re Pomaville*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2004 (Docket No. 247168), p 2. The respondent-father in that case was categorized as "developmentally delayed," had an IQ of 54, and could not read. *Id*. The state "accounted for and reasonably accommodated respondent-appellant's disability in its efforts to reunify the family by locating parenting classes to accommodate his reading disability, attempting to locate services that would enable respondent to parent his children and referring him to two doctors to evaluate his ability to parent with his disability." *Id*. When the parent cannot benefit even from modified services, however, termination is in the best interests of the children, this Court determined. *Id*.

Michigan jurisprudence has thereby recognized that reasonable accommodations must be tailored to the individual so as to meaningfully enable that person to benefit from services. Our courts have implied that a

cognitively impaired parent could maintain custody of his or her child even if he or she requires assistance from a family member to safely care for the child, but have not gone so far as to require the DHHS to consider an assistive housing arrangement such as parenting in a group home or a parent-child foster placement. This Court has recognized the benefit of the DHHS coordinating child-protective services with organizations that serve the disabled community. And this Court has cited with approval lower court decisions to delay the initiation of termination proceedings when a disabled parent requires additional time to benefit from services because of his or her disability.

Given the dearth of Michigan caselaw on point, we also reviewed the jurisprudence of our sister states. We found instructive to our current analysis *In re Victoria M*, 207 Cal App 3d 1317; 255 Cal Rptr 498 (1989). The respondent-mother in that matter had an IQ of 72, placing her "in the borderline range of intelligence." *Id*. at 1321-1322. She had taken special-education classes as a child, and she "used social services agencies in the community extensively" as an adult. *Id*. The county department of social services (DSS) took the mother's three children into care because the family was chronically homeless and the children were underfed, filthy, and infested with lice. *Id*. at 1322. Despite that the mother had "obvious handicaps," *id*. at 1328, and the DSS had intervened with the family in the past, *id*. at 1327, the DSS waited 16 months to provide psychological testing to assess the mother's level of intellectual functioning. *Id*. at 1324. In the meantime, the mother was referred for generalized services, and those providers questioned whether the mother could benefit given her obvious limitations. *Id*. at 1323-1324. The DSS was aware that specialized services for the developmentally disabled were available; it referred the

mother's son for such services at Valley Mountain Regional Center (VMRC). *Id*. at 1323-1324 & n 4. The mother eventually secured services for herself through VMRC, but the DSS failed to monitor her progress or coordinate with the agency. *Id*. at 1324, 1330. Of great concern, the DSS also provided little to no assistance in the very areas that brought the children into care. Her parenting-class coordinator failed to address "health and hygiene concerns" with the mother, incorrectly believing that the mother understood these concepts. *Id*. at 1328. And despite the mother's homelessness and extremely low income, the caseworker simply directed her to a local housing authority and told her to read the newspaper to find housing. *Id*.

The California Court of Appeals found "[t]he record . . . clear that no accommodation was made for [the mother's] special needs in providing reunification services." *Id*. at 1329. The court continued that the mother "obviously is developmentally disabled" and "[h]er disability should have been apparent to those assessing the suitability of services offered to her." *Id*. The caseworker had already referred one of the children to VMRC, a "[r]egional center[] . . . specifically designed to provide services to persons such as" the mother, but took no steps to secure similar assistance for her. *Id*. at 1329-1330. Given the insufficiency of the services provided, termination could not be supported by clear and convincing evidence on the ground that the mother had not benefitted from services. *Id*. We find *In re Victoria M* virtually indistinguishable from the case at bar, and we adopt its reasoning.

Drawing from caselaw, federal and state law and regulations, and the plethora of expert opinions on the topic, we take this opportunity to clarify what a court and the DHHS must do when faced with a parent with

a known or suspected intellectual, cognitive, or developmental impairment. In such situations, neither the court nor the DHHS may sit back and wait for the parent to assert his or her right to reasonable accommodations. Rather, the DHHS must offer evaluations to determine the nature and extent of the parent's disability and to secure recommendations for tailoring necessary reunification services to the individual. The DHHS must then endeavor to locate agencies that can provide services geared toward assisting the parent to overcome obstacles to reunification. If no local agency catering to the needs of such individuals exists, the DHHS must ensure that the available service providers modify or adjust their programs to allow the parent an opportunity to benefit equally to a nondisabled parent. If it becomes clear that the parent will only be able to safely care for his or her children in a supportive environment, the DHHS must search for potential relatives or friends willing and able to provide a home for all. And if the DHHS shirks these duties, the circuit court must order compliance. Moreover, consistent with MCL 712A.19a(6), if there is a delay in providing the parent reasonably accommodated services or if the evidence supports that the parent could safely care for his or her children within a reasonable time given a reasonable extension of the services period, the court would not be required to order the filing of a termination petition merely because the child has been in foster care for 15 out of the last 22 months.

We emphasize that these requirements are not intended to stymie child-protective proceedings to the detriment of the children involved. However, "[t]he goal of reunification of the family must not be lost in the laudable attempt to make sure that children are not languishing in foster care while termination proceedings drag on and on." *Boursaw*, 239 Mich App at

176-177. In the event that reasonable accommodations are made but the parent fails to demonstrate sufficient benefit such that he or she can safely parent the child, then the court may proceed to termination. See *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012); *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005). If honest and careful evaluation reveals that no level or type of services could possibly remediate the parent to the point he or she could safely care for the child, termination need not be unnecessarily delayed. Yet, such assessment may not be based on stereotypes or assumptions or an unwillingness to make the required effort to accommodate the parent's needs.

V. APPLICATION TO THE CURRENT CASE

The DHHS did not fulfill its duties in this case, and the circuit court failed to adequately recognize that shortcoming. The DHHS should have suspected (and likely knew) before the onset of these child-protective proceedings that respondent is cognitively impaired. Houle, Baskerville, and Emerinini noted respondent's disability upon first meeting her. Huckaby did not describe respondent as cognitively impaired, but believed she at least suffered from mental illness. As respondent's compromised intellectual abilities were readily apparent, the DHHS workers involved in CB's child-protective proceedings were on notice by November 2011 that respondent required assistance. And no worker involved in the current proceedings has denied the obvious nature of respondent's condition.

Instead of acting posthaste to secure psychological and psychiatric evaluations to determine whether reasonably accommodated services were necessary or offered potential benefit, the DHHS waited until May

2013—13 months after DH came into care—to secure these evaluations. In the meantime, the DHHS failed to make adequate efforts to provide respondent with parenting time, effectively denying her contact with her daughter for eight months.

Further, the DHHS failed to reconsider respondent's service plan after respondent was psychologically evaluated. The results of respondent's psychological evaluation were grim, revealing that respondent fell into the low and extremely low range on various assessments. She could read but lacked comprehension of the material perused and could not write in complete sentences. Despite these results, the DHHS ordered respondent to earn a GED and find employment and housing, and never revisited these mechanically generated requirements. The psychologist recommended "administer[ing] a measure of adaptive functioning to determine specific strengths and weaknesses with regard to activities of daily living."[14] This was never done. The result was that the DHHS ordered respondent to climb mountains that she could not possibly surmount. Specifically, respondent likely will never be able to read and comprehend the contents of a GED exam, hold down employment without an on-site mentor, or live independently. A service plan that ignored

[14] "Adaptive functioning" is "the relative ability of a person to effectively interact with society on all levels and care for one's self; affected by one's willingness to practice skills and pursue opportunities for improvement on all levels. Often used to describe levels of mental retardation." *The Free Dictionary*, <http://medical-dictionary.thefreedictionary.com/adaptive+functioning> (accessed April 18, 2016) [https://perma.cc/P5CA-ZH49]. "Tests of adaptive functioning evaluate the social and emotional maturity of a child, relative to his or her peers. They also help to evaluate life skills and abilities." Reynolds, Zupanick & Dombeck, *Tests of Adaptive Functioning* <https://www.mentalhelp.net/articles/tests-of-adaptive-functioning/> (accessed April 18, 2016) [https//perma.cc/Y5V8-5FFP].

these realities was simply unreasonable and not individually tailored to respondent's needs.

Following the evaluations, the DHHS failed to consider whether respondent required specialized services for the cognitively impaired. The record establishes that several agencies provide wraparound services for the cognitively impaired in the metropolitan Detroit area. Respondent was even referred for generalized services at some of those agencies. Yet, the DHHS did not seek to have respondent placed in any of the programs geared toward the cognitively impaired until several months after Gilflix objected in August 2014. The DHHS then delayed referring respondent for the proper type of services until the very eve of the termination hearing. Its employee made a half-hearted attempt to transfer respondent's services to the agency that respondent's counsel recommended, failed to follow up in a timely manner, and ultimately denied respondent the type of services she required for several months. Although Houle informed the regular service providers that respondent was cognitively impaired and required explicit and simple instruction, this was inadequate when more intensive services from specialized agencies were readily available.

The record is also devoid of information regarding the content of the parenting classes, job training, and GED preparation courses in which respondent participated. The psychologist noted that respondent required "in-session role-playing" to address concerns. Respondent also had difficulty reading and comprehending written material. The DHHS presented no witnesses from any service provider to describe how material was presented to respondent. Accordingly, we cannot know whether the limited accommodations recommended by the DHHS were even implemented in

practice. And while the caseworkers testified that respondent's therapist provided a higher level of hands-on services to assist respondent in meeting her goals, that therapist was never presented to describe her role or respondent's progress. The DHHS also failed to present the parent partner who was apparently assigned to offer more in-depth assistance and made no record of the parent partner's particular services.

Certain evidence suggested that respondent might never achieve the ability to safely parent her children independently. As a result, the DHHS actively searched for a friend or family member to take in both mother and children and provide assistance with childcare. Respondent's grandmother in Ohio offered the family a home, but only if respondent was solely responsible for the children's care. The DHHS deemed this an inappropriate placement. However, the record is devoid of information regarding whether local services would be available to respondent in Ohio so that she could safely parent her children in her grandmother's home with some outside assistance.

Ultimately, respondent may be unable to overcome the conditions that brought her children into care. We readily acknowledge that even with appropriate assistive services she may be unable to safely parent her children. Investigation may reveal that no home is available to respondent where she may provide for her children without, or even with, outside assistance. Given the inadequate reunification services provided thus far, however, any such conclusion is premature. Accordingly, we must vacate the termination decision and remand for the provision of services with reasonable accommodation made for respondent's cognitive impairment.

We vacate the termination decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH and FORT HOOD, JJ., concurred with GLEICHER, P.J.

LECH v HUNTMORE ESTATES CONDOMINIUM ASSOCIATION (ON REMAND)

Docket No. 320028. Submitted February 22, 2016, at Lansing. Decided April 26, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 903.

Ronald W. Lech II filed a complaint in the Livingston Circuit Court against Huntmore Estates Condominium Association; Jacobson Ore Creek Land Development, LLC; and Scott R. Jacobson (Jacobson), doing business as S. R. Jacobson Land Development, LLC. The court, David J. Reader, J., granted summary disposition in favor of Jacobson Ore Creek and Jacobson. It also awarded costs to them as offer-of-judgment sanctions under MCR 2.405 and, pursuant to MCL 600.6013(1), awarded judgment interest on that award. The Court of Appeals, O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ., in part reversed the trial court's award of judgment interest on the sanctions award. 310 Mich App 258 (2015). Jacobson Ore Creek and Jacobson sought leave to appeal in the Supreme Court, which, in lieu of granting leave to appeal, vacated that portion of the Court of Appeals opinion that held Jacobson Ore Creek and Jacobson were not entitled to judgment interest on the sanctions award and remanded the case to the Court of Appeals to consider whether the decision was consistent with *Ayar v Foodland Distrib*, 472 Mich 713, 717 (2005). 498 Mich 968 (2016).

On remand, the Court of Appeals *held*:

Under MCL 600.6131(1), interest is allowed on a money judgment recovered in a civil action. The purpose of MCL 600.6013 is to compensate the prevailing party for the expenses incurred in bringing an action and for the delay in receiving money damages. A money judgment in a civil action is a judgment that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred. The trial court erred by calculating judgment interest under MCL 600.6013(1) on its award of mediation sanctions to Jacobson Ore Creek and Jacobson. The decision in *Ayers* was distinguishable on the facts. In *Ayers*, the Supreme Court concluded that when a trial court awards mediation sanctions of attorney fees and costs under MCR 2.403(O) against a liable defendant, it must apply judgment interest under MCL 600.6013(8) from the date of the filing of the

complaint against that liable defendant. In this case, Jacobson Ore Creek and Jacobson did not file a complaint and did not obtain a money judgment in a civil action; rather, they defended against a complaint, they were granted summary disposition, and they were awarded mediation sanctions. Contrary to the plain language of MCL 600.6013(1), the sanctions order was an order directing an action to be done—payment of Jacobson Ore Creek and Jacobson's attorney fees and costs—not a money judgment in a civil action. In contrast to the purpose of judgment interest awarded under MCL 600.3013, Jacobson Ore Creek and Jacobson did not incur expenses in bringing the action and suffered no delay in receiving money damages.

Reversed and remanded.

INTEREST — MEDIATION SANCTIONS — ORDER DIRECTING ACTION TO BE DONE.

Under MCL 600.6131(1), interest is allowed on a money judgment recovered in a civil action; a trial court may not award judgment interest on mediation sanctions awarded under MCR 2.405(O) to a prevailing defendant because the award is not a money judgment for purposes of MCL 600.6013 but rather an order directing an action to be done.

Shanaberger Law, PLLC (by *William G. Shanaberger*), for Ronald W. Lech II.

The Meisner Law Group, PC (by *Robert M. Meisner* and *Daniel P. Feinberg*), for Jacobson Ore Creek Land Development, LLC, and Scott R. Jacobson, doing business as S. R. Jacobson Land Development, LLC.

ON REMAND

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

O'CONNELL, P.J. This appeal concerns whether defendants Jacobson Ore Creek Land Development, LLC, and Scott R. Jacobson (collectively, the developers) are entitled to judgment interest under MCL 600.6013 on costs awarded as offer-of-judgment sanctions under MCR 2.405. This Court previously reversed the trial court's award of judgment interest on the sanctions

award. *Lech v Huntmore Estates Condo Ass'n*, 310 Mich App 258, 259; 871 NW2d 551 (2015), vacated in part 498 Mich 968 (2016). Our Supreme Court vacated the portion of this Court's opinion holding that the developers were not entitled to judgment interest on the sanctions award and remanded the case to this Court for reconsideration of this issue in light of *Ayar v Foodland Distrib*, 472 Mich 713, 717; 698 NW2d 875 (2005). *Lech v Huntmore Estates Condo Ass'n*, 498 Mich 968 (2016). Because we conclude that *Ayar* does not mandate a different result, we again reverse the trial court's award of judgment interest on the sanctions award under MCL 600.6013.

I. STANDARD OF REVIEW

> This Court reviews de novo the interpretation and application of statutes. *McCormick v Carrier*, 487 Mich 180, 188; 795 NW2d 517 (2010). We also review de novo the interpretation and application of our court rules. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 445; 861 NW2d 303 (2014). We use the same rules of interpretation to interpret statutes and court rules. *Id*. at 446. We give the words of rules and statutes their plain and ordinary meanings. *Id*. See also *McCormick*, 487 Mich at 192. We construe legal terms according to their legal meanings. See *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006). We determine the intent of the court rule "from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Haliw* [*v Sterling Hts*], 471 Mich [700,] 706[; 691 NW2d 753 (2005)]. [*Lech*, 310 Mich App at 261.]

II. ANALYSIS

We again conclude that the developers are not entitled to recover judgment interest on their sanctions award under MCL 600.6013. *Ayar* does not require a contrary holding.

MCL 600.6013(1) provides that "[i]nterest is allowed on a money judgment recovered in a civil action, as provided in this section." The purpose of MCL 600.6013 is "to compensate the prevailing party for the expenses incurred in bringing an action and for the delay in receiving money damages." *In re Forfeiture of $176,598*, 465 Mich 382, 386 n 9; 633 NW2d 367 (2001) (quotation marks and citation omitted). A money judgment in a civil action is a judgment "that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred." *Id*. at 386. There are several types of civil awards that are not a money judgment in a civil action, including money awards in drug forfeitures, divorce judgments, awards of back pay for wrongful discharge, and awards reflecting payment of a forced share in an estate. *Id*. at 388.

Ayar concerned "when interest begins to accrue, pursuant to MCL 600.6013(8), on costs and attorney fees imposed for rejecting a mediation evaluation, MCR 2.403(O)(1), (6)." *Ayar*, 472 Mich at 714.[1] In *Ayar*, the plaintiffs filed a complaint against the defendants for damages arising out of commercial relationships. *Id*. at 715. After the case proceeded to trial, the plaintiffs obtained a substantial verdict. *Id*. The trial court entered a judgment that included prejudgment interest as well as "costs and attorney fees to be assessed, if any." *Id*. The trial court later entered an order assessing costs and mediation sanctions under MCR 2.403(O), calculated from the date that the complaint was filed. *Id*.

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[1] The Supreme Court noted in *Ayar* that the court rule was amended in 2000 to refer to "case evaluation" rather than "mediation," but because the mediation in *Ayar* occurred in 1995, the Supreme Court used the term "mediation" in its opinion in that case. *Ayar*, 472 Mich at 714 n 1.

This Court reversed and remanded for a redetermination of the amount of interest. *Id*. We concluded that judgment interest was allowed on mediation sanctions but determined that the trial court should calculate interest from the date of the judgment because, "before that date, no mediation award existed upon which interest could be calculated." *Id*.

Our Supreme Court reversed this Court's judgment and reinstated the trial court's order. *Id*. at 714. It reasoned that under MCL 600.6013(8), interest is calculated on the entire judgment amount, including attorney fees and costs, from the date of filing the complaint. *Id*. at 716. Thus, "[t]he statute plainly states that interest on a money judgment is calculated from the date of filing the complaint." *Id*. While this Court was correct in applying the judgment-interest statute to the mediation sanctions, the Supreme Court concluded that we erred by treating them as an additional claim for damages:

> The mediation process is an integral part of the proceeding commenced when plaintiffs filed their complaint. The realization of mediation sanctions is tied directly to the amount of the verdict rendered with regard to that complaint. MCR 2.403(O)(1). Indeed, the award of prejudgment interest on mediation sanctions is part of the final judgment against defendants. At all times during which interest was assessed, plaintiffs' claim against defendants was in dispute. [*Id*. at 717.]

The Supreme Court ultimately concluded that courts properly apply judgment interest under MCL 600.6013(8) to "attorney fees and costs ordered as mediation sanctions under MCR 2.403(O) from the filing of the complaint against the liable defendant." *Id*. at 717-718.

This case is distinguishable from *Ayar*, which concerned whether a plaintiff can recover prejudgment interest on a money judgement under MCL 600.6013(8) from the date of filing the complaint. The developers in this case did not file a complaint, and they did not obtain a money judgment. Instead, they defended against a complaint and obtained summary disposition. The trial court's sanctions order was an order directing an action to be done—payment of the other party's attorney fees and costs—not an order providing for a money judgment in a civil action. Because the developers in this case did not "incur expenses in bringing an action" and "suffered no delay in receiving money damages," an award of prejudgment interest would not serve the purpose of the statute. We conclude that, by its plain language, MCL 600.6013 does not apply in this situation, and *Ayar* does not mandate a different result.

We reverse and remand. We do not retain jurisdiction.

FORT HOOD and GADOLA, JJ., concurred with O'CONNELL, P.J.

DETROIT FREE PRESS, INC v UNIVERSITY OF MICHIGAN REGENTS

Docket No. 328182. Submitted April 13, 2016, at Lansing. Decided April 26, 2016, at 9:10 a.m. Leave to appeal denied 500 Mich 897.

Detroit Free Press, Inc., and Federated Publications, Inc., brought an action against the University of Michigan Regents in the Court of Claims, seeking injunctive relief and claiming that defendant's use of informal, closed-door meetings violated the Open Meetings Act (OMA), MCL 15.261 *et seq*., and Article 8, §§ 4 and 5 of the Michigan Constitution. The court, MICHAEL J. TALBOT, J., denied plaintiffs' motion for summary disposition, denied plaintiffs' motion for injunctive relief, and granted summary disposition in favor of defendant, concluding that the OMA did not require defendant's informal meetings to be open to the public and that neither caselaw nor Const 1963, art 8, §§ 4 and 5, required those meetings to be open to the public. Plaintiffs appealed.

The Court of Appeals *held*:

1. Article 8, § 4 of the Michigan Constitution requires that formal sessions of the governing boards of public universities be open to the public. The Michigan Constitution does not delegate to the Legislature the task of defining the phrase "formal sessions" as used in that provision. By limiting the provision to formal sessions, rather than all sessions, governing boards retain their power to decide whether to hold informal sessions in public. Article 8, § 5 of the Michigan Constitution also prohibits the Legislature from intruding on a governing board's decision whether to hold informal sessions in public, which is a basic, day-to-day exercise of the governing board's powers. While a governing board is entitled to deference regarding its definition of formal and informal meetings, that discretion is not unfettered; the definition may be judicially reviewed to determine whether the definition fails to bear any relation to the purpose of § 4.

2. The Court of Claims correctly determined that our Supreme Court's decision in *Federated Publications, Inc v Mich State Bd of Trustees*, 460 Mich 75 (1999), was determinative of the outcome in this case. The broad holding of *Federated Publications*—that the

Legislature does not have authority to regulate informal meetings at public universities through application of the OMA because under Const 1963, art 8, § 4, only formal sessions held by governing boards of public universities must be public—was not dictum, and the holding was not distinguishable on the facts. The trial court correctly concluded that defendant was not required to hold its informal meetings in public and that defendant was entitled to summary disposition.

Affirmed.

CONSTITUTIONAL LAW — GOVERNING BOARDS OF PUBLIC UNIVERSITIES — INFORMAL SESSIONS — NOT OPEN TO PUBLIC.

Under Article 8, § 4 of the Michigan Constitution, only formal sessions of the governing boards of public universities must be open to the public, not informal sessions; while a governing board is entitled to deference regarding its definition of formal and informal sessions, that discretion is not unfettered because the definition may be judicially reviewed to determine whether the definition fails to bear any relation to the purpose of § 4.

Herschel P. Fink and *Aaron Sanders PLLC* (by *Paul R. McAdoo*) for plaintiffs.

Dickinson Wright PLLC (by *Peter H. Ellsworth*, *Jeffery V. Stuckey*, and *Phillip J. DeRosier*) and *Timothy G. Lynch* for defendant.

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

RONAYNE KRAUSE, J. Plaintiffs, Detroit Free Press, Inc., and Federated Publications, Inc., appeal by right the order of the Court of Claims, which denied plaintiffs' motion for summary disposition and request for injunctive relief and granted summary disposition in favor of defendant, the University of Michigan Regents. Plaintiffs publish or operate two major newspapers in this state; defendant is a constitutional corporation and public body responsible for governing the University of Michigan pursuant to Article 8, §§ 4

and 5 of the Michigan Constitution. Plaintiffs contend that all "closed informal sessions" held by defendant violate the Open Meetings Act (OMA), MCL 15.261 *et seq*., and Article 8, § 4 of the Michigan Constitution. The Court of Claims disagreed. We affirm.

There is no dispute that defendant holds meetings that are both open to the public and closed to the public. It appears that the parties at least tacitly agree that defendant held its formal meetings publicly, in compliance with the OMA. At issue is defendant's practice of conducting informal meetings, which plaintiffs alternatively call "closed door meetings," privately. Defendant describes these informal meetings as being more informational than decisional, and although agendas were prepared for them and a quorum was present, voting did not take place and was not discussed at the informal meetings. Plaintiffs contend, very generally, that *all* such meetings are required by law to be open to the public.

The Court of Claims concluded that pursuant to *Federated Publications, Inc v Mich State Univ Bd of Trustees*, 460 Mich 75; 594 NW2d 491 (1999), Michigan's Constitution insulates defendant from being required by the OMA to open its informal meetings to the public and that, in addition, defendant is empowered to define what constitutes a formal session. The court reasoned further as follows:

> This Court declines plaintiffs' invitation to judicially impose the limitations that the Legislature imposed in the OMA on governing boards of public universities. The Supreme Court has already explained, "[T]he Legislature is not delegated the task of defining the phrase 'formal sessions' for purposes of Const 1963, art 8, § 4." *Federated Publications*, 460 Mich at 75. Neither is this Court. Although the Court suggested judicial review would be available to examine whether a university's definition

> fails to "bear any relation to the purpose of § 4," *id*. at 91 n 14, plaintiffs do not advance an argument that is directed at meeting that "most deferential standard." *Id*. This Court will not construct it for them.

The Court of Claims further determined that plaintiffs' claims would have the OMA " 'dictate[] the manner in which the university operates on a day-to[-]day basis,' " which would be contrary to Article 8, § 5. Therefore, "application of the OMA to defendant's informal sessions runs afoul of defendant's constitutionally-based power to supervise the university." Plaintiffs were not entitled to injunctive relief because they did not succeed on at least one count. Ultimately, it is not relevant in this case whether the sessions were formal or informal as neither side has argued this point. The question being raised is whether all the sessions had to be public, regardless of whether they were designated as informal.

We review de novo a trial court's decision on a motion for summary disposition. *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 446; 830 NW2d 781 (2013). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In interpreting a statute, a court seeks to ascertain and implement the intent of the Legislature. *Huron Mountain Club v Marquette Co Rd Comm*, 303 Mich App 312, 323; 845 NW2d 523 (2013). We do so first by examining the language employed, and if it is unambiguous when afforded its plain and ordinary meaning, we enforce it as written. *Id*. at 324.

Plaintiffs' claims on appeal are dependent on their assertions that the facts of this case are distinguish-

able from the facts in *Federated Publications* and that the Court of Claims erroneously relied on dicta from that case when granting summary disposition in favor of defendant. The latter argument simply fails as a matter of well-established precedent that if our Supreme Court "intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum*, but is a judicial act of the court which it will thereafter recognize as a binding decision." *Detroit v Mich Pub Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939) (quotation marks and citation omitted). It is clear that nothing in *Federated Publications* was in the nature of a gratuitous and irrelevant remark with no bearing on the case. See *Johnson v White*, 430 Mich 47, 54 n 2; 420 NW2d 87 (1988) (noting a distinction between "obiter dicta" and "judicial dicta"). To the extent any discussion in *Federated Publications* is relevant to the instant matter, the Court of Claims was obligated, as are we, to treat it as binding.

The former argument—that the facts in *Federated Publications* are distinguishable from those in this case—also fails. Plaintiffs are, of course, correct in pointing out that *Federated Publications* entailed the rather special circumstance of a university searching for a replacement president, which, to the best of our knowledge, is not at issue in the case at bar. However, our Supreme Court did not restrict its reasoning to that context and indeed noted that under discussion was "the question of the scope of the Legislature's power to regulate public universities." *Federated Publications*, 460 Mich at 83-84. Our Supreme Court made a much broader pronouncement:

> That [Const 1963, art 8, § 4, which requires that "[f]ormal sessions of governing boards . . . shall be open to the public,"] is limited to "formal sessions," rather than all sessions, signifies that the governing boards retain their power to decide whether to hold "informal" sessions in public. Const 1963, art 8, § 5, prohibits the Legislature from intruding in this basic day-to-day exercise of the boards' constitutional power. Nor can application of the OMA rest on the absence of a definition of "formal sessions" in the constitution. Unlike other provisions of the constitution, the Legislature is not delegated the task of defining the phrase "formal sessions" for purposes of Const 1963, art 8, § 4. [*Id*. at 90.]

The Court also noted that "[g]iven the constitutional authority to supervise the institution generally, application of the OMA to the governing board of our public universities is likewise beyond the realm of legislative authority." *Id*. at 89.

It is clear and unambiguous that *Federated Publications* determines the outcome of this matter, and the Court of Claims correctly applied it to this case. The Constitution permits defendant to hold informal meetings in private; defendant is only required to hold its formal meetings in public. We are simply not empowered to evaluate whether that is good policy or, for that matter, take any action on the basis of whether we might believe it to be. However, we note that plaintiffs need not be concerned that this gives defendant *completely* unfettered discretion: our Supreme Court has also determined that although defendant and similarly situated boards are entitled to a great deal of deference, a governing board's determination of what constitutes formal and informal is not *wholly* insulated from judicial review. *Id*. at 91 n 14.

We decline to consider any argument pertaining to plaintiffs' desired injunctive relief because the issue is

moot. We affirm the Court of Claims. We direct that because of the important public policy nature of this appeal, the parties shall bear their own costs. MCR 7.219(A).

SAWYER, P.J., and MURPHY, J., concurred with RONAYNE KRAUSE, J.

RODGERS v JPMORGAN CHASE BANK NA

Docket No. 327403. Submitted April 13, 2016, at Grand Rapids. Decided April 26, 2016, at 9:15 a.m. Leave to appeal denied 500 Mich 883.

Mack and Lillie Rodgers brought an action in the Berrien Circuit Court against JPMorgan Chase Bank NA, an unknown noteholder, and Ocwen Loan Servicing LLC, alleging that a loan-modification agreement was a binding contract and that defendants had breached that contract. While plaintiffs had signed one portion of the agreement, plaintiffs had failed to sign the final page, and Ocwen had never signed the agreement. In an amended complaint, plaintiffs sought a declaratory judgment that Ocwen had breached the loan-modification agreement and the implied covenant of good faith and fair dealing. Ocwen moved for summary disposition under MCR 2.116(C)(10), alleging that the statute of frauds, MCL 566.132(2), barred plaintiffs' claims because no authorized Ocwen representative had ever signed the agreement. Ocwen further alleged that even if the statute of frauds was not implicated, plaintiffs' claims must fail because plaintiffs never fully executed the agreement by signing the last page and because Ocwen never signed the agreement. The court, Sterling R. Schrock, J., granted Ocwen's motion for summary disposition and, pursuant to the parties' agreement, dismissed JPMorgan Chase Bank from the action. Plaintiffs appealed.

The Court of Appeals *held*:

The statute of frauds, MCL 566.132(2), provides, in relevant part, that an action shall not be brought against a financial institution to enforce a financial institution's promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation unless the promise or commitment is in writing and signed with an authorized signature by the financial institution. Plaintiffs attempted to enforce a written loan-modification agreement by relying on the agreement itself as well as documents and correspondence between the parties that detailed the modification process; however, none of these documents contained Ocwen's authorized signature. Without an authorized signature, the statute of frauds barred plaintiffs' claims based on any theory,

including plaintiffs' theories of breach of contract, breach of the implied covenant of good faith and fair dealing, and estoppel. Even if the statute of frauds had not been implicated, summary disposition was proper because the loan-modification agreement contained express conditions that had to be satisfied before the agreement would be enforceable, including the condition that plaintiffs receive a signed copy of the agreement from defendant, which never occurred. Therefore, because neither party fully executed the agreement and because the conditions precedent to the formation of the contract were not satisfied, there was no agreement to enforce. Because no contract was ever formed, the doctrine of substantial performance and the implied covenant of good faith and fair dealing were inapplicable.

Affirmed.

Lewis Reed & Allen, PC (by *Ronald W. Ryan*), for Mack Rodgers and Lillie Rodgers.

Dykema Gossett PLLC (by *Thomas M. Schehr*, *Jill M. Wheaton*, and *Mark J. Magyar*) for Ocwen Loan Serving LLC.

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

SAAD, P.J. Plaintiffs appeal the trial court order that granted defendant Ocwen Loan Servicing LLC's[1] motion for summary disposition. For the reasons provided below, we affirm.

I. BASIC FACTS

The following facts are not in dispute. On November 10, 2006, plaintiffs obtained a loan for real property and granted a mortgage as security. By 2011, plaintiffs had defaulted on their loan and filed for bankruptcy in the United States Bankruptcy Court

[1] The other named defendant, JPMorgan Chase Bank NA, was dismissed and is not part of this appeal. As a result, our use of the term "defendant" in this opinion will refer to Ocwen.

for the Western District of Michigan. But rather than surrender the property in bankruptcy and discharge the debt, plaintiffs chose to reaffirm the debt.

Defendant received the servicing rights to the loan on April 2, 2012. Because of the risk of foreclosure, plaintiffs submitted an application to defendant for a modification of the loan. On May 11, 2012, defendant sent plaintiffs a letter that explained the process for modifying the terms of the loan. The letter set out the three steps that would have to occur for a loan modification to become effective:

> Step 1 – The first step in the approval process is to have your financial package reviewed for completeness. We must make sure that all of the required information has been submitted and the applicable forms are signed and dated appropriately. After you submit the financial package, there is no need to call us to check on it. If your package is incomplete, Ocwen will notify you through a letter indicating what documents are missing or incorrect. If your package is complete, it will automatically move to underwriting.
>
> Step 2 – Once the package has been certified as complete, your application moves to the underwriting stage where your eligibility is determined. If you have applied for assistance on your primary residence and your loan is a first lien, Ocwen will first look to qualify you for the federal government's Home Affordable Modification Program (HAMP). If we determine that you do not qualify for the HAMP modification, we will attempt to qualify you for an Ocwen sponsored modification program automatically. If you are applying for assistance on an investment property or second lien mortgage, you may still qualify for an Ocwen sponsored modification. If you do not qualify for either an HAMP or Ocwen modification, we will send you a letter with information on alternatives.
>
> Step 3 – If you qualify, we will send you either a Trial Period Plan offer or a modification offer depending on the program. It takes approximately 30 days for us to complete our review.

The letter was not signed by any individual but instead closed with "**Sincerely, Ocwen Loan Servicing, LLC**."

On September 28, 2012, defendant wrote another letter to plaintiffs, which provided in pertinent part:

> **Congratulations!** This is the first step toward qualifying for more affordable mortgage payments. Please read this letter so that you understand all the steps you need to take to modify your mortgage payments.
>
> **What you need to do. . .**
>
> To accept this offer, you must make your first monthly "trial period payment." To qualify for a permanent modification, you must make the following trial period payments in a timely manner:
>
> [Three trial payments of $768.95 each are due on November 1, 2012, December 1, 2012, and January 1, 2013.]
>
> After all trial period payments are timely made and you have submitted all the required documents, your mortgage will be permanently modified. (Your existing loan and loan requirements remain in effect and unchanged during the trial period.)

As before, this letter was not signed by an individual but instead closed with "Sincerely, Ocwen Loan Servicing, LLC."

In October 2012, defendant sent plaintiffs an eight-page "Home Affordable Modification Agreement." There were two portions that required plaintiffs' signature. The first portion described the new monthly payment schedule, and the other portion described how there was a balloon payment of $27,856.26 due on December 1, 2036, after the 287 monthly installments were complete. The agreement provided that after plaintiffs returned two signed copies, defendant would countersign and return a fully signed version. The agreement further provided that it was not to take

effect unless the preconditions in section 2 of the agreement had been satisfied. One of those preconditions states:

> I understand that the Loan Documents will not be modified unless and until (i) I receive from the Servicer a copy of this Agreement signed by the Servicer, and (ii) the Modification Effective Date (as defined in Section 3) has occurred. I further understand and agree that the Servicer will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Agreement.

It is undisputed that defendant never returned a signed copy to plaintiffs. That is because on October 31, 2012, defendant noticed that, while plaintiffs signed the first portion of the agreement, plaintiffs had failed to sign page 8 of the agreement, which pertained to the balloon-payment disclosure. Consequently, on March 4, 2013, defendant closed the modification plan and wrote a letter to plaintiffs notifying them that their application for a modification was denied because they "**failed to return the final modification agreement within the required timeframe**." The denial letter was mailed on March 6.

On March 19, plaintiff Mack Rodgers called defendant to inquire about the denial. Defendant's representative informed Mack that no fully authorized final agreement was received. Defendant thereafter sent another copy of the agreement to plaintiffs for them to fully execute. However, there is no evidence that plaintiffs ever executed that agreement and returned it to defendant.

Plaintiffs filed their original complaint on September 25, 2013. The complaint sought a declaration that the loan-modification agreement was a binding contract and that defendant breached it. Defendant moved

for summary disposition under MCR 2.116(C)(8), and the trial court granted the motion because plaintiffs failed to attach the written instruments they relied upon to their complaint, contrary to MCR 2.113(F). But the court allowed plaintiffs to amend their complaint.

Relevant to the appeal before us is plaintiffs' amended complaint, which was filed on August 29, 2014, and seeks a declaratory judgment that defendant breached the loan-modification agreement and that defendant breached the implied covenant of good faith and fair dealing. This time, plaintiffs attached the written documents they were relying upon—including the loan-modification agreement at issue—to the complaint.

Defendant again moved for summary disposition, this time under MCR 2.116(C)(10). Defendant argued that the statute of frauds, MCL 566.132(2), barred plaintiffs' claims because the loan-modification agreement that plaintiffs sought to enforce was never signed by any authorized representative. Furthermore, defendant argued that even if the statute of frauds was not implicated, plaintiffs' claims must fail because (1) plaintiffs never fully executed the modification agreement by signing the last page pertaining to the balloon-payment disclosure and (2) defendant never signed the modification agreement either. The trial court agreed with all of defendant's reasons and granted the motion for summary disposition.

II. 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). Defendant 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).

Additionally, we review questions of contractual interpretation and statutory interpretation de novo. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). And whether the statute of frauds bars enforcement of a purported contract presents a question of law that this Court reviews de novo. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

III. ANALYSIS

Plaintiffs argue on appeal that the loan-modification agreement should be enforced as a binding agreement between them and defendant. We disagree.

Plaintiffs assert that the statute of frauds is not a bar to the enforceability of the agreement. The relevant statute of frauds is found in MCL 566.132(2) and provides the following:

> An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing *and signed with an authorized signature* by the financial institution:
>
> * * *

> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation. [Emphasis added.]

As this Court has explained in *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 550; 619 NW2d 66 (2000):

> The statute of frauds specifically bars "an action." By not specifying what sort of "action" MCL 566.132(2) . . . prohibits, we read this as an unqualified and broad ban. We also note that the subsections of MCL 566.132(2) . . . use generic and encompassing terms to describe the types of promises or commitments that the statute of frauds now protects absolutely. This is consistent with interpreting MCL 566.132(2) . . . to preclude *all* actions for the enumerated promises and commitments, including actions for promissory estoppel. Further, it would make absolutely no sense to conclude that the Legislature enacted a new section of the statute of frauds specifically addressing oral agreements by financial institutions but, nevertheless, the Legislature still intended to allow promissory estoppel to exist as a cause of action for those same oral agreements.

Although we are not confronted with a purported oral agreement in the instant case, *Crown Technology Park*'s holding is nonetheless applicable.[2] Here, plaintiffs attempt to enforce a written agreement by relying on many documents, including the letters defendant sent to plaintiffs that detail the modification process and the loan-modification agreement itself. However, none of these writings is "signed with an authorized signature." Thus, without any authorized signature,

[2] We disagree with the nonbinding federal authority plaintiffs rely on that suggests that *Crown Technology Park*'s holding should be limited to circumstances involving oral promises. See *Yates v US Bank Nat'l Ass'n*, 912 F Supp 2d 478, 488 (ED Mich, 2012). We see no reason why MCL 566.132(2)'s requirement of an authorized signature is to be given less weight than its requirement of a writing.

the statute of frauds bars *any* claim, regardless of its label, by plaintiffs to enforce any purported agreement. This bar covers plaintiffs' claims based on any theory, including their theories of breach of contract, breach of the implied covenant of good faith and fair dealing, and estoppel.

Moreover, the trial court correctly ruled that summary disposition was proper apart from the bar of the claims based on the statute of frauds. Clearly, the relevant agreement that plaintiffs seek declared enforceable is the loan-modification agreement.[3] That agreement contained express conditions that had to be satisfied before the agreement would be enforceable. Section 2 of the agreement listed these conditions, one of which states:

> I understand that the Loan Documents will not be modified unless and until (i) I receive from the Servicer a copy of this Agreement signed by the Servicer, and (ii) the Modification Effective Date (as defined in Section 3) has occurred. I further understand and agree that the Servicer will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Agreement.

Thus, one of the conditions precedent to the formation of the contract was that plaintiffs receive a signed copy of the agreement from defendant. It is undisputed that this never occurred. Indeed, that defendant did not

[3] While defendant sent letters to plaintiffs leading up to the presentment of the loan-modification agreement, those letters contained no specific terms regarding any loan modification. Indeed, the May 11, 2012 letter plainly uses conditional language, such as, "If you qualify." And the September 28, 2012 letter references the actual loan-modification agreement that is to come and that will need to be executed by plaintiffs: "After all trial period payments are timely made *and you have submitted all the required documents*, your mortgage will be permanently modified." (Emphasis added.)

return a signed copy is understandable because plaintiffs themselves never signed the balloon-payment disclosure, which was an integral part of the agreement. Hence, because neither party fully executed the agreement and because the conditions precedent to the formation of the contract were not satisfied, there is no agreement to enforce.

Further, plaintiffs' reliance on the doctrine of substantial performance is misplaced. The doctrine of substantial performance is used to determine whether a party can be considered to have fulfilled its obligation under a contract even though that party has not fully performed. See *Black's Law Dictionary* (10th ed) (defining the "substantial-performance doctrine" as "[t]he rule that if a good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished"). However, this doctrine is inapplicable to the fulfillment of express conditions. See *Fisher v Burroughs Adding Machine Co*, 166 Mich 396, 402-403; 132 NW 101 (1911); *Brown-Marx Assoc, Ltd v Emigrant Savings Bank*, 703 F2d 1361, 1367-1368 (CA 11, 1983); 17A Am Jur 2d, Contracts, § 616, p 573. As a result, because the express conditions precedent to the formation of the contract were not fulfilled, the contract never came into existence and is consequently not enforceable. *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953).

And similarly, because no contract was formed, plaintiffs' reliance on the implied covenant of good faith and fair dealing is unavailing. "It has been said that the covenant of good faith and fair dealing is an implied promise contained in every contract 'that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to

receive the fruits of the contract.' " *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992), quoting *Fortune v Nat'l Cash Register Co*, 373 Mass 96, 104; 364 NE2d 1251 (1977). But plaintiffs' claim based on this theory must fail because "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006); see also *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 197; 480 NW2d 910 (1991), citing *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 422-423; 295 NW2d 50 (1980). Moreover, this covenant is applicable only if there is a valid, enforceable contract. But, as already discussed, no contract was ever formed. Therefore, it is clear that dismissal of this claim was warranted.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

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

COMMONWEALTH LAND TITLE INSURANCE COMPANY v METRO TITLE CORPORATION

Docket No. 324914. Submitted April 5, 2016, at Detroit. Decided May 3, 2016, at 9:00 a.m.

Plaintiff, Commonwealth Land Title Insurance Company, filed a complaint in the Oakland Circuit Court to enforce a default judgment entered in plaintiff's favor in an earlier, separate case between plaintiff and Metro Title Agency, a registered assumed name for Metro Title Corporation (collectively, Metro Title). After the judgment and before plaintiff initiated the instant case, Metro Title formed a new business entity, Metro Equity Services (Metro Equity). The owner of Metro Equity was also the owner of Metro Title. Plaintiff asserted that Metro Title had formed Metro Equity and fraudulently transferred assets to it so that Metro Title could avoid collection on the previous default judgment. Plaintiff claimed that under a successor-liability theory, Metro Equity was responsible for paying the default judgment to plaintiff because Metro Equity was a mere continuation of Metro Title. The court, Nanci J. Grant, J., denied Metro Equity's motion for summary disposition. After a bench trial, the court granted Metro Equity a directed verdict on plaintiff's fraudulent-transfer claim. However, the court also ruled that Metro Equity was liable for the judgment because Metro Equity was a mere continuation of Metro Title for purposes of plaintiff's successor-liability claim. Metro Equity appealed.

The Court of Appeals *held*:

With two exceptions, a successor corporation is not ordinarily liable for the liabilities of its predecessor corporation. The exceptions are (1) when there is a continuity of the enterprise between the predecessor and the successor corporations and (2) when the successor corporation is a mere continuation of the predecessor corporation. In cases involving a continuity-of-the-enterprise claim, the successor corporation may be liable only in cases involving products liability or cases with similar public-policy concerns. The mere-continuation theory is broader. In general, the transaction between the successor and predecessor corporations defines the exception to the nonliability rule. When a corporation merges with another corporation and shares of stock serve as

consideration for the acquisition, there is continuity of the enterprise and the successor corporation is liable for the predecessor's liability if the case concerns products liability. A successor is liable for its predecessor's liabilities under a continuity-of-the-enterprise theory when (1) the seller corporation continues to do business and there is a continuity of management, location, personnel, etc., (2) the predecessor corporation stops ordinary business operations, liquidates, and dissolves, and (3) the successor corporation assumes the seller's obligations that are necessary to continue normal business operations. On the other hand, in a transaction involving two corporations exchanging cash for assets, the successor corporation is generally not liable for its predecessor's liabilities unless one of the following is present: (1) an express or implied assumption of liability, (2) a de facto consolidation or merger, (3) fraud, (4) a transfer lacking in good faith or consideration, and (5) the successor corporation is a mere continuation or reincarnation of the predecessor corporation. In this case, the trial court correctly held that Metro Equity was a mere continuation of Metro Title. Metro Title transferred its assets to Metro Equity before Metro Title filed for bankruptcy; therefore, Metro Equity was responsible for paying to plaintiff the amount of money awarded in the default judgment against Metro Title.

Affirmed.

CORPORATIONS — SUCCESSOR NONLIABILITY — EXCEPTIONS — MERE CONTINUANCE OF PREDECESSOR.

A successor corporation is generally not liable for the liabilities of its predecessor unless the successor corporation is a mere continuation of the predecessor corporation or, in cases involving products liability, there is continuity in the enterprise of both successor and predecessor corporations.

Plunkett Cooney (by *Karen E. Beach*) for plaintiff.

The Darren Findling Law Firm, PLC (by *Darren Findling* and *Andrew J. Black*), for defendant.

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

O'CONNELL, P.J. Defendant Metro Equity Services (Metro Equity) appeals as of right the trial court's November 17, 2014 order enforcing a judgment obtained by plaintiff, Commonwealth Land Title Insur-

ance Company, under a successor-liability theory. Because Michigan recognizes a separate and distinct exception to successor nonliability in cases other than products liability, we affirm.

I. FACTUAL BACKGROUND

This case arises out of a default judgment that was entered in May 2012 in favor of plaintiff against Metro Title Corporation and Metro Title Agency (Metro Title)[1] in a separate case. Approximately three months after the trial court entered the default judgment, plaintiff filed this lawsuit against both Metro Title and Metro Equity, asserting that (1) Metro Title formed Metro Equity for the purpose of fraudulently transferring assets to avoid collection on the May 2012 default judgment, and (2) Metro Equity was liable for the judgment as a mere continuation of Metro Title under a successor-liability theory.

Metro Equity moved for summary disposition under MCR 2.116(C)(8) and (10). While it acknowledged that its owner was the owner of both Metro Title and Metro Equity, it argued that Metro Equity was not a mere continuation of Metro Title because Metro Equity did not engage in the same business or share the same customer base as Metro Title and because Metro Equity did not purchase any of Metro Title's stock or liabilities.

The trial court denied Metro Equity's motion, concluding that questions of fact remained regarding Metro Equity's liability as a successor corporation. The trial court held a bench trial, and at the close of plaintiff's proofs, it granted Metro Equity a directed verdict on

[1] Metro Title Agency is a registered assumed name for Metro Title Corporation. Metro Title, under either name, did not participate in this appeal.

plaintiff's fraudulent-transfer claim, but it found that Metro Equity constituted a mere continuation of Metro Title under plaintiff's successor-liability theory. Thus, the trial court entered an order enforcing the May 2012 judgment against Metro Equity. Metro Equity now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's conclusions of law made during a bench trial. *Waisanen v Superior Twp*, 305 Mich App 719, 723; 854 NW2d 213 (2014). We review for an abuse of discretion a trial court's decisions regarding the scope and meaning of pleadings. *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992).

III. ANALYSIS

Metro Equity asserts that the "mere continuation" exception to successor nonliability is no longer a viable theory of successor liability and that all plaintiffs must proceed under a "continuity of the enterprise" theory, which may not be applied to judgment creditors. We disagree.

Michigan law recognizes two separate exceptions to a successor corporation's nonliability. The continuity-of-the-enterprise exception only applies to products-liability cases and cases with similar public-policy concerns, but the mere-continuation exception applies to other causes of action involving successor nonliability. Judge RIORDAN has elegantly summarized these two exceptions and the difference between them:

I. "MERE CONTINUATION"

> Michigan follows the traditional rule of successor liability. *Foster* [*v Cone-Blanchard Machine Co*], 460 Mich

[696,] 702[; 597 NW2d 506 (1999)]. Under that rule, the nature of the transaction determines the potential liability of predecessor and successor corporations. *Id*. "If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies." *Id*. The five exceptions are: (1) an express or implied assumption of liability; (2) de facto consolidation or merger; (3) fraud; (4) transfer lacking in good faith or consideration; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation. *Id*. at 702. . . .

II. "CONTINUITY OF THE ENTERPRISE"

However, another relevant doctrine is the continuity of the enterprise doctrine. In *Turner* [*v Bituminous Cas Co*], 397 Mich [406, 429-430; 244 NW2d 873 (1976)], the Michigan Supreme Court applied the successor liability doctrine in the context of products liability cases, establishing the continuity of the enterprise doctrine. Pursuant to this doctrine, successor liability is imposed if: (1) there is continuation of the seller corporation (i.e.[,] continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation); (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves; and (3) the purchasing corporation assumes liabilities and obligations of the seller ordinarily necessary for the continuation of normal business operations. See *Foster*, 460 Mich at 703 (describing the *Turner* doctrine). Also pertinent is whether the purchasing corporation held itself out to the world as the effective continuation of the seller corporation. *Turner*, 397 Mich at 430.

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. . . [T]he continuity of the enterprise doctrine generally is limited to products liability cases. See *CT Charlton*

& Assoc, Inc, 541 Fed Appx [549,] 552 [2013] ("No matter how the 'continuity of the enterprise' doctrine is characterized, a review of Michigan law and the policies underlying the doctrine makes clear that it is only meant to apply in products-liability cases (and potentially a few other areas animated by similar public-policy concerns)."). See also *Turner*, 397 Mich at 416 ("This is a products liability case first and foremost."). In fact, *Starks* could be interpreted as limiting the continuity of the enterprise doctrine to the products liability context. [*Starks v Mich Welding Specialists, Inc*,] 477 Mich [922 (2006)] ("Because an exception designed to protect injured victims of defective products rests upon policy reasons not applicable to a judgment creditor, the Court declines to expand the exception to the traditional rule set forth in [*Turner*] to cases in which the plaintiff is a judgment creditor."). See also *City Mgt Corp v US Chem Co, Inc*, 43 F3d 244, 253 (CA 6, 1994) ("[T]he Michigan Supreme Court intended that the continuing enterprise exception be limited to products liability cases.").

However, no such limitation appears in the context of the mere continuation doctrine. As the bankruptcy court in the eastern district of Michigan opined, "the traditional exceptions under Michigan law for the general rule of corporate successor nonliability, one of which is the 'mere continuation' exception, *do* apply in the commercial context, and are *not limited* to product liability cases." *In re Clements Mfg Liquidation Co, LLC* [*v THB America, LLC*], 521 BR [231,] 253 [(ED Mich, 2014)] (emphasis added). Stated differently, the mere continuation exception applies to commercial cases and is not limited to product liability cases. The *Clements* court further opined that "[t]he Michigan Supreme Court's one paragraph opinion in the *Starks* case . . . does not hold otherwise. Rather, . . . *Starks* limited . . . to product liability cases, a different exception to the traditional rule of non-liability of corporate successors, namely, the 'continuity of the enterprise' doctrine, which is a separate basis for imposing successor liability from the 'mere continuation' doctrine." *Id*. at 253-254. [*Taizhou Golden Sun Arts & Crafts, Ltd v*

> *Colorbök, LLC*, unpublished opinion per curiam of the Court of Appeals, issued August 18, 2015 (Docket No. 320129) (RIORDAN, J., concurring), pp 1-3.][2]

A deeper analysis of precedent reveals that Judge RIORDAN's summary well reflects the current state of the law in this area. In *Chase v Mich Tel Co*, 121 Mich 631, 634; 80 NW 717 (1899), our Supreme Court considered whether a successor corporation could be liable for injuries sustained by an employee of the predecessor corporation, and stated that

> [t]he law is well settled in regard to liability of the consolidated or purchasing corporation for the debts and liabilities of the consolidating or selling corporation. Such obligations are assumed (1) when two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of the old; (2) when by agreement, express or implied, a purchasing corporation promises to pay the debts of the selling corporation; (3) *when the new corporation is a mere continuance of the old*; (4) when the sale is fraudulent, and the property of the old corporation, liable for its debts, can be followed into the hands of the purchaser. [Emphasis added.]

The *Chase* Court explained that separate exceptions arose from each of the four situations. See *id*. ("Plaintiff produced no evidence tending to bring the defendant within any of these cases."). In *Turner*, our Supreme Court summarized the elements of a de facto merger, *Turner*, 397 Mich at 420, and then modified them to account for the fact that the sale of a product will rarely involve shareholders, *id*. at 430. Accordingly, the *Turner* Court created a continuity-of-the-enterprise exception to apply in products-liability cases involving the cash sale of corporate assets. The exception depended on

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[2] See also Petrik, *The Current State of Successor Liability in Michigan and Why the Michigan Supreme Court's Clarification is Necessary*, 93 U Det Mercy L Rev 437 (2016).

whether (1) the enterprise continued through its retention of assets and personnel, (2) the selling corporation ceased operations, (3) the purchasing corporation assumed liabilities and obligations to the extent necessary to continue operations, and (4) the purchasing corporation held itself out to the world as a continuation. *Id*. at 430-431. *Turner* did not specifically rely on *Chase* and did not purport to limit the scope of *Chase*'s mere-continuation general exception.

Our Court has applied the traditional mere-continuation exception outside the context of products-liability cases. See *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 707; 762 NW2d 529 (2008) (stating that the plaintiff in a commercial context could pursue a mere-continuation theory at trial); *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 508-509; 802 NW2d 712 (2010) (same). Particularly relevant to this case, the plaintiff in *RDM Holdings* was allowed to advance a mere-continuation theory when the defendant had transferred its assets and obligations "in advance of bankruptcy." *RDM Holdings*, 281 Mich App at 707.

Our Supreme Court's decision in *Starks* does not mandate a different result:

> Where, as here, a successor corporation acquires the assets of a predecessor corporation and does not explicitly assume the liabilities of the predecessor, the traditional rule of corporate successor non-liability applies. See *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702 (1999). *Because an exception designed to protect injured victims of defective products rests upon policy reasons not applicable to a judgment creditor*, the Court declines to expand the exception to the traditional rule set forth in *Turner v Bituminous Casualty Co*, 397 Mich 406 (1976), to cases in which the plaintiff is a judgment creditor. [*Starks*, 477 Mich 922 (emphasis added).]

The *Starks* Court expressly affirmed this Court's judgment in a case in which this Court considered whether there was a sufficient continuity of the enterprise between the successor and predecessor corporations. *Starks v Mich Welding Specialists, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 257127), pp 4-5. The factors in that case did not support imposing successor liability. *Id*. at 5. Specifically, in that case, the predecessor corporation did not sell the assets—a foreclosing creditor did—the predecessor ceased operating *before* the assets were purchased, and the successor corporation did not hold itself out as a continuation of the previous corporation. *Id*.

In this case, *Starks* does not apply because there has been no intervening foreclosure and this case involves the mere-continuation exception. The plaintiff in *Starks* was attempting to pursue successor liability through a foreclosure and unrelated transfer of assets on the basis of a products-liability exception. Such an expansion is not at issue in this case; there has been no foreclosure (i.e., the assets were transferred in advance of bankruptcy, like in *RDM Holdings*), and the case involves a different legal doctrine (i.e., the mere-continuation exception).

We also note that two federal cases, *Stramaglia v United States*, 377 Fed Appx 472, 475 (CA 6, 2010), and *CT Charlton*, 541 Fed Appx at 551-552, recognize the ongoing viability of the mere-continuation exception to successor nonliability in Michigan.[3] As Judge Boggs stated in *CT Charlton*, 541 Fed Appx at 551-552, "A

[3] Although this Court is not bound to follow federal decisions that interpret state law, we may view these decisions as persuasive authority. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 5; 772 NW2d 827 (2009).

review of *Turner* . . . suggests that these are best understood as two independent exceptions, motivated by different policy concerns and applied in different circumstances." Judge Boggs explained:

> In creating the "continuity of the enterprise" doctrine, *Turner* modified one of the traditional "limited exceptions" to successor liability to fit in the products-liability context. But this modified exception was not the "mere continuation" exception, which is only mentioned in passing in *Turner*, appearing in a list in a footnote. *Turner*, 244 NW2d at 877 n 3. Instead, *Turner* modified the de-facto-merger doctrine, a traditional exception that imposes successor liability when four requirements are met: 1) continuation of the enterprise, 2) continuity of shareholders, 3) ending of ordinary business operations by the seller, and 4) assumption of liabilities and obligations necessary for uninterrupted continuation of business operations by the purchaser. *Turner*, 244 NW2d at 879. After reviewing the policies underlying products-liability law, the court concluded that, in the products-liability context, the form of the acquisition is irrelevant to the question of liability. *Id*. at 880. . . . As a result, the *Turner* court dropped the "continuity of shareholders" element, requiring only elements 1, 3, and 4 of the de-facto-merger doctrine to establish successor products liability. *Id*. at 883. *The "continuity of the enterprise" doctrine, therefore, is best read as a relaxation of the de-facto-merger doctrine in products-liability cases, not a redefinition of the "mere continuation" exception.* The "mere continuation" exception remains narrow, but retains its general applicability. [*Id*. at 552 (emphasis added).]

In this case, in the absence of any clear authority holding that the mere-continuation exception has ceased to exist, we find these decisions persuasive. We conclude that the trial court in this case properly applied the mere-continuation exception, which continues to exist as a traditional successor-liability theory

and allowed plaintiff to establish successor liability after Metro Title transferred its assets in advance of bankruptcy.

Metro Equity also asserts that the trial court erred by allowing plaintiff to proceed to trial on a mere-continuation theory. We disagree.

A complaint must provide the opposing party with reasonable notice of the nature of the claims brought against it. *Dacon*, 441 Mich at 329. A trial court has the discretion to allow a party to amend a pleading at any time to conform to the proofs. MCR 2.118(C)(1). In this case, a review of the pleadings indicates that plaintiff's first amended complaint, filed in February 2014, alleged the theory on which plaintiff proceeded at trial in September and October 2014. We reject Metro Equity's argument that it lacked notice of plaintiff's theory.

We affirm.

MARKEY and O'BRIEN, JJ., concurred with O'CONNELL, P.J.

In re BIBI GUARDIANSHIP

Docket No. 327159. Submitted April 12, 2016, at Detroit. Decided May 3, 2016, at 9:05 a.m.

Petitioner, Nadima Bibi, filed a petition in the Wayne County Probate Court, seeking guardianship of her minor grandchildren, who had resided for two years with respondent, Lorraine Wallace—the minors' other grandmother—in accordance with a consent judgment reached in an earlier proceeding in Canada. Wallace filed a cross-petition, also seeking guardianship of the minors. The Canadian proceeding was a child protection proceeding in which the Canadian court had placed the minors under the joint care and custody of Wallace and the minors' nonparty maternal aunt for a period of six months, under the supervision of the Windsor-Essex Children's Aid Society. The minors' father later died, their mother was incarcerated in a Florida county jail, and both petitioner and respondent moved to Michigan. The court, Judy A. Hartsfield, J., concluded that because of the Canadian consent judgment, Bibi's petition was barred by the doctrines of collateral estoppel and res judicata, and it granted Wallace's guardianship request. Bibi appealed the probate court decision in the Wayne Circuit Court. The circuit court, David J. Allen, J., affirmed the probate court order that granted guardianship of the minors to Wallace, concluding that the probate court had properly applied collateral estoppel to bar Bibi's petition and, in the alternative, that Bibi had failed to establish under the Child Custody Act (CCA), MCL 722.21 *et seq*., proper cause or a change of circumstances sufficient to justify reopening the Canadian guardianship order. Bibi appealed by leave granted.

The Court of Appeals *held*:

1. As a matter of comity, Michigan courts recognize the validity of judgments from foreign nations. A consent judgment is a settlement or a contract that becomes a court judgment when sanctioned by the judge. In general, interpretation of a contract provision is governed by the law of the state in which the contract was entered. However, if the court of last resort in the foreign jurisdiction in which the contract was entered has not declared the applicable foreign law with absolute certainty, Michigan law

controls when an action involving that contract is filed in a Michigan court. Because the doctrines of collateral estoppel and res judicata are applied in a flexible, discretionary manner under Canadian law, and not with absolute certainty, Michigan law applied regarding whether the Canadian consent judgment precluded Bibi's guardianship petition.

2. Guardianship proceedings are child custody proceedings for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. The Canadian consent judgment, which established a temporary placement for the minors, was a child-custody determination regarding physical custody under the UCCJEA. As required by MCL 722.1206(1) of the UCCJEA, before the probate court assumed jurisdiction over the minors, the Canadian court agreed to terminate its jurisdiction because there were no proceedings pending regarding the minors. The UCCJEA did not apply to the probate court proceedings once the probate court assumed jurisdiction over the minors.

3. Collateral estoppel is a flexible rule intended to relieve parties of multiple litigations, conserve judicial resources, and encourage reliance on adjudication. For collateral estoppel to apply, the ultimate issue to be concluded in the instant action must have been identical to those involved in the first action. However, collateral estoppel may not be applied to a consent judgment when factual issues were neither tried nor conceded. The probate court erred when it applied collateral estoppel to bar Bibi's petition. The consent judgment was an agreement between the parties regarding the temporary placement of the minors (not a final resolution of the child protection proceedings), and there was no evidence that the factual issues involved in the Canadian proceeding were tried or conceded before entry of the consent judgment. In addition, the issues resolved in the two proceedings were not identical because the Canadian proceeding involved a determination under Canadian law of the best temporary placement for the minors, while the probate court proceeding involved a determination of guardianship under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*.

4. Res judicata precludes a claim when the prior action was decided on the merits, both actions involved the same parties or privies, and the matter in the second case was, or could have been, resolved in the first. The probate court erred when it concluded Bibi's claim was barred by the doctrine of res judicata. Although res judicata applies to consent judgments, the judgment was not final for purposes of res judicata because it was not intended to be the last word of the Canadian court regarding the

minors. Even if it were a final judgment, res judicata would not have applied because there were intervening changes of facts and a change of law in that Michigan law displaced Ontario law when the minor children moved to Wayne County.

5. Under MCL 700.5212, probate courts are charged with appointing as a guardian a person whose appointment will serve the minor's welfare, even if the person is a professional guardian. In this case, the probate court erred by granting Wallace's cross-petition for guardianship after dismissing Bibi's petition on the basis of collateral estoppel and res judicata. By simply granting Wallace's cross-petition, the probate court abdicated its statutory duty under MCL 700.5212 to appoint on the merits a guardian who would best serve the minors' welfare; thus, the probate court abused its discretion.

6. MCL 722.27(1)(c) of the CCA provides that in a child-custody dispute, a circuit court may modify its previous orders or judgments for the best interests of the child. The circuit court erred when it applied the CCA to uphold the probate court's guardianship decision on the basis that Bibi had failed to establish proper cause or changed circumstances sufficient to reopen and modify the custody order contained in the Canadian consent judgment. MCL 722.27(1)(c) does not apply to guardianship proceedings. Because the circuit court never issued a custody order regarding the minors, the probate court's guardianship order did not modify an order or judgment of the circuit court for purposes of the CCA. Instead, EPIC applied, and pursuant to MCL 700.1302(c) of that act, the probate court generally had exclusive jurisdiction over the guardianship proceeding.

7. To determine whether a case should be remanded to a different judge, an appellate court considers whether the original judge would have difficulty in putting aside previously expressed views or findings, whether reassignment is advisable to preserve the appearance of justice, and whether reassignment will not entail excessive waste or duplication. In this case, it was not necessary to reassign the case on remand to a different probate court judge. While the probate judge made comments regarding Bibi's wealth that were inappropriate, the record did not establish that she would have difficulty putting aside her previously expressed views or findings. In addition, although the probate court erred by applying collateral estoppel and res judicata to bar Bibi's guardianship petition, that fact alone was not sufficient to demonstrate bias or prejudice and did not give the appearance of impropriety.

Reversed and remanded.

1. CONFLICT OF LAWS — RES JUDICATA AND COLLATERAL ESTOPPEL — CANADIAN CONSENT JUDGMENT INVOLVING CHILD CUSTODY — MICHIGAN LAW APPLIES.

In general, the interpretation of a contract or consent judgment provision is governed by the law of the state in which the contract was entered; if the court of last resort in the foreign jurisdiction in which a contract was entered has not declared the applicable foreign law with absolute certainty, Michigan law controls when an action involving that contract is filed in a Michigan court; because Canada applies the doctrines of res judicata and collateral estoppel in a flexible and discretionary manner, Michigan law regarding those doctrines applies when determining in a Michigan court the preclusive effect of a Canadian consent judgment involving child custody.

2. COURTS — PROBATE COURTS — GUARDIANSHIP ORDER — CHILD CUSTODY ACT FACTORS DO NOT APPLY.

The Estates and Protected Individuals Code (EPIC), MCL 700.1001 *et seq*., applies in part to guardianship proceedings involving children; under MCL 700.1302(c) of the EPIC, the probate court generally has exclusive jurisdiction over a proceeding that concerns a guardianship; MCL 722.27(1)(c) of the Child Custody Act, MCL 722.21 *et seq*.—which allows a circuit court to modify or amend a previous child custody order because of proper cause shown or a change of circumstances—does not apply to guardianship decisions made by a probate court under EPIC and is not a proper basis for a circuit court to uphold or reverse that guardianship decision.

Wood, Kull, Herschfus, Obee & Kull, PC (by *Katherine Wainright Shensky*), for Nadima Bibi.

Vincent D. Giovanni for Lorraine Wallace.

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

PER CURIAM. In this dispute over guardianship, petitioner, Nadima Bibi, appeals by leave granted[1] the

[1] *In re Guardianship of Bibi/Wallace Minors*, unpublished order of the Court of Appeals, entered September 30, 2015 (Docket No. 327159).

circuit court's appellate opinion and order, which affirmed the probate court's guardianship decision in favor of respondent, Lorraine Wallace. We conclude that the probate court erred when it applied principles of preclusion to Bibi's petition and that the circuit court erred when it affirmed the probate court's order. Accordingly, we reverse and remand for further proceedings in the probate court.

I. BASIC FACTS

This case arises out of a guardianship dispute between the minor wards' grandmothers. It began not long after the entry of a consent judgment in an earlier Canadian proceeding. According to the parties, the wards' parents have a long history of substance abuse, transient living, criminal activity, and incarceration for drug offenses. The Canadian proceeding was a "child protection proceeding" instituted by the Windsor-Essex Children's Aid Society (Children's Aid) under Ontario's Child and Family Services Act, RSO 1990, ch C.11 (Can). The parties to that proceeding, including Bibi, agreed to the consent judgment. Under the terms of the consent judgment, the court "placed" the wards under the joint care and custody of Wallace and the wards' maternal aunt, "subject to the supervision of [Children's Aid] for a period of six months," and subject to further terms and conditions. The following spring, the wards' father died. Around that same time, their mother was incarcerated in a Florida county jail.

Bibi subsequently petitioned the probate court and asked it to appoint her as the wards' full guardian. In a cross-petition, Wallace also asked to be appointed the wards' guardian. The probate court determined that Bibi's petitions were barred by collateral estoppel and

res judicata arising from the Canadian consent judgment. It then granted Wallace's request.

Bibi appealed the probate court's decision in the circuit court, and the circuit court affirmed. It determined that the probate court had properly applied collateral estoppel to bar Bibi's petition. In the alternative, it agreed with Wallace's argument that Bibi failed to establish grounds for revisiting an existing custody order. Specifically, it stated that Bibi failed to establish proper cause or a change of circumstances sufficient to justify "reopening the guardianship decision of the Ontario Court . . . ."

Bibi now appeals in this Court.

II. ANALYSIS

A. STANDARDS OF REVIEW

Bibi argues on appeal that the probate and circuit courts erred by applying res judicata and estoppel and erred in applying the relevant law. "This Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes . . . ." *Kaeb v Kaeb*, 309 Mich App 556, 564; 873 NW2d 319 (2015). This Court also reviews de novo whether the trial court properly applied legal doctrines such as res judicata and collateral estoppel. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). We likewise review de novo issues concerning choice and conflicts of law. *Talmer Bank & Trust v Parikh*, 304 Mich App 373, 383; 848 NW2d 408 (2014), vacated in part on other grounds 497 Mich 857 (2014).

This Court, however, reviews for an abuse of discretion a probate court's dispositional rulings and reviews for clear error the factual findings underlying a probate court's decision. *In re Lundy Estate*, 291 Mich App

347, 352; 804 NW2d 773 (2011). A probate court "abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A probate court's "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).

B. CHOICE OF LAW

We must first determine whether Michigan or Canadian law governs the preclusive effect of the Canadian consent judgment. As a matter of comity, our Courts have recognized the validity of judgments from foreign nations. See *Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999). Likewise, "a consent judgment is a settlement or a contract that becomes a court judgment when the judge sanctions it," *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 354; 852 NW2d 22 (2014) (quotation marks and citation omitted), and, subject to an exception, "interpretation of contract provisions is governed by the law of the state in which the contract was entered," *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 398; 509 NW2d 829 (1993), mod on other grounds by *Patterson v Kleiman*, 447 Mich 429, 433 n 3; 526 NW2d 879 (1994). The exception to the rule is that, "[i]f the court of last resort in the foreign [jurisdiction] has not declared the applicable foreign law with absolute certainty, then Michigan law controls an action instituted in a Michigan forum." *Jones*, 202 Mich App at 398 (quotation marks and citations omitted). This exception applies to a foreign jurisdic-

tion's application of preclusion principles. See *id*. at 398-401 (concluding that Michigan law controlled because the Kentucky Supreme Court had not declared with absolute certainty whether Kentucky's application of the doctrine of res judicata would bar the plaintiff's claim). Both collateral estoppel and res judicata are applied in a flexible, discretionary manner under Canadian law. *Penner v Niagara (Regional Police Servs Bd)*, 2013 SCC 19, ¶ 29; 2 SCR 125 (Can, 2013); *R v Mahalingan*, 2008 SCC 63, ¶¶ 109-110; 3 SCR 316 (Can, 2008). Therefore, we shall apply Michigan law to determine whether the Canadian consent judgment should be given preclusive effect. See *Jones*, 202 Mich App at 398.

C. UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT

As a preliminary matter, we shall address the parties' arguments concerning the application of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. Under the UCCJEA, a guardianship proceeding qualifies as a "child-custody proceeding," MCL 722.1102(d), and the phrase "child-custody determination" is broadly defined as "a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child," including "a permanent, temporary, initial, and modification order," MCL 722.1102(c). The UCCJEA further defines "physical custody" as "the physical care and supervision of a child." MCL 722.1102(n). Therefore, despite the fact that the Canadian consent judgment established a temporary placement for the wards, it nevertheless qualifies as a "child-custody determination" regarding "physical custody" under the UCCJEA.

Because the consent judgment qualified as a child-custody determination, after the probate court became aware of the Canadian proceeding, it had to confer with the Ontario court regarding jurisdiction before it could exercise its own jurisdiction to issue a guardianship decision. See *Fisher v Belcher*, 269 Mich App 247, 255; 713 NW2d 6 (2005). After conferring with the Ontario court, the probate court was permitted to exercise its jurisdiction under the UCCJEA if the prior "proceeding [was] terminated or . . . stayed by the [foreign] court . . . because a court of this state is a more convenient forum . . . ." MCL 722.1206(1); see also *Fisher*, 269 Mich App at 255.

At the July 2014 petition hearing, the probate court noted for the record that it had conferred with the Ontario court and received "confirmation" that there was "nothing pending over in the [Ontario c]ourt" and that the Ontario court would accordingly terminate its jurisdiction over the wards. Because Bibi, Wallace, and the wards all now reside in Michigan, this state was clearly the more convenient forum. Consequently, after the Ontario court indicated that it had "nothing pending" in the prior action, and that it would terminate its jurisdiction as soon as the probate court assumed jurisdiction, the UCCJEA no longer applied.

D. COLLATERAL ESTOPPEL

Bibi argues that the probate court erred when it applied collateral estoppel to bar her petition. "Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529; 866 NW2d 817 (2014). "The doctrine of collateral estoppel must be

applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a full and fair adjudication of the issues involved in their claims." *Storey v Meijer, Inc*, 431 Mich 368, 372; 429 NW2d 169 (1988). However, collateral estoppel "does not apply to consent judgments where factual issues are neither tried nor conceded." *Smit v State Farm Mut Auto Ins Co*, 207 Mich App 674, 682; 525 NW2d 528 (1994), citing *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 102-103; 380 NW2d 60 (1985). There is no indication that the factual issues involved in the prior proceeding were actually tried or conceded by entry of the consent judgment. On the contrary, the consent judgment was merely an agreement between the parties regarding a temporary placement for the wards who were under the supervision of Children's Aid.

Additionally, the consent judgment was not a final decision on the merits. By its own terms, the consent judgment was a temporary resolution of the wards' placement "for a period of six months," subject to ongoing review, not a final, conclusive resolution of the child protection proceedings. The issues involved in the prior proceeding also differ from those at issue here. For collateral estoppel to preclude relitigation of an issue, "the ultimate issue to be concluded must be the same as that involved in the first action." *Rental Props*, 308 Mich App at 529. "The issues must be identical, and not merely similar." *Id*. In the Canadian proceeding, the ultimate issue was what steps were necessary and appropriate under Canadian law to protect the wards from harm, with due consideration of the children's best interests; it did not involve a determination of who would be the best guardian for the children under Michigan's Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. The issues involved

in this petition are not identical to those involved in the Canadian proceeding, and for that reason, the probate court erred when it applied collateral estoppel to bar Bibi's petition.

E. RES JUDICATA

The probate court similarly erred when it applied res judicata to bar Bibi's petition.[2] "The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 715; 848 NW2d 482 (2014) (quotation marks and citation omitted). For res judicata to preclude a claim, three elements must be satisfied: "(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." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "[T]he burden of proving the applicability of . . . res judicata is on the party asserting it." *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Although "[r]es judicata applies to consent judgments," *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001), the consent judgment at issue here was not a final decision for purposes of res judicata. "To be accorded the conclusive effect of res judicata, the judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court . . . ."

[2] Because we conclude that the probate court erred when it applied collateral estoppel and res judicata, we do not consider Bibi's arguments that the probate court also erred by failing to hold an evidentiary hearing or by failing to state sufficient factual findings to support its decision.

Kosiel v Arrow Liquors Corp, 446 Mich 374, 381; 521 NW2d 531 (1994) (quotation marks and citation omitted). Thus, neither orders granting temporary relief "until . . . further order" of the court, *id*., nor interlocutory orders, *Indiana Ins Co v Auto-Owners Ins Co*, 260 Mich App 662, 671 n 8; 680 NW2d 466 (2004), generally carry preclusive effect under res judicata. The consent judgment was clearly not intended to be the last word of the Canadian court with regard to the wards. It was, rather, an agreement between the parties regarding a temporary placement. Indeed, it ordered Wallace and the maternal aunt to maintain a certain residence until "further Order of the Court."

Even if the consent judgment could be characterized as a final decision, "[r]es judicata does not bar a subsequent action between the same parties or their privies when the facts have changed or new facts have developed," *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 636 n 10; 808 NW2d 471 (2010), or when there has been an intervening change of law that "alters the legal principles on which the court will resolve the subsequent case," *Ditmore*, 244 Mich App at 581 n 5. More than a year passed between the entry of the consent judgment and the probate court's decision, during which there were intervening changes of both fact and law. During that time, the wards' father died, their mother was imprisoned, the authority of Children's Aid to supervise the wards expired, and the proper venue for a guardianship or custody changed from Ontario to Michigan. Moreover, according to Bibi's allegations, which Wallace did not contest in the probate court, numerous other material facts had also changed: the maternal aunt no longer lived with Wallace to provide joint care and custody for the wards, the relationship between Bibi and Wallace had deteriorated significantly—Bibi claimed that Wallace re-

quested compensation in exchange for allowing her to visit the children and then ultimately denied her access to them—Wallace became dependent on the aid of others to provide proper care and custody for the wards, Wallace began to permit her autistic son to babysit the wards, Wallace admitted in written correspondence that she was having difficulty caring for the wards, and despite the mother's addiction issues, Wallace permitted her to live with and care for the wards. Finally, because the wards began to reside in Wayne County, Michigan law eventually displaced Ontario law.

Given these changed circumstances, it was error for the probate court to apply res judicata to bar Bibi's petitions. In guardianship matters involving minor children, our probate courts are charged to "appoint as guardian a person whose appointment serves the minor's welfare," even if that person is a "professional guardian." MCL 700.5212. But instead of basing its guardianship decision on the appointment that would serve the wards' welfare, the probate court relied on its erroneous application of preclusion principles, reasoning that because Bibi's petitions were barred, it could simply grant Wallace's competing petitions. In doing so, the probate court abdicated its statutory authority to decide the issue on the merits and, therefore, abused its discretion. See *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012) (noting that a trial court's failure to exercise discretion when required constitutes an abdication and, therefore, an abuse of discretion). In situations such as this, when our courts are entrusted with safeguarding the interests of minor children, res judicata must be applied with great care. See *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 383; 596 NW2d 153 (1999) ("The goal of res

judicata is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible.").

F. PROPER CAUSE OR CHANGE IN CIRCUMSTANCES

We next consider the alternative grounds for affirmance offered by Wallace. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994) (recognizing that an appellee may urge alternative grounds in support of a judgment in its favor). In the circuit court, Wallace argued that Bibi had not established grounds for revisiting an established custody order. The circuit court agreed. On appeal, Bibi argues that the circuit court erred by concluding that her purported failure to establish proper cause or changed circumstances under the Child Custody Act, MCL 722.21 *et seq*., was a valid ground for affirming the probate court's guardianship decision. We agree. Contrary to Wallace's arguments on appeal, MCL 722.27(1)(c) does not apply to guardianship decisions by the probate court; it applies to custody actions, orders, and judgments in "the circuit court." MCL 722.27(1); see also MCL 722.26(1) (stating that the act applies to "circuit court child custody disputes and actions"); MCL 722.26b(1) and (5) (granting guardians standing to bring custody actions and providing that the probate judge who appointed the guardian should act as the circuit judge for such child custody actions). The probate court generally has exclusive jurisdiction over a proceeding that concerns a guardianship. MCL 700.1302(c). Because there was no custody order from the circuit court involving the wards, the probate court's guardianship order neither could nor did modify "an order or judgment of the circuit court."

Consequently, MCL 722.27(1)(c) did not apply, and the circuit court erred when it determined otherwise.

G. REASSIGNMENT ON REMAND

Bibi argues that the probate judge made several comments that warrant reassignment of the case on remand. "The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case." *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). In deciding whether to remand to a different judge, this Court considers whether "the original judge would have difficulty in putting aside previously expressed views or findings," whether "reassignment is advisable to preserve the appearance of justice," and whether "reassignment will not entail excessive waste or duplication." *Id*. at 603.

Bibi contends that the probate judge made comments that suggest bias against her:

> Just because she [Bibi] has a lot of money and has the ability to access the Courts, doesn't mean that she gets to constantly re-litigate the same issues over and over again. And that's the way I see it, is that this [action] is a re-litigation of things that took place in 2012 in the Canadian Court system. And I don't see anything with respect to Ms. Wallace's care of these children that should cause me to open up this can of worms on this competing guardianship matter.

We agree that the probate judge's comments about Bibi's wealth were inappropriate, but we do not agree that the comments warrant reassignment. The record does not show that the probate judge would have difficulty in putting aside her previously expressed views or findings. *Id*. Reassignment is also not neces-

sary to preserve the appearance of justice. Even though the probate court's application of preclusion principles was erroneous, that fact does not demonstrate bias or prejudice that would tend to give the appearance of impropriety. See *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002).

III. CONCLUSION

We reverse the decisions of the circuit and probate courts and remand this matter to the probate court for consideration of the petitions on the merits.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

DILLON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 324902. Submitted April 13, 2016, at Lansing. Decided May 3, 2016, at 9:10 a.m. Leave to appeal sought.

Jessica A. Dillon brought an action in the Isabella Circuit Court against State Farm Mutual Automobile Insurance Company, seeking payment of personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*. After being struck by a motor vehicle in 2008, Jessica Dillon received treatment for injuries to her lower back and left shoulder and for various abrasions. State Farm made payments related to those injuries. In 2011, Dillon began to experience hip pain. She sought treatment and ultimately had surgery in 2012 to repair a labral tear. Dillon attributed the tear to the 2008 accident and sought personal protection insurance benefits from State Farm. State Farm denied the claim, arguing that it had not received notice of the hip injury within one year of the accident in accordance with MCL 500.3145(1), and Dillon brought this action. After the trial court denied State Farm's motion for summary disposition, the case went to trial, and the jury found for Dillon. State Farm appealed.

The Court of Appeals *held*:

MCL 500.3145(1) requires that written notice of injury be given to the insurer within one year after the accident. The notice must indicate the time, place, and nature of the claimant's injury. The notice of injury required by MCL 500.3145(1) does not require identification of the specific injury for which the insured later seeks coverage. The Legislature's omission of the definite article "the" in the phrase "notice of injury" indicates that it was not referring to a definite or particular injury. This is supported by the Legislature's requirement that the notice give the "nature of his injury," which is a reference to the general, not the specific. Therefore, Dillon's notice of injury within one year of the accident was sufficient to recover personal protection insurance benefits for losses incurred within one year of the commencement of the action, including benefits for her hip injury even though it was not specified in the notice given to State Farm.

Affirmed.

INSURANCE — NO-FAULT — ONE-YEAR-BACK RULE — NOTICE OF INJURY.

The notice of injury required by MCL 500.3145(1) does not require identification of the specific injury for which the insured later seeks coverage.

Gray, Sowle & Iacco, PC (by *Patrick A. Richards* and *Daniel A. Iacco*), for Jessica A. Dillon.

Hackney, Grover, Hoover & Bean, PLC (by *John P. Lewis* and *Jeffrey K. Wesorick*), for State Farm Mutual Automobile Insurance Company.

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

SAWYER, P.J. At issue in this case is the question of how specific a notice of injury must be under MCL 500.3145(1). More particularly, we must decide whether the notice must identify the specific injury for which the insured later seeks coverage. We hold that the notice does not have to identify the specific injury.

Plaintiff was injured in August 2008 when she was struck by a motor vehicle while she was crossing the street. She was transported by ambulance to the hospital. Her initial complaints were of upper and lower back pain and various abrasions. After various imaging studies, no significant injuries were noted. When plaintiff spoke with a representative from defendant, she complained only of injuries to her lower back and left shoulder and various abrasions; no mention was made of an injury to her left hip. Defendant made payments related to those injuries that plaintiff had identified.

In March 2011, plaintiff sought treatment for hip pain. She again sought treatment in December 2011 for left hip pain. She underwent physical therapy to relieve the pain. Treatment continued into early 2012.

After an arthrogram was performed on February 3, 2012, plaintiff was diagnosed with a left anterosuperior quadrant labral tear and detachment. Arthroscopic surgery was performed in March 2012. Because plaintiff attributed the hip injury to the 2008 accident, she sought payment of personal protection insurance benefits from defendant. Defendant denied the claim on the basis that it had not received notice of the hip injury within one year of the accident. The trial court denied defendant's motion for summary disposition, and following trial, the jury found in plaintiff's favor. Defendant now appeals. We affirm.

MCL 500.3145(1) provides as follows:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

Given this statutory language, the question presented in this case is whether it was necessary for plaintiff to specifically identify in her notice of injury an injury to

her left hip in order to successfully pursue a claim for benefits related to her hip injury, when the hip-injury claim arose more than one year after the accident. In particular, we must determine what is meant in the last sentence of § 3145(1) by "the time, place and nature" of the injury.

Defendant does identify some unpublished decisions of this Court that seem to support its decision to deny the hip-injury claim. But defendant points to no published decision of this Court or the Supreme Court that clearly resolves this question, and we have not discovered any such opinion ourselves. The unpublished opinions relied on by defendant seem to trace their holdings to our decision in *Mousa v State Auto Ins Cos*[1] and the Supreme Court's decision in *Welton v Carriers Ins Co*,[2] but we find little assistance in those cases to resolve this issue. And, for that matter, we find that what assistance is provided would seem to support plaintiff more so than defendant.

Mousa goes into no detail about the extent of the notice of injury, and its guidance is limited to these two sentences: "The notice must be specific enough to inform the insurer of the nature of the loss. It must give sufficient information that the insurer knows or has reason to know that there has been a compensable loss."[3] The first sentence does little more than rephrase the statute, and the second speaks of "a" loss, rather than "the" loss and says nothing about the notice having to specifically identify the injury for which the insured is now seeking compensation. Because of the general language employed, particularly the use of an indefinite article rather than a definite article, if any

[1] 185 Mich App 293; 460 NW2d 310 (1990).

[2] 421 Mich 571; 365 NW2d 170 (1984).

[3] *Mousa*, 185 Mich App at 295.

conclusion can be reached, it would be that *Mousa* stands for the proposition that the notice of loss does not need to identify the specific injury.

Turning to *Welton*, we find a bit more guidance. *Welton* dealt with a tolling question not involved in this case.[4] But because the plaintiff's argument in that case was based upon the notice of injury, the Court did have to discuss it. The Court concluded that the notice of injury was inadequate to invoke the type of tolling the plaintiff argued for because "a general notice of injury of the type here given is insufficient to trigger tolling."[5] The Court then went on to briefly discuss the nature of the notice of injury required under the statute:

> Notice of injury simply informs the insurer of "the name and address of the claimant," "the name of the person injured and the time, place and nature of his injury." MCL 500.3145(1); MSA 24.13145(1). Until a specific claim is made, an insurer has no way of knowing what expenses have been incurred, whether those expenses are covered losses and, indeed, whether the insured will file a claim at all.

While hardly definitive regarding the question before us, it would seem that the *Welton* Court, to the extent the opinion has any relevance after *Devillers v Auto Club Ins Ass'n*,[6] viewed the notice of injury required by the statute in much more general terms than defendant proposes or than did this Court in the unpublished decisions relied on by defendant.

Therefore, we must turn to the words of the statute

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[4] The *Welton* Court accepted, without deciding, the existence of the tolling that the plaintiff advocated. Later, in *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), the Court adopted the judicial-tolling doctrine. But the Supreme Court later overruled *Lewis* in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), overruling *Welton* as well.

[5] *Welton*, 421 Mich at 579.

[6] *Devillers*, 473 Mich 562.

itself to divine its meaning. Looking to the first sentence of § 3145(1), we contrast the phrase "notice of injury" with the phrase "benefits for the injury." In the first phrase, which describes the notice that must be given to relax the application of the one-year-back rule, the use of the definite article "the" is conspicuously absent. The fact that the Legislature uses it later in the same sentence suggests that it was not mere oversight or poor grammar. The definite article "the" is "used as a function word to indicate that a following noun or noun equivalent is definite" or that it "is a unique or particular member of its class," and it also serves "as a function word before a noun to limit its application to that specified by a succeeding element in the sentence[.]"[7] The fact that the Legislature omitted its use before the word "injury" in "notice of injury" indicates that the Legislature was not referring to a definite or particular injury. That is, if the Legislature intended for the "notice of injury" to identify a very specific injury, such as an injury to the left hip, rather than the mere fact that an accident resulted in some injury, it would have provided that "notice of *the* injury" must be given.

Turning to the last sentence of § 3145(1), the Legislature tells us that, among other things, the notice shall give the "nature of his injury." *Merriam-Webster's* defines "nature" in this context as "a kind or class [usually] distinguished by fundamental or essential characteristics[.]"[8] Thus, we see reference to the general, not the specific.[9] Accordingly, we reject defen-

[7] *Merriam-Webster's Collegiate Dictionary* (11th ed).

[8] *Id*.

[9] *Merriam-Webster's* gives as an example of this definition "documents of a confidential [nature.]" *Id*. That is, a group or type of document, not the identification of a specific document.

dant's argument that the notice of injury must have specified injury to plaintiff's left hip. The fact that defendant received notice that plaintiff suffered physical injuries in a motor vehicle accident was sufficient to satisfy the statute.

In conclusion, because plaintiff gave notice of injury within one year of the accident, § 3145(1) allows her to recover personal protection insurance benefits for any loss incurred within one year of the commencement of the action.

Affirmed. Plaintiff may tax costs.

MURPHY and RONAYNE KRAUSE, JJ., concurred with SAWYER, P.J.

PEOPLE v SOURS

Docket No. 326291. Submitted May 3, 2016, at Grand Rapids. Decided May 10, 2016, at 9:00 a.m.

Jerald L. Sours pleaded guilty in the Branch Circuit Court to possession of methamphetamine, MCL 333.7403(2)(b)(*i*). The court, Patrick W. O'Grady, J., sentenced defendant as a second-offense habitual offender, MCL 769.10, to 47 months to 15 years' imprisonment with the sentence to run consecutively to a sentence from which he was on parole. Defendant appealed his sentence by leave granted, alleging that the trial court erred by assessing 10 instead of zero points for Offense Variable (OV) 19, MCL 777.49(c), because defendant did not interfere with the administration of justice in relation to his sentencing offense merely because he was contemporaneously in violation of his parole.

The Court of Appeals *held*:

Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise. Only conduct that relates to the offense being scored may be considered when determining the score for an offense variable. MCL 777.49(c) requires the assignment of 10 points if the offender interfered with or attempted to interfere with the administration of justice. The trial court erred by assessing 10 points for OV 19 under MCL 777.49(c) during sentencing on defendant's possession-of-methamphetamine conviction because defendant's failure to report to his parole agent before committing a new felony, the sentencing offense, did not hinder the process of administering judgment for the sentencing offense. In this case, the sentencing offense was the possession-of-methamphetamine conviction, and defendant was not simultaneously being sentenced for the parole violation. To be assessed 10 points on OV 19 for interfering with the administration of justice, defendant would have had to have acted in a way that hindered the process of investigating and administering judgment for the methamphetamine offense. The fact that defendant was also violating his parole had no effect on the process of investigating, trying, and

convicting him for the methamphetamine offense; therefore, OV 19 should have been scored at zero points. Defendant was entitled to be resentenced because the original sentence was based on an inaccurately calculated guidelines range, and properly assessing zero points for OV 19 moved defendant to OV Level I, which resulted in a corrected guidelines range of 10 to 28 months rather than 19 to 47 months. Defendant's argument that the assessment of 10 points for OV 19 was based on unconstitutional judicial fact-finding was moot because defendant was entitled to be resentenced.

Case remanded for resentencing under properly calculated guidelines.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 19 — INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE — CONTEMPORANEOUS PAROLE VIOLATION.

To be assessed 10 points under Offense Variable 19, MCL 777.49(c), a defendant must act in a way that hinders the process of investigating and administering judgment for the sentencing offense; points may not be assessed for Offense Variable 19 on the basis of a defendant's violation of parole if that violation had no effect on the process of investigating, trying, and convicting that defendant for the sentencing offense.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Ralph W. Kimble II*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Mitchell T. Foster*) for defendant.

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

PER CURIAM. Defendant, Jerald Lavere Sours, pleaded guilty to possession of methamphetamine, MCL 333.7403(2)(b)(*i*), and was sentenced as a second-offense habitual offender, MCL 769.10, to 47 months to 15 years' imprisonment with the sentence to run consecutively to his parole sentence. Defendant now appeals his sentence by leave granted. We remand to the trial court for resentencing under properly calculated guidelines.

Defendant argues that the trial court erred by assessing 10 instead of zero points for Offense Variable (OV) 19, MCL 777.49(c), because defendant did not interfere with the administration of justice in relation to his sentencing offense merely because he was contemporaneously in violation of his parole. A claim that the sentencing guidelines range was improperly calculated is preserved by raising the issue "at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 311; 684 NW2d 669 (2004). Here, defendant preserved this issue by moving that the trial court correct an invalid sentence based on the same claim that he raises on appeal; the trial court treated the motion as one for resentencing. 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). On appeal, "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).

"Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). The *McGraw* Court defined "sentencing offense" as "the crime of which the defendant has been convicted and for which he or she is being sentenced." *Id*. at 122 n 3. In other words, "unless stated otherwise, only conduct that relates to

the offense being scored may be considered" when determining the score for an offense variable. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). The instructions for scoring OV 19 are found in MCL 777.49, which requires the assignment of 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). "[T]he plain and ordinary meaning of 'interfere with the administration of justice' for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013).

OV 19 is generally scored for conduct that constitutes an attempt to avoid being caught and held accountable for the sentencing offense.[1] For example, in *People v Barbee*, 470 Mich 283, 285; 681 NW2d 348 (2004), the defendant pleaded guilty to operating a motor vehicle while intoxicated. The trial court scored OV 19 at 10 points for interference with the administration of justice because the defendant gave a false name to the police officer who initially stopped his car. *Id*. Our Supreme Court affirmed, reasoning that investigating crime "is critical to the administration of justice" and that the defendant impeded that process by giving a false name to the police. *Id*. at 288. Additionally, in *People v Smith*, 488 Mich 193, 196-197, 202; 793 NW2d 666 (2010), the Court held that it was

[1] OV 19 may also be properly scored when the sentencing offense itself necessarily involves interfering with the administration of justice. *People v Underwood*, 278 Mich App 334, 340; 750 NW2d 612 (2008). For example, OV 19 may be scored when the defendant is convicted of perjury. *Id*. at 338-340. Here, however, defendant's sentencing offense was possession of methamphetamine, which, unlike perjury, does not inherently interfere with the administration of justice. Therefore, *Underwood* does not affect our analysis.

proper to score OV 19 on the defendant's manslaughter conviction when, after the crash that caused the victim's death, the defendant threatened the passenger who was in the defendant's vehicle at the time of the crash to keep her from talking to the police. The *Smith* Court held that "[t]he 'administration of justice' process . . . is not commenced until an underlying crime has occurred, which invokes the process." *Id*. at 202.

Here, the trial court erred by assessing 10 points for OV 19 during sentencing on defendant's possession-of-methamphetamine conviction because defendant's failure to report to his parole agent before committing a new felony, the sentencing offense, did not hinder the process of administering judgment for the sentencing offense. Under *McGraw*, the sentencing offense in this case is the possession-of-methamphetamine conviction because that is the crime for which defendant was being sentenced on June 23, 2014. See *McGraw*, 484 Mich at 122 n 3. Defendant was not being sentenced for the parole violation simultaneously. So, to be assessed 10 points on OV 19 for interfering with the administration of justice, defendant would have had to have acted in a way that hindered the process of investigating and administering judgment for the methamphetamine offense. See, e.g., *Barbee*, 470 Mich at 284-285, 288; *Smith*, 488 Mich at 196-197, 202. In this case, defendant was arrested immediately after being discovered with methamphetamine. The fact that he was also violating his parole had no effect on the process of investigating, trying, and convicting him for the methamphetamine offense; therefore, OV 19 should have been scored at zero points. *Sargent*, 481 Mich at 350.

Because OV 19 was improperly scored, which resulted in an improperly calculated guidelines range, defendant is entitled to be resentenced. See *People v*

Francisco, 474 Mich 82, 92; 711 NW2d 44 (2006) (holding that a defendant is entitled to be resentenced if the original sentence was based on an inaccurately calculated guidelines range). In this case, the trial court erroneously scored OV 19 at 10 rather than zero points. Assessing zero points for OV 19 moves defendant to OV Level I, which results in a corrected guidelines range of 10 to 28 months rather than 19 to 47 months. MCL 777.65; MCL 777.21(3)(a). Although the trial court stated that it might nonetheless consider defendant's conduct to be grounds for a departure, implying that it might have imposed the same sentence, defendant is still entitled to be resentenced because his minimum sentence of 47 months falls outside the properly calculated minimum guidelines range of 10 to 28 months. See *Francisco*, 474 Mich at 89 n 8. There is simply no way of knowing what sentence the trial court would have imposed in light of the correctly calculated guidelines. See *id*. at 91. "Thus, requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends." *Id*. at 92.

Defendant also argues that the assessment of 10 points for OV 19 was based on unconstitutional judicial fact-finding. In *People v Lockridge*, 498 Mich 358, 399; 870 NW2d 502 (2015), our Supreme Court held that Michigan's sentencing guidelines are advisory, remedying the constitutional violation presented by allowing mandatory minimum sentences to be increased based on judicial fact-finding. Because we conclude that OV 19 should have been scored at zero points and that defendant is entitled to be resentenced, defendant's *Lockridge* issue is now moot, and we need not address it. "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). This Court generally does not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

We remand for resentencing. We do not retain jurisdiction.

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

McJIMPSON v AUTO CLUB GROUP INSURANCE COMPANY

Docket No. 320671. Submitted July 14, 2015, at Detroit. Decided May 12, 2016, at 9:00 a.m.

Karen D. McJimpson brought an action in the Wayne Circuit Court against Auto Club Group Insurance Company, alleging that defendant had unlawfully or unreasonably refused or neglected to pay uninsured-motorist benefits after a metal object that was propelled from an unidentified vehicle struck her car and shattered her windshield while she was driving on an interstate highway. Defendant moved for partial summary disposition, alleging that plaintiff did not meet the "direct physical contact" requirement of the uninsured-motorist provision because plaintiff conceded that she was struck by an object propelled from the unidentified vehicle and not by the vehicle itself. The court, Susan D. Borman, J., denied defendant's motion, stating that the language in defendant's policy was ambiguous and that direct physical contact did occur between the object that was propelled from the unidentified vehicle and plaintiff's car. Defendant appealed, alleging that plaintiff was not entitled to uninsured-motorist benefits as a matter of law under the language of the insurance policy because the phrase "direct physical contact" was not ambiguous and because the undisputed facts demonstrated that the unidentified vehicle never made direct physical contact with plaintiff's vehicle.

The Court of Appeals *held*:

The rights and limitations of uninsured-motorist coverage are purely contractual and are construed without reference to the no-fault act, MCL 500.3101 *et seq*. General principles of contract interpretation apply to the interpretation of insurance policies, and courts must construe unambiguous contract provisions as written. Use of the term "physical contact" in uninsured-motorist policies has been interpreted to mean that either direct or indirect contact is sufficient to trigger policy coverage and that contact with a propelled object constitutes indirect contact provided that there is a substantial physical nexus between the propelled object and the unidentified vehicle. However, the insurance policy at issue in this case provided coverage only when the unidentified

vehicle made "direct physical contact" with the insured person or vehicle. The policy did not refer to propelled objects nor did it use the unmodified term "physical contact"; therefore, by requiring direct physical contact with the unidentified vehicle, defendant's policy limited uninsured-motorist coverage to cases in which the unidentified vehicle itself struck an insured person or vehicle. The trial court erred by denying defendant's motion for partial summary disposition because the direct-physical-contact requirement was not met when plaintiff's vehicle was struck by an object propelled from the unidentified vehicle and not struck by the unidentified vehicle itself.

Reversed and remanded.

Reifman Law Firm (by *Steven W. Reifman*) for Karen D. McJimpson.

Garan Lucow Miller, PC (by *Caryn A. Ford*), for Auto Club Group Insurance Company.

Before: WILDER, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

WILDER, P.J. Defendant, Auto Club Group Insurance Company, appeals as of right an order denying its motion for partial summary disposition. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This action arises out of injuries sustained on April 5, 2012, by plaintiff, Karen Denise McJimpson, when a piece of metal flew off an unidentified 18-wheeler semitruck and struck her car as she drove eastbound on I-96 between Novi Road and Beck Road. The semitruck was two cars ahead of plaintiff's vehicle, driving in the same direction. Suddenly, an object flew off the truck, and vehicles near the truck started swerving. Plaintiff did not see the object strike the

vehicle in front of her before the object struck plaintiff's car and shattered her windshield. Plaintiff slammed on her brakes, which caused the object to rebound off the hood of her car, strike the roof of the car, and finally come to rest in the road. The driver of the truck never stopped.

Following the incident, the Michigan State Police trooper who arrived to assist plaintiff pointed out the piece of sheet metal that he believed hit her vehicle. During her deposition, plaintiff described the object as an arc-shaped piece of silvery metal and estimated that the object was approximately half the size of her car's windshield. Plaintiff sustained numerous cuts and bruises during the accident and was eventually diagnosed with torn tissue in her left shoulder, strains and sprains in her back and neck, and spinal injuries.

Plaintiff made a claim for uninsured-motorist benefits under the insurance policy that she held with defendant. Under the policy, plaintiff was entitled to uninsured-motorist benefits if the vehicle that caused her injuries met the contractual definition of an "uninsured motor vehicle," which, in relevant part, included "a hit-and-run **motor vehicle** of which the operator and owner are unknown and which makes *direct physical contact* with: (1) **you** or a **resident relative**, or (2) a **motor vehicle** which an **insured person** is **occupying**." (Italicized emphasis added.)

Plaintiff filed a complaint against defendant, alleging that defendant had unlawfully or unreasonably refused or neglected to pay uninsured-motorist benefits.[1] Defendant filed a motion for summary disposi-

[1] Plaintiff's complaint also alleged that defendant had failed to fully pay her personal protection insurance (PIP) benefits, but payment of the PIP benefits is not at issue in this appeal.

tion under MCR 2.116(C)(8) and MCR 2.116(C)(10) on the ground that the facts as alleged and testified to by plaintiff did not meet the requirements of the uninsured-motorist provision because plaintiff conceded that she was struck by an object propelled by or from the unidentified vehicle and not by the vehicle itself.

In her response, plaintiff distinguished the unpublished case cited by defendant in its brief and argued that the policy language unambiguously provided coverage under these circumstances. She further argued that at a minimum the terms of the policy were ambiguous and accordingly should be interpreted in favor of the insured. The trial court denied defendant's motion for summary disposition, stating:

> [Testimony that the object "came off the truck and hit the Plaintiff's car" is] the only testimony we have. I read the cases that were cited. I don't think anything is really on point. I think the language in [defendant's] policy is ambiguous. For that one reason I'm going to interpret the meaning against [defendant] because it is ambiguous and [defendant is] the drafter.
>
> Secondly, I think there was direct physical contact. It flew through the air. It wasn't interrupted by anything. It directly flew off the truck through the air and hit the Plaintiff's car and caused the accident. That's my interpretation, so your motion is denied.

On February 18, 2014, the trial court entered an order denying defendant's motion for partial summary disposition, and this appeal ensued.

II. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115;

839 NW2d 223 (2013). Additionally, this Court reviews de novo, as a question of law, a trial court's construction and interpretation of an insurance policy, including a trial court's conclusion regarding whether the terms of the policy are ambiguous. *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 7; 792 NW2d 372 (2010).

While the trial court did not specify the particular subrule of MCR 2.116(C) under which it denied defendant's motion for partial summary disposition, in light of the trial court's statements at the motion hearing regarding plaintiff's deposition testimony, it is apparent that the trial court considered documentation beyond the pleadings and therefore ruled on the motion under MCR 2.116(C)(10). See *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 23; 800 NW2d 93 (2010). A motion for summary disposition under 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 deciding a motion under MCR 2.116(C)(10), this Court reviews "the entire record, including affidavits, depositions, admissions, or other documentary evidence," in the light most favorable to the nonmoving party. *Gorman*, 302 Mich App at 115. To avoid dismissal on a motion for summary disposition under MCR 2.116(C)(10), the nonmoving party must "show[] by evidentiary materials that a genuine issue of disputed fact exists, and the disputed factual issue must be material to the dispositive legal claim[.]" *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003) (citations omitted); see also MCR 2.116(G)(4). Conversely, "[a] trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact and that the

moving party is entitled to judgment as a matter of law." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013).

III. ANALYSIS

On appeal, defendant argues that plaintiff is not entitled to uninsured-motorist benefits as a matter of law under the language of the insurance policy because the phrase "direct physical contact" is not ambiguous and because the undisputed facts demonstrate that the unidentified semitruck never made "direct physical contact" with plaintiff's vehicle. We agree.

As the Michigan Supreme Court recognized in *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005):

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act. [Citations omitted.]

See also *Dawson v Farm Bureau Mut Ins Co of Mich*, 293 Mich App 563, 568; 810 NW2d 106 (2011). "An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to determine what the agreement was and effectuate the intent of the parties." *Hunt v Drielick*, 496 Mich 366, 372; 852 NW2d 562 (2014) (quotation marks and citation omitted). Likewise, the general principles of contract interpretation apply to insurance policies. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005). This Court reads an

insurance contract "as a whole, with meaning given to all terms." *Dancey*, 288 Mich App at 8. "Policy language should be given its plain and ordinary meaning," *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 519; 847 NW2d 657 (2014), and "unless a contract provision violates [the] 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*, 473 Mich at 461.

Over the years, we have considered various linguistic formulations of uninsured-motorist coverage. Some policies are written broadly and would provide coverage in this setting. For example, the policy in *Dancey*, 288 Mich App at 11-12, stated that such coverage required that "[t]he [unidentified] vehicle must hit, *or cause an object to hit*, an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying.' " (Emphasis added.)

Other policies we have examined have been written more narrowly. Some provide that there must be "physical contact" between the vehicles but do not include the phrase "cause an object to hit." In these cases, we have held that either *direct* or *indirect* contact is sufficient to trigger coverage and that contact with a propelled object constitutes indirect contact provided that there is a "substantial physical nexus" between the propelled object and the unidentified vehicle.

In *Hill v Citizens Ins Co of America*, 157 Mich App 383, 394; 403 NW2d 147 (1987), we reviewed a broad range of cases and concluded that "the 'physical contact' provision in uninsured motor vehicle coverage may be satisfied even though there is *no direct contact* between the disappearing vehicle and claimant or claimant's vehicle" provided that there is a sufficient

causal connection between the disappearing vehicle and the striking object. (Emphasis added.)

This was also the basis for our ruling in *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 347; 556 NW2d 207 (1996). The policy in *Berry* required "physical contact," which, as noted, we interpreted as providing coverage where there was *either* direct or indirect contact:

> [T]his Court has construed the physical contact requirement broadly to include *indirect physical contact*, such as where a rock is thrown or an object is cast off by the hit-and-run vehicle, *as long as a substantial physical nexus between the disappearing vehicle and the object cast off or struck is established by the proofs*. [*Id*. (emphasis added).]

Our focus on the presence of a "substantial physical nexus" continued in *Wills v State Farm Ins Co*, 222 Mich App 110, 115; 564 NW2d 488 (1997). In *Wills*, we stated that "indirect physical contact" involves situations when an object is "cast off" by a vehicle:

> An uninsured motorist policy's requirement of "physical contact" between a hit-and-run vehicle and the insured or the insured's vehicle is enforceable in Michigan. This Court has construed the physical contact requirement broadly to include indirect physical contact as long as a substantial physical nexus exists between the unidentified vehicle and the object cast off by that vehicle or the object that strikes the insured's vehicle.
>
> A "substantial physical nexus" between the unidentified vehicle and the object causing the injury to the insured has been found where the object in question was a *piece* of, or *projected* by, the unidentified vehicle, but not where the object originates from an occupant of an unidentified vehicle. [*Id*. (citations omitted).]

We agree with plaintiff that a policy so drafted would provide for coverage under the facts alleged in this case.

However, the policy language in this case is different from the language considered in those cases. Defendant's uninsured-motorist provision is written more narrowly, providing for coverage only when the unidentified vehicle makes "direct physical contact" with the insured or her vehicle. It does not refer to propelled objects as in *Wills* nor does it use the unmodified term "physical contact," thereby implicating the "substantial physical nexus" test. By instead requiring "*direct* physical contact" with the unidentified vehicle, the policy limits uninsured-motorist coverage to cases in which the unidentified vehicle itself strikes an insured person or vehicle. That requirement is not met here.

The fundamental difference between "physical contact" and "direct physical contact" for purposes of uninsured-motorist coverage[2] was defined by this Court in *Hill* nearly 30 years ago. And in this case, the vehicles did not make direct contact. There was contact between the plaintiff's vehicle and an object projected from or propelled by the unidentified vehicle, which, under the language of defendant's policy, does not trigger uninsured-motorist coverage.

IV. CONCLUSION

The subject policy provides uninsured-motorist coverage when there is "direct physical contact" between "a hit-and-run **motor vehicle**" and "(1) **you** or a **resident relative**, or (2) a **motor vehicle** which an **insured person** is **occupying**." The direct-physical-

[2] Our analysis of the meaning of these terms applies only to uninsured-motorist-coverage provisions because these provisions are not governed by the no-fault act, MCL 500.3101 *et seq*. We do not intend to address in this analysis or control by means of this analysis the use or meaning of such terms elsewhere in a no-fault policy that are governed by statute.

contact requirement was not met when plaintiff's vehicle was struck by something propelled by or cast off from the other vehicle. Therefore, the trial court erred by denying defendant's motion to dismiss. Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

SHAPIRO and RONAYNE KRAUSE, JJ., concurred with WILDER, P.J.

PEOPLE v BYLSMA

PEOPLE v OVERHOLT

Docket Nos. 317904 and 321556. Submitted May 4, 2016, at Grand Rapids. Decided May 17, 2016, at 9:00 a.m. Leave to appeal denied ___ Mich ___.

In Docket No. 317904, Ryan M. Bylsma was charged in the Kent Circuit Court with manufacturing marijuana in violation of MCL 333.7401(1) and MCL 333.7401(2)(d) of the Public Health Code. Bylsma rented a warehouse space for the purpose of growing marijuana to provide medical users with marijuana. He also, in the same warehouse space, assisted other individuals—qualifying patients and registered caregivers—with growing marijuana. Bylsma moved under § 4, MCL 333.26424, of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., to dismiss the charges against him and, in the alternative, reserved his right to raise an affirmative defense under § 8, MCL 333.26428, of the MMMA. The court, George S. Buth, J., held that Bylsma was not entitled to immunity under § 4, and because Bylsma could not satisfy the requirements of § 4, neither could he establish an affirmative defense under § 8. The Court of Appeals affirmed the trial court's decision. Bylsma filed an application for leave to appeal in the Michigan Supreme Court, which affirmed in part and reversed in part and remanded the case to the trial court for further proceedings. 493 Mich 17 (2012). Byslma again moved to dismiss or, in the alternative, for permission to raise at trial the affirmative defense in § 8. The trial court denied Bylsma's motion to dismiss and denied him permission to raise the § 8 defense at trial. Bylsma filed an application for leave to appeal in the Court of Appeals, which denied the application. Byslma then filed an application for leave to appeal in the Michigan Supreme Court. The Supreme Court ultimately remanded Bylsma's case to the Court of Appeals for consideration as on leave granted. 498 Mich 913 (2015). The case was consolidated with *People v Overholt* (Docket No. 321556).

In Docket No. 321556, David A. Overholt, Jr., was charged in the Kent Circuit Court with delivery or manufacture of a Schedule 1 or 2 controlled substance, MCL 333.7401(2)(a)(*iv*) (a charge that was later dismissed; a charge of delivery or manufacture of

a Schedule 1, 2, or 3 controlled substance other than marijuana, MCL 333.7401(2)(b)(*ii*), was later added), delivery or manufacture of marijuana, MCL 333.7401(2)(d)(*iii*), and maintaining a drug house, MCL 333.7405(1)(d). The charges arose from Overholt's ownership of a medical marijuana dispensary, the Mid-Michigan Compassion Club, through which he sold marijuana and edible marijuana products to individuals with memberships to the club and proper documentation of their status as a patient or a primary caregiver under the MMMA. Overholt moved to dismiss the charges under § 8 of the MMMA. The court, Mark A. Trusock, J., denied the motion. On the day of trial, the court considered whether Overholt could raise a § 8 defense despite the fact that he was not entitled to a dismissal on that basis. The court denied Overholt's request to present the affirmative defense under § 8. Overholt conditionally pleaded no contest to delivery and manufacture of marijuana in anticipation of appellate review of his claims under the MMMA. After the Court of Appeals denied Overholt's delayed application for leave to appeal, he applied for leave to appeal in the Michigan Supreme Court. The Supreme Court ultimately remanded the case to the Court of Appeals as on leave granted. 498 Mich 914 (2015). The case was consolidated with *People v Bylsma* (Docket No. 317904).

The Court of Appeals *held*:

The affirmative defense in § 8, MCL 333.26428, is available to a defendant in the context of a traditional patient and primary-caregiver relationship as long as the defendant is himself or herself a patient or primary caregiver as those terms are defined in the MMMA. An individual may not provide marijuana to patients of another caregiver and may not cultivate, manufacture, or otherwise possess marijuana on behalf of patients of another caregiver. A patient may have only one primary caregiver, and a primary caregiver may have only five patients. In defendant Bylsma's case, he provided marijuana to or cultivated marijuana for several patients who had formally declared other individuals as their primary caregivers or themselves served as their own primary caregivers. In defendant Overholt's case, he sold marijuana to a multitude of caregivers and to patients who served as their own caregivers. The affirmative defense in § 8 was not available to either defendant, and the trial courts properly denied both defendants' motions to raise the affirmative defense of § 8 in their respective cases. Additionally, nothing in the MMMA supports the contention that caregiver-to-caregiver transactions are protected under § 8.

Bylsma affirmed and remanded to the trial court for further proceedings. *Overholt* affirmed.

MICHIGAN MEDICAL MARIHUANA ACT — SECTION 8 AFFIRMATIVE DEFENSE — PROVIDING MARIJUANA TO OR CULTIVATING MARIJUANA FOR OTHER CAREGIVERS AND PATIENTS ASSOCIATED WITH OTHER CAREGIVERS.

The affirmative defense under § 8, MCL 333.26428, of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., is not available to a defendant unless the defendant is a patient or caregiver as those terms are defined in the MMMA; the affirmative defense is not available when the relationship between the individuals involved is not a traditional patient-caregiver relationship; a patient or caregiver cannot raise a § 8 defense if he or she has provided marijuana to, or cultivated marijuana for, an individual who serves as his or her own primary caregiver or who has named another individual as his or her primary caregiver.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, *James K. Benison*, Chief Appellate Attorney, and *Gary A. Moore*, Assistant Prosecuting Attorney, for the people.

Bruce Alan Block, PLC (by *Bruce Alan Block* and *Bogomir Rajsic, III*), for defendant Ryan M. Bylsma.

Richard C. Gould for defendant David J. Overholt, Jr.

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

RIORDAN, P.J. These cases, which involve application of the Michigan Medical Marihuana[1] Act (MMMA), MCL 333.26421 *et seq*., to a cooperative medical marijuana grow operation and a medical marijuana dispen-

[1] Although the MMMA refers to "marihuana," this Court uses the more common spelling, i.e., "marijuana," in its opinions. *People v Carruthers*, 301 Mich App 590, 593 n 1; 837 NW2d 16 (2013). Therefore, except when directly quoting a statute, we will use the more common spelling in this opinion.

sary, return to this Court on remand from the Michigan Supreme Court for consideration as on leave granted.[2] They have been consolidated on appeal because each case presents the same issue: whether a defendant who possessed, cultivated, manufactured, delivered, sold, or transferred marijuana to a patient or caregiver with whom the defendant was not connected through the registration process of the MMMA is entitled to raise a defense under § 8 of the MMMA, MCL 333.26428. See *People v Bylsma*, 498 Mich 913 (2015); *People v Overholt*, 498 Mich 914 (2015). For the reasons set forth in this opinion, we conclude that a § 8 affirmative defense may be available to a defendant who sells, transfers, possesses, cultivates, manufactures, or delivers marijuana to and for patients and caregivers with whom he or she is not connected through the registration process of the MMMA. However, as a necessary prerequisite, such a defendant must fall within the definition of "patient" or "primary caregiver" as those terms are defined, used, and limited under the act. See MCL 333.26423, MCL 333.26426, MCL 333.26427(a), and MCL 333.26428.

In Docket No. 317904, we affirm the trial court order denying defendant Ryan Michael Bylsma's motion to dismiss or, in the alternative, for permission to assert an affirmative defense under § 8 of the MMMA at trial, and we remand for further proceedings consistent with this opinion. In Docket No. 321556, we similarly affirm the trial court order denying defendant David James Overholt, Jr.'s motion to dismiss and its later ruling that an affirmative defense under § 8 of the MMMA did not apply to defendant Overholt.

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[2] *People v Bylsma*, 498 Mich 913 (2015); *People v Overholt*, 498 Mich 914 (2015).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. DOCKET NO. 317904

The charges in Docket No. 317904 arise from Bylsma's operation of a "cooperative medical marijuana grow operation" in Grand Rapids, Michigan. The underlying facts of this action were set forth in *People v Bylsma*, 493 Mich 17, 23-24; 825 NW2d 543 (2012):

> Pursuant to § 6 of the MMMA, a qualifying patient and his primary caregiver, if any, can apply to the MDCH [Michigan Department of Community Health] for a registry identification card. Defendant Ryan Bylsma did so and, at all relevant times for the purposes of this appeal, was registered with the MDCH as the primary caregiver for two registered qualifying medical marijuana patients. He leased commercial warehouse space in Grand Rapids and equipped that space both to grow marijuana for his two patients and to allow him to assist other qualifying patients and primary caregivers in growing marijuana. A single lock secured the warehouse space, which was divided into three separate booths. The booths were latched but not locked, and defendant moved plants between the booths depending on the growing conditions that each plant required. Defendant spent 5 to 7 days each week at the warehouse space, where he oversaw and cared for the plants' growth. Sometimes, defendant's brother would help defendant care for and cultivate the plants. Defendant had access to the warehouse space at all times, although defense counsel acknowledged that two others also had access to the space.
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> In September 2011, a Grand Rapids city inspector forced entry into defendant's warehouse space after he noticed illegal electrical lines running along water lines. The inspector notified Grand Rapids police of the marijuana that was growing there. The police executed a search warrant and seized approximately 86 to 88 plants. Defendant claims ownership of 24 of the seized plants and

> asserts that the remaining plants belong to the other qualifying patients and registered caregivers whom he was assisting.
>
> Defendant was charged with manufacturing marijuana in violation of the Public Health Code, MCL 333.7401(1) and (2)(d), subject to an enhanced sentence under MCL 333.7413 for a subsequent controlled substances offense.

In the trial court, Bylsma moved to dismiss under § 4 of the MMMA, MCL 333.26424, reserving his right to later raise an affirmative defense under § 8. The trial court denied the motion. *Id*. at 24. Most relevant to this appeal, the court concluded that because Bylsma was not entitled to immunity under § 4, he also was not entitled to raise an affirmative defense under § 8. *Id*. That is, Bylsma's noncompliance with § 4 precluded him from being able to raise an affirmative defense under § 8.

This Court granted Bylsma's application for leave to appeal[3] and affirmed the trial court's decision. This Court agreed that Bylsma could not avail himself of the § 4 immunity provision, and as a result, he was not entitled to assert an affirmative defense under § 8, because an affirmative defense under § 8 requires compliance with the provisions of § 4. *Bylsma*, 493 Mich at 25.

Bylsma appealed this Court's decision in the Michigan Supreme Court, which affirmed in part and reversed in part. *Id*. at 21-22. The Court agreed with us that Bylsma was not entitled to immunity under § 4. *Id*. at 21, 33-35. However, the Court reversed our decision that Bylsma was necessarily precluded from raising an affirmative defense under § 8 because he failed to satisfy the elements of § 4. Rather, it con-

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[3] *People v Bylsma*, unpublished order of the Court of Appeals, entered April 11, 2011 (Docket No. 302762).

cluded that § 4 and § 8 are mutually exclusive and that a defendant is not required to establish the elements of § 4 in order to avail himself of the § 8 affirmative defense. *Id*. at 22, 35-36. The Court then declined to address the merits of Bylsma's § 8 affirmative defense, concluding that it would be "premature" to decide the issue because defendant neither raised that defense nor received an opportunity to present evidence on that defense in the trial court. *Id*. at 36-37. Accordingly, the Court remanded the case back to the trial court for further proceedings. *Id*. at 37.

On remand, Bylsma filed a second motion to dismiss the charges against him, or in the alternative, to allow him to raise at trial the affirmative defense outlined in § 8 of the MMMA. In pertinent part, Bylsma argued that he was entitled to the defense under § 8 because, under the broad terms of that section, he was a primary caregiver for 14 different patients: himself, Brad Verduin, Jeremy Sturdavant, David Taylor, Alohilani May, Lawrence Huck, Daniel Bylsma, Dennis Rooy, Glen Woudenberg, James Wagner, Eric Bylsma, Jonathan Hooper, Daniel Keltin, and Matthew Roest. Bylsma acknowledged that most of his patients had primary caregivers other than himself, but he asserted that this fact was not relevant for purposes of § 8, contending that even though § 4 allowed a qualifying patient to have only one primary caregiver and allowed a primary caregiver to have only five qualifying patients,[4] there were no such limitations in § 8. In other words, Bylsma argued that even though he was not the "Section 4 caregiver" for most of these individuals, he was their "Section 8 caregiver." Each of these individu-

[4] Bylsma erroneously cited § 4 for this proposition. As discussed further later in this opinion, § 6, MCL 333.26426, not § 4, provides that a primary caregiver may assist no more than five qualifying patients.

als (1) had a documented need for medical marijuana, (2) had been issued a medical marijuana identification card, and (3) was receiving assistance from Bylsma to meet his or her medical marijuana needs. Additionally, Bylsma argued that it was reasonably necessary for him to possess all the marijuana plants found in his warehouse to ensure an uninterrupted supply of marijuana to himself and each of his other patients. In response to Bylsma's motion, the trial court held a two-day evidentiary hearing. During his testimony, Bylsma acknowledged that on the day of the raid, he was registered as a § 4 primary caregiver for only two patients, Huck and May. However, because of his training and experience with cultivating marijuana, he believed that he could "help anybody that needed help, as long as they had doctor's recommendations" for the use of medical marijuana, including patients who had registered primary caregivers other than Bylsma and primary caregivers with patients other than Bylsma. Many of the individuals associated with Bylsma's cooperative grow operation also testified regarding their certification as qualified medical marijuana patients or their designation as primary caregivers, as well as their relationships with Bylsma in connection with the cultivation of marijuana. Three licensed Michigan physicians also testified regarding medical certifications that they issued for patients involved in Bylsma's cooperative grow operation.

The trial court denied Bylsma's motion to dismiss and held that Bylsma was precluded from raising at trial an affirmative defense under § 8. In pertinent part, the trial court concluded:

> 8. Under the MMMA, a "primary caregiver" is "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal

> drugs." MCL 333.26423(i). Defendant now argues that at the time of the charged offense, he was a primary caregiver for twelve patients. Defendant contends that because the Supreme Court, in [*People v*] *Kolanek*[, 491 Mich 382; 817 NW2d 528 (2012),] and this case, ruled that § 4 and § 8 "operate independently", there is no limitation on the number of primary caregivers a single patient may have and, accordingly, the fact that some patients "had designated Section 4 registered caregivers did not prevent them from also designating [defendant] as their Section 8 caregiver.". . . The Court is not persuaded by this argument. The record from the January 2011 hearing makes clear that defendant was the primary caregiver for only two patients. Defendant admitted at that time that most of the plants in his warehouse space were for patients other than those with whom he was connected;
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> 9. Defendant's position requires interpretation of the MMMA, which the people enacted by initiative petition in November 2008. . . . When giving the words of the MMMA their ordinary and plain meaning as they would have been understood by the electorate, a primary caregiver refers to the patient's first or main caregiver. This Court must presume that every word, phrase and clause in the act has meaning and avoid any interpretation that renders any part of the statute surplusage. To accept defendant's argument that a qualifying patient could have more than one primary caregiver impermissibly renders the word "primary" nugatory and the Act internally inconsistent[.]

Additionally, concerning Bylsma's ability to raise a § 8 defense solely for his conduct involving himself, Huck, and May, the trial court concluded that Bylsma had not presented sufficient evidence to support each element required for the defense under § 8(a).[5]

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[5] After Bylsma's second motion to dismiss was denied, the prosecution amended the felony information to add one count of maintaining a drug house, MCL 333.7405(1)(d), and one count of possession of marijuana, MCL 333.7403(2)(d).

The trial court denied Bylsma's subsequent motion for reconsideration. Most notably, the court reiterated that the record evidence demonstrated that Bylsma was the primary caregiver for only two patients, and it rejected Bylsma's claim that the MMMA allows a qualifying patient to have more than one primary caregiver. Rather, it emphasized that Bylsma was assisting other primary caregivers with the cultivation of marijuana for patients specifically linked in the registry to those other caregivers, concluding that the MMMA does not permit caregiver-to-caregiver assistance. The trial court also restated its earlier conclusions regarding Bylsma's failure to establish a question of fact about each element of a § 8 defense as it pertained to his marijuana-related conduct involving himself or his two qualifying patients.

Bylsma filed a second application for leave to appeal in this Court, which was denied.[6] He then filed an application for leave to appeal in the Michigan Supreme Court, which the Court held in abeyance pending its decisions in *People v Hartwick* (Docket No. 148444) and *People v Tuttle* (Docket No. 148971). *People v Bylsma*, 846 NW2d 921 (2014). After the Court issued a consolidated opinion in *People v Hartwick*, 498 Mich 192; 870 NW2d 37 (2015),[7] it remanded this case back to this Court for consideration as on leave granted. *People v Bylsma*, 498 Mich 913 (2015).

B. DOCKET NO. 321556

The charges in Docket No. 321556 arise from Overholt's ownership of a medical marijuana dispensary, the Mid-Michigan Compassion Club (the Club), in

[6] *People v Bylsma*, unpublished order of the Court of Appeals, entered November 12, 2013 (Docket No. 317904).

[7] *Hartwick* was consolidated with *People v Tuttle*.

Grand Rapids, Michigan. Overholt is a registered medical marijuana caregiver for at least one patient.

In March 2013, Grand Rapids police officers executed a search warrant at the Club, where they discovered various containers, jars, and bags filled with marijuana, several jars of hash oil, plastic baggies containing marijuana candies, digital scales, and money. Overholt was charged with delivery or manufacture of less than 50 grams of a Schedule 1 or 2 controlled substance (Delta 1-Tetrahydrocannabinol), MCL 333.7401(2)(a)(*iv*); delivery or manufacture of less than 5 kilograms or 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*); and maintaining a drug house, MCL 333.7405(1)(d).[8]

The preliminary examination testimony revealed that the Club operated on a membership basis. Any person with a patient or caregiver card under the MMMA could become a member and purchase marijuana through the Club as long as he or she presented the proper documentation and paid the $20 annual fee. Overholt or his "network of growers" grew the marijuana that Overholt sold to Club members. Originally, Overholt sold marijuana to both patients and caregivers through the business. However, following the Michigan Supreme Court's decision in *Michigan v McQueen*, 493 Mich 135; 828 NW2d 644 (2013), Overholt, in an effort to remain in compliance with the MMMA, allowed only caregivers to become members. However, according to the investigating detective's understanding of Overholt's operations, Overholt con-

[8] Later, Overholt's charges were amended. The charge of delivery or manufacture of less than 50 grams of a Schedule 1 or 2 controlled substance (Delta 1-Tetrahydrocannabinol), MCL 333.7401(2)(a)(*iv*), was dismissed. One count of delivery or manufacture of a Schedule 1, 2, or 3 controlled substance other than marijuana, MCL 333.7401(2)(b)(*ii*), was added.

tinued to sell marijuana directly to some patients even after the *McQueen* decision.

Before trial, Overholt moved to dismiss his charges under § 8 of the MMMA, MCL 333.26428, arguing that (1) he was in compliance with the MMMA because any person—not just a patient or caregiver—could claim a defense under § 8(b); (2) the statute does not require all marijuana used for medical purposes to be grown by a patient or a caregiver, and as a result, the statute contemplates caregiver-to-caregiver transactions; (3) he only sold marijuana to members of the Club who provided proof that they were "authorized to be in possession of medical marijuana," i.e., caregivers or patients who did not have caregivers; (4) he possessed only an amount of marijuana that was reasonably necessary to ensure the uninterrupted availability of marijuana for his Club members; and (5) he only provided marijuana to individuals who were using it for medical purposes. In response, the prosecution argued, *inter alia*, that Overholt could not assert an affirmative defense under § 8 because it only applied to "a patient and a patient's primary caregiver," and the evidence showed that he supplied marijuana to people who were not his patients.

Following a hearing at which no evidence was presented, the trial court adopted the prosecution's reasoning and denied Overholt's motion to dismiss. It emphasized its duty to enforce the law as written and concluded that Overholt's position was an improper extension of the MMMA. However, the trial court did not decide whether Overholt would be permitted to raise at trial an affirmative defense under § 8.[9]

[9] See *People v Kolanek*, 491 Mich 382, 412; 817 NW2d 528 (2012) (stating that a trial court has three options when deciding a motion to dismiss under § 8: (1) grant the motion to dismiss, (2) deny the motion

On the date set for trial, the court addressed whether Overholt was entitled to raise a § 8 defense even though he was not entitled to dismissal under that section. The court concluded that Overholt was not entitled to raise the affirmative defense in § 8, reiterating its obligation to apply the MMMA as written and noting the absence of any provision in the MMMA allowing caregiver-to-caregiver sales of marijuana. Likewise, the court stated that it found no provision of § 8 applicable in this case. Therefore, the trial court concluded that a § 8 defense was "irrelevant" and that Overholt could not present it. The court added that it would not reconsider the issue unless the proofs demonstrated that Overholt had acted in compliance with the MMMA.

Immediately thereafter, Overholt accepted a settlement offer presented by the prosecution under which he pleaded no contest to one count of delivery or manufacture of marijuana in exchange for the dismissal of the remaining counts and a recommendation that he serve no jail time if he closed his business. The plea was conditioned on appellate review of the MMMA. The trial court accepted the plea and sentenced Overholt to two years' probation.

Overholt filed a delayed application for leave to appeal in this Court, which was denied.[10] He then applied for leave to appeal in the Supreme Court. As in Docket No. 317904, the Supreme Court held Overholt's application in abeyance pending its decisions in *People v Hartwick* (Docket No. 148444) and *People v Tuttle*

to dismiss but allow the defendant to raise the defense at trial, or (3) deny the motion to dismiss and preclude the defendant from raising the defense at trial).

[10] *People v Overholt*, unpublished order of the Court of Appeals, entered June 4, 2014 (Docket No. 321556).

(Docket No. 148971). *People v Overholt*, 858 NW2d 54 (2015). Following the release of its consolidated opinion in *Hartwick*, 498 Mich 192, the Supreme Court reconsidered Overholt's application for leave to appeal and, in lieu of granting leave, remanded the case back to this Court for consideration as on leave granted.

II. STANDARD OF REVIEW

"We review for an abuse of discretion a circuit court's ruling on a motion to dismiss but review de novo the circuit court's rulings on underlying questions regarding the interpretation of the MMMA . . . ." *Bylsma*, 493 Mich at 26. "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

III. RAISING A DEFENSE UNDER § 8 OF THE MMMA

"The possession, manufacture, and delivery of marijuana are punishable criminal offenses under Michigan law. Under the MMMA, though, '[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act.' " *Hartwick*, 498 Mich at 209, quoting MCL 333.26427(a) (alterations in original).[11] Individuals in compliance with the MMMA may claim immunity from arrest and prosecution under § 4, MCL 333.26424, or

[11] Contrary to medical marijuana statutes in other jurisdictions, such as California and Colorado, the MMMA does not expressly authorize cooperative medical marijuana enterprises. *Bylsma*, 493 Mich at 27, 27 n 26. As previously noted by Judge O'CONNELL, Dianne Byrum, a spokesperson for the ballot proposal that led to adoption of the MMMA, stated "that '[t]he Michigan proposal wouldn't permit the type of cooperative growing that allows pot shops to exist in California.' " *People v Redden*, 290 Mich App 65, 110 n 17; 799 NW2d 184 (2010) (O'CONNELL, J., concurring) (citation omitted; alteration in original).

raise an affirmative defense to prosecution under § 8, MCL 333.26428. See *Hartwick*, 498 Mich at 209. In particular, § 4 "grants broad immunity from criminal prosecution and civil penalties to [registered] 'qualifying patient[s]' and 'primary caregiver[s]' " who satisfy the elements of that section. *Id*. at 210 (alterations in original). On the other hand, § 8 "provides any patient or primary caregiver—regardless of registration with the state—with the ability to assert an affirmative defense to a marijuana-related offense" if that person satisfies the elements of that section. *Id*. at 226. Notably, "to establish the elements of the affirmative defense in § 8, a defendant need not establish the elements of § 4." *People v Kolanek*, 491 Mich 382, 403; 817 NW2d 528 (2012).

In this case, our task is to determine whether a defendant who possesses, cultivates, or manufactures marijuana for a patient or caregiver to whom they are not connected through the MMMA registration process, or who otherwise provides marijuana to such a patient or caregiver, may assert an affirmative defense under § 8. This inquiry requires statutory interpretation of the MMMA.

As an initial matter, we recognize that due regard must be given to the fact that the MMMA is a voter-initiated statute:

> The MMMA was passed into law by initiative. We must therefore determine the intent of the electorate in approving the MMMA, rather than the intent of the Legislature. Our interpretation is ultimately drawn from the plain language of the statute, which provides the most reliable evidence of the electors' intent. But as with other initiatives, we place special emphasis on the duty of judicial restraint. Particularly, we make no judgment as to the wisdom of the medical use of marijuana in Michigan. This state's electors have made that determination for us. To

> that end, we do not attempt to limit or extend the statute's words. We merely bring them meaning derived from the plain language of the statute. [*Hartwick*, 498 Mich at 209-210 (quotation marks and citations omitted); see also *Bylsma*, 493 Mich at 26.]

Stated differently, "[i]f the statutory language is unambiguous, . . . [n]o further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed." *Bylsma*, 493 Mich at 26 (quotation marks and citations omitted; second alteration in original). However, "[o]ur consideration of the availability of the affirmative defense in § 8 . . . is guided by the traditional principles of statutory construction." *Kolanek*, 491 Mich at 397. Accordingly,

> [i]n determining the [drafters'] intent, we must first look to the actual language of the statute. As far as possible, effect should be given to every phrase, clause, and word in the statute. Moreover, the statutory language must be read and understood in its grammatical context. When considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words within a statute, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. [*People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).]

When Bylsma and Overholt committed the offenses at issue in these cases, § 8 of the MMMA provided, in relevant part:

> (a) Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
>
> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a). [MCL 333.26428.][12]

Accordingly, under MCL 333.26428(a), "a *patient* and a *patient's primary caregiver*, if any," may assert the medical purpose for using marijuana as an affirmative defense in a marijuana-related prosecution. (Emphasis added.) We agree with defendants that an individual who qualifies as a patient or a primary

[12] MCL 333.26428 was amended by 2012 PA 512, effective April 1, 2013. Amended Subsections (a) and (b) are substantively identical to the former version of MCL 333.26428.

caregiver may assert a § 8 defense regardless of his or her registration status and the registration status of the patient or primary caregiver, if any, with whom he or she is affiliated. See *Hartwick*, 498 Mich at 213, 228; *Kolanek*, 491 Mich at 402. As the Michigan Supreme Court noted in *Hartwick*, 498 Mich at 236, "Those patients and primary caregivers who are not registered may still be entitled to § 8 protections if they can show that their use of marijuana was for a medical purpose—to treat or alleviate a serious or debilitating medical condition or its symptoms." Accordingly, we hold that a defendant who possessed, cultivated, manufactured, sold, transferred, or delivered marijuana to someone with whom he or she was not formally connected through the MMMA registration process may be entitled to raise an affirmative defense under § 8. However, we also hold that in order for such a defendant to be entitled to raise a defense under § 8, he or she must qualify as a "patient" or "primary caregiver" *as those terms are defined and limited under the MMMA*. See *Hartwick*, 498 Mich at 209 ("Under the MMMA, . . . '[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act.' The MMMA grants to persons in compliance with its provisions either immunity from, or an affirmative defense to, those marijuana-related violations of state law.") (alterations in original), quoting MCL 333.26427(a).

Given the context of these consolidated appeals, it is necessary for us to clarify who constitutes a "patient" and a "primary caregiver" under the MMMA. "[I]n interpreting a statute, this Court must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *People v Beardsley*, 263 Mich App 408, 412; 688 NW2d

304 (2004). At time of the offenses at issue, the term "patient" was not defined in the MMMA; the term "qualifying patient" was defined as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h).[13] Nevertheless, the language of § 8 indicates that "patient" is used in that section to denote a person who has been diagnosed by a physician as having a "serious or debilitating medical condition," MCL 333.26428(a)(1) through (3), which is consistent with the meaning of "qualifying patient" under the former version of MCL 333.26423(h). In addition, the statute originally defined "primary caregiver" as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MCL 333.26423(g).[14] Notably, the definition of "primary caregiver" was framed in the singular, indicating that a patient's primary caregiver constituted one person.[15] Consistent with the syntax of this definition,

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[13] The current version of the statute, as amended by 2012 PA 512, effective April 1, 2013, defines *both* "qualifying patient" and "patient" as "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(i).

[14] The definition, which was amended by 2012 PA 512, effective April 1, 2013, now provides:

> "Primary caregiver" or "caregiver" means a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime as defined in . . . MCL 770.9a. [MCL 333.26423(h).]

[15] While we recognize that "[i]f a statute specifically defines a term, the statutory definition is controlling," *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013), it is noteworthy that the singular framing of this definition is consistent with the common meaning of "primary." See *Merriam-Webster's College Dictionary* (11th ed) (defining

§ 6 of the act provides that "each qualifying patient can have no more than 1 primary caregiver . . . ." MCL 333.26426(d). Section 6(d) also states that "a primary caregiver may assist no more than 5 qualifying patients with their medical use of marihuana." *Id*. Again,

> [w]hen considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words within a statute, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. [*Jackson*, 487 Mich at 791.]

Accordingly, we hold that to be in compliance with the MMMA—and, therefore, to be eligible to raise a defense under § 8 in a prosecution for marijuana-related conduct, see *Hartwick*, 498 Mich at 209—an individual must either be a "patient" or the "primary caregiver" for no more than five qualifying patients, as those terms are defined and understood under the MMMA.

We also conclude that the plain language of § 8 clearly indicates that the affirmative defense available under that section is intended to apply only to a prosecution arising out of activities directly related to a defendant's status as a patient or, if applicable, a defendant's status as a patient's primary caregiver. As earlier stated, § 8(a) provides that "a patient *and* a patient's primary caregiver, if any, may assert *the* medical purpose for using marihuana as a defense to any prosecution involving marihuana . . . ." (Emphasis added.) We believe that the use of the word "and" in this context is conjunctive, joining "patient" and "a patient's primary caregiver" as two limited, and con-

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"primary" as "first in order of time or development" or "something that stands first in rank, importance, or value").

nected, categories of individuals who may raise a § 8 defense. See *Black's Law Dictionary* (10th ed) (defining "conjunctive/disjunctive canon" as "[t]he doctrine that in a legal instrument, *and* joins a conjunctive list to combine items, while *or* joins a disjunctive list to create alternatives"). "The" is a definite article "with a specific or particularizing effect . . . ." See *Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) (quotation marks and citation omitted). Therefore, from this language, it is clear that only a patient himself or herself and that patient's primary caregiver may assert as an affirmative defense a specific patient's "medical purpose for using marihuana." This understanding is confirmed by the fact that the subsequent elements of § 8(a) consistently refer to "*the* patient" and "*the* patient's primary caregiver." (Emphasis added.) Likewise, the Michigan Supreme Court implicitly recognized that a § 8 defense is available only for conduct occurring in the context of an established patient-caregiver relationship when it stated, "A primary caregiver has the burden of establishing the elements of § 8(a)(1) for each patient to whom the primary caregiver is alleged to have unlawfully provided marijuana." *Hartwick*, 498 Mich at 232; see also § 8(a)(3) ("***The*** patient and **the** patient's primary caregiver, if any, **were engaged** in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate *the patient's* serious or debilitating medical condition or symptoms of *the patient's* serious or debilitating medical condition.") (italic and bold emphasis added). Therefore, we conclude that the language employed in § 8 presupposes a relationship between the primary caregiver and the patient, so that the marijuana in the primary caregiver's possession is cultivated or held by

that caregiver, or transferred by the caregiver to the patient, in furtherance of the medical use of the marijuana by that particular caregiver's patient.

Accordingly, we find no basis for concluding that a defendant may assert a § 8 defense in a prosecution for conduct by which he possessed, cultivated, manufactured, delivered, sold, or transferred marijuana to an individual who serves as a primary caregiver for other patients or to a patient whom he did not serve as a *primary* caregiver. Stated differently, a defendant may not raise a § 8 defense in a prosecution for patient-to-patient transactions involving marijuana, caregiver-to-caregiver transactions involving marijuana, transactions that do not involve a patient for whom the defendant serves as a *primary* caregiver, and transactions involving marijuana that do not involve the defendant's own *primary* caregiver, as "patient" and "primary caregiver" are defined and expressly limited under the act. Only conduct directly arising from the traditional patient and primary-caregiver relationship is subject to an affirmative defense under § 8.

In so holding, we reject Overholt's claim that a § 8 defense is available not only to a patient or primary caregiver, but also to *any* "person" under § 8(b). Contrary to his characterization of the statute, § 8(b) expressly incorporates § 8(a): "A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person *shows the elements listed in subsection (a)*." MCL 333.26428(b) (emphasis added). Section 8(a), in turn, specifically provides that "a patient and a patient's primary caregiver, if any," may assert the defense, and the elements under § 8(a) repeatedly refer to "the patient" and "the patient's primary caregiver." Therefore, when read in

context, it is clear that the reference in § 8(b) to a "person" is, in fact, a reference to a patient or a primary caregiver who is able to satisfy the elements of § 8(a).

We also reject defendants' claim that caregiver-to-caregiver transactions are permitted under the MMMA. Contrary to Bylsma's claims on appeal, assisting another patient's caregiver is not equivalent to assisting that patient directly for purposes of § 8. In contending that caregiver-to-caregiver transactions are permitted, both defendants rely on § 6(b)(3), which states that in order for a minor to be eligible to be a qualifying patient and receive a registry identification card, the minor's parent must agree in writing to serve as the minor's primary caregiver and control the acquisition of marijuana for the child. MCL 333.26426(b)(3). From this language, they argue that § 6(b)(3)(C) implicitly recognizes that caregiver-to-caregiver transactions are allowable because the section implies that a parent can be a primary caregiver without having to personally cultivate marijuana so long as the parent controls how the child acquires marijuana from other sources (i.e., other caregivers).

We first reject the application of this subsection to these cases because it is undisputed that defendants' charges did not arise from transactions involving the parents of minor patients. Further, the plain language of § 6(b), both when read in isolation and in the context of the act, does not permit a parent, as the primary caregiver of a qualifying patient who is a minor child, to obtain marijuana from other caregivers. Instead, the provision simply requires the parent to control the child's "acquisition," "dosage," and "frequency of the medical use of" marijuana. "Acquisition" is not defined in the MMMA, but it is defined by *Merriam-Webster's Collegiate Dictionary* (11th ed) as "the act of acquir-

ing[.]"[16] "Acquire" is defined as "to come into possession or control of *often by unspecified means*." *Id*. (emphasis added). Accordingly, § 6(b)(3)(C) only requires that a parent *control* the way in which a child comes into possession or control of marijuana, meaning, in effect, that a child may not serve as his own caregiver and acquire marijuana himself or herself. Further, consistent with the definition of "acquire," the means of acquisition are unspecified here, and we find no basis for concluding that this provision provides general authority for caregiver-to-caregiver transactions under the MMMA.

Therefore, in sum, a defendant who is not formally affiliated with a patient or primary caregiver through the registration process under the MMMA may raise a defense under § 8, but the defendant must first demonstrate that he or she qualifies as a "patient" or "primary caregiver" as those terms are defined, and limited, under the MMMA and used in § 8. The plain language of the MMMA indicates that a patient can only have one primary caregiver, and an individual may serve as a primary caregiver for no more than five patients. MCL 333.26423(g), as enacted by 2008 IL 1 (defining "primary caregiver" prior to the act's amendment); MCL 333.26426(d). Thus, even though the plain language of § 8 does not specifically require a primary caregiver to be connected to a patient through the registration process under the MMMA, see *Hartwick*, 498 Mich at 228, the defense available under § 8 is limited by other provisions in the act, provisions that restrict the number of primary caregivers a patient may have and restrict the number of patients a primary caregiver may serve. Moreover, the affirmative

[16] When a term is not defined in a statute, the dictionary definition of the term may be consulted. *Lewis*, 302 Mich App at 342.

defense available under § 8 is necessarily restricted by the fact that no provision of the MMMA permits an individual to provide marijuana to one or more patients of another caregiver—or cultivate, manufacture, or otherwise possess marijuana on behalf of one or more patients of another caregiver—and therefore qualify as a primary caregiver for purposes of § 8.

IV. APPLICATION

For the reasons later discussed, no reasonable juror could have concluded that either Bylsma or Overholt was entitled to an affirmative defense under § 8 in these consolidated, although factually distinct, cases. The undisputed facts of each case demonstrate that neither defendant served as a "primary caregiver" or a "patient," as those terms are defined and limited under the MMMA and used in § 8, during their operation of the cooperative growing operation and medical marijuana dispensary that resulted in the charges brought against them. Accordingly, the trial courts properly denied their motions to dismiss and correctly concluded that defendants were precluded from presenting evidence of an affirmative defense under § 8 at trial. See *Kolanek*, 491 Mich at 413 (stating that if no reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, as a matter of law the defendant is precluded from presenting evidence of the § 8 defense at trial).

A. DOCKET NO. 317904

In arguing that he is entitled to raise an affirmative defense under § 8, Bylsma fails to recognize the effect of the statutory definitions of "patient" and "primary caregiver" under the MMMA. He contends that he does not have to be connected to his numerous patients

through the MDCH registry to be considered their primary caregiver because "a § 8 defense may be pursued by any defendant, regardless of registration status." Accordingly, he argues that he is entitled to assert a defense under § 8 as long as he demonstrates that each of his patients satisfies all the elements under § 8(a). However, a prima facie showing of each of the elements under § 8(a) is inconsequential unless he first demonstrates for purposes of § 8 that he qualifies as a primary caregiver with regard to each patient-caregiver relationship. See *Hartwick*, 498 Mich at 232 ("A primary caregiver has the burden of establishing the elements of § 8(a)(1) *for each patient* to whom the primary caregiver is alleged to have unlawfully provided marijuana.") (emphasis added).

As previously discussed, § 8 specifically allows a patient's primary caregiver or a patient to assert the affirmative defense of the medical use of marijuana as long as the elements of § 8(a) are established. MCL 333.26428(a) and (b). At the time of Bylsma's arrest, the term "primary caregiver" was defined as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MCL 333.26423(g). Reading this definition in isolation, Bylsma could arguably constitute a primary caregiver for all the patients that he was assisting with the manufacture or cultivation of marijuana. Importantly, though, many of his patients—including Wagner, Woudenberg, Hooper, Keltin, and Roest—had already designated themselves as their own primary caregivers or had designated through the MDCH registry primary caregivers other than Bylsma. Thus, as a practical matter, defendant could not be the primary caregiver for these patients, and there is nothing in the MMMA to suggest that a registered

patient may have more than one primary caregiver. Rather, as earlier discussed, § 6 of the MMMA expresses a clear directive that a qualifying patient cannot have more than one primary caregiver. MCL 333.26426(d). Therefore, under the plain language of § 8(a), Bylsma is not entitled to assert an affirmative defense related to registered patients who, through the MDCH registry, had primary caregivers other than Bylsma.

Likewise, because he was cultivating marijuana for other primary caregivers who were not themselves patients and therefore had no need for medical marijuana, including Dixon (Keltin's primary caregiver) and VanderZee (Hooper's primary caregiver), Bylsma is not entitled to raise a § 8 affirmative defense in connection with that conduct. With regard to those individuals, Bylsma was not a caregiver at all, let alone a primary caregiver, and as explained previously, caregiver-to-caregiver transactions are not protected by § 8. Further, even if Bylsma could qualify as a primary caregiver for purposes of § 8 for the two patients who were serving as their own primary caregivers, the evidence revealed that Bylsma directly assisted significantly more than five patients, which again, is not permitted under § 6(d). MCL 333.26426(d).

In sum, Bylsma is not entitled to raise a § 8 defense because he does not qualify as a primary caregiver, as that term is defined and limited under the act, for each of the individuals to whom, or on behalf of whom, he possessed, cultivated, manufactured, or delivered marijuana. See *Hartwick*, 498 Mich at 232. There is nothing in the language of § 8 that allows a patient to have more than one primary caregiver or that allows a third party to possess marijuana plants on behalf of a

registered primary caregiver who intends to supply the marijuana to patients connected to that caregiver. Accordingly, the trial court did not abuse its discretion by denying Bylsma's motion to dismiss the charges and precluding him from raising a § 8 defense at trial. See *Bylsma*, 493 Mich at 26.

B. DOCKET NO. 321556

As Overholt expressly concedes on appeal, the evidence produced at the preliminary examination demonstrated that he, as a registered caregiver, sold marijuana to a multitude of caregivers as well as patients who did not have a primary caregiver and who, therefore, served as their own caregivers.[17] It is apparent that Overholt sold marijuana indiscriminately to any caregiver (or patient) who came into his business with a medical marijuana card. Defendant could not fulfill the definition of "primary caregiver" with regard to all of those individuals given how the term "primary caregiver" is defined and limited by the MMMA and how it is used in § 8; an individual is not permitted to have more than one caregiver, and a primary caregiver may only serve up to five patients. See *Hartwick*, 498 Mich at 232 (stating that a primary caregiver must establish the elements of § 8(a) with regard to each patient provided with marijuana in order to claim the defense). Further, as explained before, we find no basis for concluding that caregiver-to-caregiver transactions are protected under § 8.

[17] "[A]n evidentiary hearing must be held before trial" if a defendant "assert[s] a § 8 defense by filing a motion to dismiss the criminal charges." *People v Carruthers*, 301 Mich App 590, 598, 612; 837 NW2d 16 (2013). However, we conclude that dismissal of Overholt's § 8 defense was proper because the undisputed facts demonstrated that Overholt was not entitled to a § 8 defense as matter of law; he did not qualify as a patient or primary caregiver for purposes of § 8, regardless of the fact that the trial court did not hold an evidentiary hearing before it entered its ruling.

The trial court did not abuse its discretion by denying Overholt's motion to dismiss and by preventing him from raising the defense at trial. See *Bylsma*, 493 Mich at 26.

V. CONCLUSION

In neither Docket No. 317904 nor Docket No. 321556 was there a genuine issue of material fact that the defendant was entitled to raise an affirmative defense under § 8. Therefore, the trial courts properly denied defendants' motions to dismiss and properly denied defendants' alternative motions to raise an affirmative defense under § 8 at trial. See *Kolanek*, 491 Mich at 412 ("[I]f there are no material questions of fact and the defendant has not shown the elements listed in subsection (a), the defendant is not entitled to dismissal of the charges and the defendant cannot assert § 8(a) as a defense at trial.").

Accordingly, in Docket No. 317904, we affirm the trial court's order denying Bylsma's motion to dismiss or, in the alternative, for permission to assert an affirmative defense under § 8 of the MMMA, and we remand for further proceedings consistent with this opinion. In Docket No. 321556, we affirm the trial court's order denying Overholt's motion to dismiss and its later ruling that an affirmative defense under § 8 of the MMMA was inapplicable in his case. We do not retain jurisdiction.

SAAD and MARKEY, JJ., concurred with RIORDAN, P.J.

WILLIAM BEAUMONT HOSPITAL v WASS

Docket No. 323393. Submitted November 9, 2015, at Detroit. Decided May 17, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 898.

William Beaumont Hospital brought an action in the 52-3 District Court against Jon Wass for payment of reasonable and necessary medical services it provided for cancer treatment to Wass. The case was subsequently transferred to the Oakland Circuit Court. Wass filed a third-party complaint against Time Insurance Company, asserting that Time was responsible for the amounts owed to Beaumont Hospital. Time contended that it had no contractual duty to pay Wass's healthcare expenses because they were excluded as a preexisting condition during the pertinent timeframe. Time moved for summary disposition under MCR 2.116(C)(7). Time asserted that the claims were barred by res judicata and collateral estoppel, relying on a June 2012 decision from the Office of Financial and Insurance Regulations (OFIR), in which the OFIR had conducted an external review of Time's original denial of coverage and adopted a recommendation that Wass be denied coverage because the cancer was a preexisting condition. The court, Rudy J. Nichols, J., granted the motion. Wass appealed.

The Court of Appeals *held*:

MCL 550.1915 of the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq*., permits a party aggrieved by a decision of the OFIR to pursue both an external review before the OFIR and a claim in the circuit court. A ruling to the contrary would have required the Court to reconsider the constitutionality of PRIRA's limited process. Res judicata and collateral estoppel only apply following administrative decisions that are (1) adjudicatory in nature, (2) when a method of appeal is provided, and (3) in cases in which it is clear that the Legislature intended to make the administrative decision final in the absence of an appeal. Because Wass was not entitled to an evidentiary hearing at any level of the administrative proceedings, the administrative decision reached under MCL 550.1915(1) did not have preclusive effect in this case. Moreover, because the statutory language explicitly provides that other remedies are not precluded by a

party's decision to pursue an external review before the OFIR, the Legislature did not intend to make the determination of the OFIR final when no appeal is taken. Accordingly, Wass's claim was not barred by res judicata or collateral estoppel.

Reversed and remanded for further proceedings.

1. INSURANCE — PATIENT'S RIGHT TO INDEPENDENT REVIEW ACT — ELECTION OF REMEDIES.

MCL 550.1915 permits a party aggrieved by a decision of the Office of Financial and Insurance Regulations (OFIR) to pursue both an external review before the OFIR and a claim in the circuit court.

2. ESTOPPEL — PRECLUSIVE EFFECT OF ADMINISTRATIVE DECISIONS UNDER THE PATIENT'S RIGHT TO INDEPENDENT REVIEW ACT.

An administrative decision reached under MCL 550.1915(1) will not have preclusive effect under the doctrines of res judicata or collateral estoppel with regard to a subsequent breach of contract claim brought in circuit court.

Blum & Associates (by *Joseph L. Konheim* and *Kamron K. Lessani*) for Jon Wass.

Merry, Farnen & Ryan, PC (by *John J. Schutza*), for William Beaumont Hospital.

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM. Defendant/third-party plaintiff, Jon Wass, appeals a trial court order granting third-party defendant, Time Insurance Company (Time), summary disposition of Wass's breach of contract claim. The trial court concluded that because the Office of Financial and Insurance Regulations (OFIR), an administrative agency, had already issued a decision pursuant to the external review procedures in MCL 550.1915(1), the breach of contract claim was barred by res judicata and collateral estoppel. MCL 550.1915(3), however, provides that Subsection (1) does not preclude Wass from seeking other remedies available under state and federal law. And because Wass was not entitled to an

evidentiary hearing at any level of the administrative proceedings, the administrative decision rendered under MCL 550.1915(1) does not have preclusive effect in this case. Accordingly, we reverse and remand for further proceedings.

I. BACKGROUND

On June 28, 2011, Time issued a certificate of insurance to Wass that provided major medical coverage. Pertinent to this dispute, the policy contained a preexisting conditions limitation. After Wass was diagnosed with and began receiving treatment for colon cancer, Time denied his claim for benefits, asserting that the colon cancer was a preexisting condition. Wass appealed the denial to Time's internal grievance panel, which also concluded that the colon cancer was a preexisting condition. Time informed Wass that the grievance panel's decision was the last avenue available for an internal review, but advised him that he could seek an external review by the OFIR pursuant to the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq*.

Wass requested an external review of Time's denial of coverage from the OFIR, which assigned the review to an Independent Review Organization (IRO). Under MCL 550.1911(9), (11), and (13), the IRO was required to review "all of the information and documents" that Time used in making its adverse determination, "any other information submitted in writing" by Wass or Wass's representative, and, to the extent it was available and appropriate, the IRO could also consider additional documentary evidence listed in the statute, such as medical records and practice guidelines. The IRO was not authorized to conduct an evidentiary

hearing or hear testimony.[1] The IRO concluded that the colon cancer was a preexisting condition,[2] thereby precluding Wass from receiving benefits. The OFIR adopted the IRO's recommendation that Wass be denied coverage.

Wass appealed the OFIR's decision in the Oakland Circuit Court pursuant to the provision providing for such review in MCL 550.1915(1). The trial court's review of the OFIR decision was limited to determining whether the decision was authorized by law. See *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 455; 688 NW2d 523 (2004). "[A]n agency's decision that 'is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious,' is a decision that is *not* authorized by law." *Id*. (quotation marks and citations omitted; alterations in original). The trial court did not conduct an evidentiary hearing. Instead, it reviewed the OFIR record and opinion and concluded that the ruling "was not contrary to law or

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[1] See *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 460-462; 688 NW2d 523 (2004) (recognizing that PRIRA's external review procedure does not require an evidentiary hearing).

[2] MCL 500.3406f(1) provides:

> An insurer may exclude or limit coverage for a condition as follows:
>
> (a) For an individual covered under an individual policy or certificate or any other policy or certificate not covered under subdivision (b) or (c), only if the exclusion or limitation relates to a condition for which medical advice, diagnosis, care, or treatment was recommended or received within 6 months before enrollment and the exclusion or limitation does not extend for more than 12 months after the effective date of the policy or certificate.

We agree with the trial court that this definition, rather than the definition in the insurance policy, applies in this case.

arbitrary and capricious." Wass did not appeal the trial court's decision in this Court.

On January 3, 2013, plaintiff, William Beaumont Hospital, filed a complaint against Wass in district court, seeking payment from Wass for the reasonable and necessary medical services it had provided. After Wass answered and filed a motion to stay the proceedings, the case was transferred to the circuit court. Wass then filed a third-party complaint against Time, alleging breach of contract and asserting that Time was responsible for the amounts sought by Beaumont Hospital. Time asserted in its answer that it had no contractual duty to pay Wass's healthcare expenses because the contract did not cover his preexisting condition during the pertinent time frame. The insurance company then filed a motion for summary disposition under MCR 2.116(C)(7), asserting that Wass's claims were barred by res judicata and collateral estoppel because of the June 2012 decision by the OFIR. The trial court agreed and granted the motion for summary disposition in Time's favor. Wass now appeals that decision.

II. ANALYSIS

PRIRA contemplates an aggrieved party being able to pursue both an administrative review and a claim in circuit court. We begin our analysis with the statute.[3] MCL 550.1915 provides:

[3] The purpose of statutory interpretation is to determine the Legislature's intent, beginning with the statutory language. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). When the statutory language clearly expresses the Legislature's intent, "no further construction is required or permitted." *Id*. In giving meaning to a statutory provision, this Court considers the provision within the context of the whole statute and "give[s] effect to every word, phrase, and clause . . . [to] avoid an interpretation that would render any part of the statute

> (1) An external review decision and an expedited external review decision are the final administrative remedies available under this act. A person aggrieved by an external review decision or an expedited external review decision may seek judicial review no later than 60 days from the date of the decision in the circuit court for the county where the covered person resides or in the circuit court of Ingham county.
>
> (2) Subsection (1) does not preclude a health carrier from seeking other remedies available under applicable state law.
>
> (3) *Subsection (1) does not preclude a covered person from seeking other remedies available under applicable federal or state law.*
>
> (4) A covered person or the covered person's authorized representative may not file a subsequent request for external review involving the same adverse determination or final adverse determination for which the covered person has already received an external review decision under this act. [Emphasis added.]

Subsection (1) provides that the final administrative remedies under PRIRA are an external review by the OFIR followed by a review by the circuit court. However, Subsection (3) plainly provides that Subsection (1) does not preclude an aggrieved party from pursuing other remedies under state and federal law, which would include the right to bring an original and separate action in circuit court for breach of contract. There is, notably, no election of remedies language in the statute, nor will we read such a requirement into the statute. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011). Accordingly, the statutory language does not preclude Wass's suit. Nevertheless, we must determine whether

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surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

his suit is precluded by the common-law doctrines of res judicata and collateral estoppel.[4]

The preclusion doctrines of res judicata and collateral estoppel "serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *Nummer v Dep't of Treasury*, 448 Mich 534, 541; 533 NW2d 250 (1995). Res judicata applies if "(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." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks, citation, and brackets omitted).

In *Standard Auto Parts Co v Employment Security Comm*, 3 Mich App 561, 570; 143 NW2d 135 (1966), this Court explained:

> In general, the answer given by the courts to the question whether decisions of administrative tribunals are capable of being *res judicata* depends upon the nature of the administrative action involved. *The doctrine of res*

[4] Our determination will be made using a review de novo of the circuit court's decision on the motion for summary disposition and on questions of law, including the application of a legal doctrine such as res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). The application of collateral estoppel is also a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

> *judicata has been applied to administrative action that is characterized by the courts as "judicial" or "quasi judicial"*, while to administrative determinations of "administrative", "executive", or "legislative" nature, the rules of *res judicata* have been held to be inapplicable. 42 Am Jur, Public Administrative Law, § 161, p 520. [Emphasis added.]

The preclusion doctrines are applicable to administrative decisions (1) that are "adjudicatory in nature," (2) when a method of appeal is provided, and (3) when it is clear that the Legislature "intended to make the decision final absent an appeal." *Nummer*, 448 Mich at 542; see also *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 38; 620 NW2d 657 (2000).

"To determine whether an administrative agency's determination is adjudicatory in nature, courts compare the agency's procedures to court procedures to determine whether they are similar." *Natural Resources Defense Counsel v Dep't of Environmental Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013). "Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents." *Id*.

The Restatement of Judgments, 2d, § 83, p 266, provides in pertinent part, "An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication . . . ." The Comments provide that "[w]here an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication." Restatement, § 83, comment *b*,

p 268. Further, "[i]n the performance of adjudicative functions, . . . administrative agencies are generally required by law to employ procedures substantially similar to those used in courts." *Id*. at p 269. Additionally, in *Holton v Ward*, 303 Mich App 718, 734; 847 NW2d 1 (2014), this Court held that an administrative decision by the Department of Environmental Quality had preclusive effect. In that case, an evidentiary hearing was held during which an administrative law judge "heard testimony from additional witnesses and reviewed a large body of evidence." *Id*. at 732.

In this case, the OFIR's decision was not adjudicatory in nature because no level of the proceedings provided for an evidentiary hearing. Although plaintiff or his representative was entitled to present a written statement and documentary evidence, MCL 550.1911(11), PRIRA's external review procedure was not substantially similar to the procedure employed by courts. Specifically, although the parties were free to submit documentary evidence, no witnesses could be produced or compelled to appear for examination by the parties or by the fact-finder, and the parties could not cross-examine the individuals responsible for the insurer's decision or any medical experts on whose opinion those individuals relied.

In *English*, 263 Mich App at 463, we upheld PRIRA's administrative process against a due-process challenge. We recognized that the review process was limited because it did not provide for an evidentiary hearing or other procedures typical to courts. *Id*. at 460-462. We listed several reasons why PRIRA's limited process was constitutional, one of which was the fact "that although the external review decision constitutes the final administrative remedy under PRIRA, the act 'does not preclude a health carrier from seeking

other remedies available under applicable state law.' " *Id*. at 463, quoting MCL 550.1915(2). Likewise, the external review decision does not preclude a covered person from seeking other remedies available under applicable state law. MCL 550.1915(3). To preclude those other remedies based on the limited administrative process provided for by PRIRA would require us to reconsider the constitutionality of that process.

Nevertheless, in support of its argument that preclusion applies, Time cites four cases in which an administrative decision was given preclusive effect. However, each of those cases involved administrative procedures far more extensive than those provided for in PRIRA. In *Nummer*, the plaintiff challenged a decision by the Michigan Civil Service Commission that denied his claims for breach of contract and discrimination on the basis of race and gender. *Nummer*, 448 Mich at 539-540. In that case, the plaintiff "was represented by counsel before the agency; had the opportunity to, and did in fact, call witnesses; and had a full hearing on the merits of his claim." *Id*. at 542-543. In addition, the *Nummer* Court made clear that its decision to give administrative decisions preclusive authority would only "affect agency decisions by formal hearing." *Id*. at 543 n 7.[5] Next, in *Minicuci*, the plaintiff challenged a decision by the Michigan Department of Labor that he was not entitled to additional wages under the wages and fringe benefits act, MCL 408.471 *et seq*. *Minicuci*, 243 Mich App at 30. However, in that matter, the plaintiff had

[5] Moreover, in *Nummer*, the administrative decision was subject to review de novo by the circuit court, requiring the plaintiff's claim to be reviewed under "a competent, material, and substantial evidence standard." *Nummer*, 448 Mich at 543-544. In contrast, the review provided by the circuit court in this case was not de novo, and the OFIR decision was only reviewed to determine if it was contrary to law.

a right to an evidentiary hearing on administrative appeal. *Id*. at 38. Time's reliance on *Dearborn Hts Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120; 592 NW2d 408 (1998), is also unavailing. In that case, the issue of whether the administrative proceedings were adjudicatory in nature was never even raised. Moreover, the parties in that case were permitted to call and question witnesses. *Id*. at 125. Finally, in *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 60 Mich App 606, 613; 231 NW2d 479 (1975), this Court held that a decision against the plaintiff by the Michigan Employment Relations Commission (MERC) had preclusive effect. However, under MCL 423.216, the parties to a proceeding before MERC are entitled to an evidentiary hearing before a hearing officer.

Accordingly, given that the proceedings before the OFIR were not adjudicatory in nature, the first element required to give an administrative decision preclusive effect is not satisfied. Thus, the preclusion doctrines do not apply to the decision of the OFIR. See *Nummer*, 448 Mich at 542; *Minicuci*, 243 Mich App at 38.

Additionally, the third element required to apply the preclusion doctrines to an administrative decision, i.e., that it is clear that the Legislature intended to make the determination final when no appeal is taken, is also not satisfied in this case. In *Nummer*, our Supreme Court concluded that, in enacting the Civil Rights Act, MCL 37.2101 *et seq*., "the Legislature [clearly] intended to make the Civil Rights Commission['s] findings final in the absence of an appeal." *Nummer*, 448 Mich at 551. The Court explained that the Legislature had explicitly provided for only one remedy from an adverse agency determination: a di-

rect appeal to the circuit court. *Id*. The statute did not contain any other language concerning the preclusive effect of the Civil Rights Commission's findings or conclusion. *Id*. at 547, 551. The Court concluded that if the Legislature intended "a new, original action[,] . . . it would have said so more directly." *Id*. at 551. Similarly, in *Dearborn Hts*, this Court held:

> [E]ven if the teacher tenure act is silent concerning whether a determination by the [State Tenure C]ommission is to be given preclusive effect, in the absence of legislative intent to the contrary, the applicability of principles of preclusion is presumed. . . . [I]t is instructive that, pursuant to the Administrative Procedures Act, the only procedure available to a party aggrieved by a final decision of the commission is direct review by the courts. MCL 24.301; MSA 3.560(201). Because the appeal process, by its very nature, does not contemplate a new, original action, the commission's decision is clearly intended to be a final decision on the merits. [*Dearborn Hts*, 233 Mich App at 129-130.]

Finally, in *Minicuci*, we reached the same conclusion when interpreting the Legislature's intent in enacting the wage act. In *Minicuci*, the wage act only provided "for appellate judicial review of the hearing referee's determinations." *Minicuci*, 243 Mich App at 40. As a result, we concluded that "the Legislature intended to make the department's administrative determination final absent an appeal." *Id*. at 40-41.

Unlike the statutes in *Nummer*, *Dearborn Hts*, and *Minicuci*, the statutory language in PRIRA explicitly provides that other remedies under state and federal law are not precluded by a party's decision to pursue an external review before the OFIR under Subsection (1). MCL 550.1915(3). As such, the OFIR's decision is not entitled to preclusive effect because the Legislature did not clearly intend to make the determination of the

OFIR final when no appeal is taken. Instead, the Legislature contemplated, and statutorily provided, that a plaintiff could file an action in circuit court even if such an action touches upon issues or claims raised during the external review procedure in Subsection (1). See MCL 550.1915(3). Accordingly, because it is not clear that the Legislature intended to make the OFIR's determination final when no appeal is taken, the preclusion doctrines do not apply.

III. CONCLUSION

MCL 550.1915 provides that a party aggrieved by a decision of the OFIR can pursue both an external review before the OFIR and a claim in circuit court. Therefore, Wass's circuit court claim is not barred by res judicata or collateral estoppel. Both doctrines only apply to administrative decisions that are adjudicatory in nature and in cases in which it is clear that the Legislature intended to make the administrative decision final in the absence of an appeal. *Nummer*, 448 Mich at 542; *Minicuci*, 243 Mich App at 38. In this case, the proceedings were not adjudicatory in nature because no evidentiary hearing was held. Moreover, given that the statute provided for an aggrieved party to proceed with both an external review under MCL 550.1915(1) and to pursue other actions under MCL 550.1915(3), it is plain that the Legislature did not intend a decision under Subsection (1) to be final in the absence of an appeal.[6] For these reasons, we conclude

[6] We note that a contrary ruling could, at least in some cases, run afoul of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq*. See *Rush Prudential HMO, Inc v Moran*, 536 US 355; 122 S Ct 2151; 153 L Ed 2d 375 (2002); see also Wexler, *A Patient's Right to Independent Review: Has Michigan's Act Changed after Rush Prudential HMO, Inc v Moran?*, 81 Mich B J 19, 21-22 (Nov 2002).

that the trial court erred when it held that Wass's claim was barred by res judicata and collateral estoppel.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ., concurred.

In re SCHADLER

Docket No. 327977. Submitted May 4, 2016, at Detroit. Decided May 24, 2016, at 9:00 a.m.

The Department of Health and Human Services petitioned the Berrien Circuit Court, Family Division, to terminate the parental rights of the respondent-father to his minor children CS and BS. The court, Scott Schofield, J., entered separate orders terminating respondent's parental rights to the children under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury or physical or sexual abuse to child or sibling of child), (k)(*ii*) (parent abused child or sibling of child by criminal sexual conduct), and, as to CS alone, (g) (failure to provide proper care or custody). Respondent appealed the order terminating his parental rights to BS. The Court of Appeals, TALBOT, C.J., acting under MCR 7.201(B)(3), dismissed respondent's claim of appeal in an unpublished order, entered September 16, 2015 (Docket No. 327977), for failure to correct filing defects in a timely manner. Subsequently, the Court of Appeals, TALBOT, C.J., acting under MCR 7.211(E)(2), granted respondent's motion for reconsideration in an unpublished order, entered November 23, 2015 (Docket No. 327977), and ordered the claim of appeal to be treated as though it had been filed as to both lower court files involved in the termination of respondent's parental rights.

The Court of Appeals *held*:

The trial court must terminate a person's parental rights to a child when the court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of the child. Termination is proper under MCL 712A.19b(3)(k)(*ii*) when the parent abused the child or a sibling of the child and the abuse included criminal sexual conduct (CSC) involving penetration, attempted penetration, or assault with intent to penetrate. A parent need not be criminally charged with CSC for MCL 712A.19b(3)(k)(*ii*) to apply; MCL 712A.19b(3)(k)(*ii*) requires clear and convincing evidence but not CSC charges or a CSC conviction. In this case, the evidence clearly and convincingly established that

respondent had digitally penetrated CS, which was an act of CSC involving penetration. Therefore, the trial court did not clearly err by finding that termination was warranted under MCL 712A.19b(3)(k)(*ii*) with respect to CS, and the trial court did not clearly err by finding that termination was warranted under MCL 712A.19b(3)(k)(*ii*) with respect to BS because BS was, indisputably, a sibling of CS. Given the evidence of sexual abuse, the trial court did not clearly err by finding grounds for termination under MCL 712A.19b(3)(b)(*i*) and (g) with respect to CS, and because only one ground for termination must be established, the determination of whether MCL 712A.19b(3)(b)(*i*) supported termination with respect to BS did not have to be addressed. In regard to the best-interest analysis, the trial court did not clearly err by finding that termination was in CS's best interests based on respondent's sexual abuse of CS and evidence that respondent imposed excessive physical discipline on CS as well as fought with CS's mother. Similarly, the trial court did not clearly err by finding that termination was in BS's best interests based on the record as a whole and, in particular, on the fact that BS did not want to be alone with respondent, whom BS feared to the point that he suffered from post-traumatic stress disorder. Further, because the definition of "relative" in MCL 712A.13a(1)(j) does not include a biological mother, the trial court was not required to consider BS's placement with his biological mother in the analysis. Finally, respondent's unsupported generalized argument that he was not criminally charged and that the system had set him up for failure because he refused to admit guilt and because he was not entitled to reunification services was meritless.

Affirmed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — STATUTORY GROUNDS FOR TERMINATION — PARENT ABUSED CHILD OR SIBLING OF CHILD BY CRIMINAL SEXUAL CONDUCT.

Termination is proper under MCL 712A.19b(3)(k)(*ii*) when there is clear and convincing evidence that the parent abused the child or a sibling of the child and the abuse included criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate; a parent need not be criminally charged with criminal sexual conduct for MCL 712A.19b(3)(k)(*ii*) to apply.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Michael J. Sepic*, Prosecuting Attorney, for the Department of Health and Human Services.

WN Law, PLLC (by *Renee L. Wagenaar*), for defendant.

Before: MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

PER CURIAM. Respondent-father appeals as of right the trial court's orders terminating his parental rights to the minor children CS and BS under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury or physical or sexual abuse to child or sibling of child), (k)(*ii*) (parent abused child or sibling of child by criminal sexual conduct), and, as to CS alone, (g) (failure to provide proper care or custody). We affirm.

On appeal, respondent challenges the trial court's findings with respect to the statutory grounds for termination and the children's best interests. If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court must terminate the respondent's parental rights to that child. MCL 712A.19b(3) and (5); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32-33; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). In applying the clear-error standard in parental termination cases,

"regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

With respect to MCL 712A.19b(3)(k)(*ii*), termination is proper when "[t]he parent abused the child or a sibling of the child and the abuse included . . . [c]riminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate." In this case, CS, who was born in 2009, consistently reported that respondent penetrated her vagina with his finger. The trial court found that CS's statements were credible and that respondent's explanation was not credible. See *In re HRC*, 286 Mich App at 460 ("It is not for this Court to displace the trial court's credibility determination."). And, contrary to respondent's argument on appeal, the forensic interviewer from the Children's Assessment Center testified that CS indicated that respondent "put his finger all the way in her vagina," and the sexual-assault nurse examiner testified that there were multiple findings with respect to CS's vaginal area that were consistent with digital or penile penetration. These medical findings corroborated CS's statements, and respondent's explanation of the circumstances was not consistent with the statements or the medical findings. The evidence clearly and convincingly established that respondent had digitally penetrated CS, which was an act of criminal sexual conduct involving penetration. Therefore, the trial court did not clearly err by finding that termination was warranted under MCL 712A.19b(3)(k)(*ii*) with respect to CS. The trial court also did not clearly err by finding that termination was proper under MCL 712A.19b(3)(k)(*ii*) with respect to BS because he is, indisputably, a sibling of CS. See *In re Hudson*, 294 Mich App at 265-266 (defining "sibling" as

" '[o]ne of two or more individuals having one or both parents in common; a brother or sister' ") (alteration in original; citation omitted).

Nevertheless, respondent argues that "the very absence of criminal charges in the case" refutes the allegations and supports his innocence. However, a parent need not be criminally charged with or convicted of criminal sexual conduct (CSC) for MCL 712A.19b(3)(k)(*ii*) to apply. Indeed, it is MCL 712A.19b(3)(n)(*i*) that addresses the situation in which a parent has actually been convicted of a CSC offense, and all that need be shown for purposes of termination under MCL 712A.19b(3)(n)(*i*) is the CSC conviction along with a best-interest determination; MCL 712A.19b(3)(k)(*ii*) requires clear and convincing evidence but not CSC charges or a CSC conviction. As explained earlier, there was substantial evidence presented that respondent digitally penetrated CS. Therefore, this argument is without merit. Given the evidence of sexual abuse, we further hold that the trial court did not clearly err by finding grounds for termination under MCL 712A.19b(3)(b)(*i*) and (*g*) with respect to CS, and because only one ground for termination need be established, we decline to address whether MCL 712A.19b(3)(b)(*i*) supported termination in regard to BS.[1]

[1] We note that BS entered a plea of admission to a CSC offense committed against CS and that respondent attempted to shift the blame for the accusations made against respondent to his son. There was also evidence that respondent exposed BS, quite openly and extensively, to pornographic magazines and movies, which, according to BS, increased his sexual curiosity and led to the acts against his sister. In sum, there was strong evidence that all the horrific sexual abuse suffered by CS was either perpetrated directly by respondent or resulted from respondent's pernicious conduct in exposing BS to pornography.

With respect to the trial court's best-interest determination, we place our focus on the child rather than the parent. *In re Moss*, 301 Mich App at 87. The trial court may consider such factors as "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." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). Moreover, a trial court must "explicitly address whether termination is appropriate in light of the children's placement with relatives." *Id*. at 43.

With respect to CS's best interests, the trial court emphasized respondent's sexual abuse of CS. It reasoned that respondent's behavior demonstrated that he was not committed to meeting CS's needs, which required providing a safe and secure environment in which to grow up. The trial court noted that CS was in relative placement and that there was some evidence of a bond between CS and respondent. However, it reasoned that the abuse was "heinous and resulted in physical injury, as well as emotional injury." Therefore, the trial court found that CS could not "thrive and prosper and recover from the trauma she has sustained at the hands of her father if his parental rights remain intact," and it concluded that termination was in CS's best interests. Given respondent's sexual abuse of CS, it was not clearly erroneous to conclude that termination was in her best interests. Moreover, there was evidence that respondent imposed excessive physical discipline, and CS reported that there was a lot of fighting between her mother and respondent, which frightened her. Given these facts, the trial court did not clearly err by finding that termination of respondent's parental rights was in CS's best interests.

Respondent argues that the trial court failed to give proper weight to CS's relative placement. However, in the trial court's best-interest analysis regarding CS, the trial court explicitly acknowledged that CS was currently in relative placement. The trial court nonetheless determined that termination was in CS's best interests, and, as explained earlier, this determination was not clearly erroneous. Reversal is not warranted.

With respect to BS's best interests, his therapist testified that BS was diagnosed with post-traumatic stress disorder (PTSD) and that the source of this trauma was violence and inappropriate parenting by his stepmother and respondent. BS indicated to the therapist that he did not want to be alone with respondent, who administered discipline with a belt and left marks. The trial court acknowledged that BS loved respondent, but it also acknowledged that BS greatly feared respondent, that BS witnessed physical violence between his stepmother and respondent, and that BS had "access to pornography, which contributed to his sexual curiosity with his sister." The therapist opined that termination was in BS's best interests. Furthermore, the trial court found that the bond between respondent and BS was damaged and that respondent failed to provide a safe and loving environment. Considering the record as a whole and especially the fact that BS did not want to be alone with respondent, whom he greatly feared to the point that he suffered from PTSD, the trial court did not clearly err by finding that termination of respondent's parental rights was in BS's best interests.

Nevertheless, respondent argues that the trial court entirely failed to give any weight to BS's placement with his biological mother. However, the trial court specifically acknowledged the "week on / week off

custodial arrangement between the father and mother" in the process of determining that termination was in BS's best interests. Moreover, MCL 712A.13a(1)(j) defines "relative," and biological mother is not included in the definition. See MCL 712A.13a(1)(j). Therefore, because BS's biological mother was not a "relative" for purposes of MCL 712A.19a, the trial court was not required to consider that relative placement. Respondent's argument is misplaced.

Finally, we reject as meritless respondent's generalized argument—containing no citation of authority—that he was not criminally charged and that the system set him up for failure because he refused to admit guilt and because he was not entitled to reunification services considering the nature of the sexual-abuse allegations. As explained earlier, the evidence clearly and convincingly established that he digitally penetrated CS, which was sufficient to support the grounds for termination. Moreover, the trial court did not clearly err by determining that termination was in CS's and BS's best interests. Therefore, respondent's argument is simply unavailing.

Affirmed.

MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ., concurred.

PEOPLE v MYSLIWIEC

Docket No. 326423. Submitted May 11, 2016, at Grand Rapids. Decided May 24, 2016, at 9:05 a.m. Leave to appeal denied 500 Mich 946.

Defendant, Jason R. Mysliwiec, was convicted in the Berrien Circuit Court of criminal contempt, MCL 600.1701(g), for violating a condition of the bond set after his arrest for operating a motor vehicle while under the influence of liquor (OUIL), MCL 257.625. At his arraignment on the OUIL charge, the court, Arthur Cotter, J., ordered defendant on the record to not consume alcohol as a condition of his bond; the trial court later issued a written mittimus of that order. Defendant subsequently violated that condition by consuming alcohol, and the trial court found him in contempt of that order. Defendant appealed.

The Court of Appeals *held*:

1. Contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. Courts have inherent authority to punish a person for contempt, which preserves the courts' effectiveness and power. Courts are also granted contempt power by statute. MCL 600.1701(g) provides that a court has power to punish by fines or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, including parties to actions, attorneys, counselors, and all other persons, for disobeying any lawful order, decree, or process of the court. Imprisonment for criminal contempt is appropriate when a defendant does something he or she was ordered not to do. A bond condition is a lawful order of the court, the violation of which may be punished with criminal contempt under MCL 600.1701(g).

2. In this case, the trial court correctly found defendant guilty of contempt for violating the no-alcohol condition of his bond. The written mittimus of the trial court—requiring as a condition of bond that defendant not use or possess alcohol—was a court order for purposes of MCL 600.1701(g), the violation of which constituted criminal contempt.

3. In the context of a criminal statute, procedural due process is satisfied when the statute provides a defendant with reasonable notice of the charge against him or her and an opportunity to

be heard and present a defense. A criminal statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. In this case, the trial court did not violate defendant's right to due process of law when it found him guilty of criminal contempt. MCL 600.1701(g) provided defendant a reasonable opportunity to know that he could be held in contempt for failing to follow a court order, which included the no-alcohol condition of his bond.

4. MCL 764.15e, which outlines the statutory procedures a peace officer must follow when arresting a person suspected of violating a bond condition imposed under MCL 765.6b or MCL 780.582a, did not apply to this case because the no-alcohol condition was not imposed under either statute.

5. The trial court did not violate defendant's right to a reasonable bond when it refused to grant bail after his bond violation. Rather, under MCR 6.106(I)(2), the trial court correctly revoked defendant's release order after the bond violation.

Affirmed.

CONTEMPT — CRIMINAL CONTEMPT — VIOLATION OF LAWFUL ORDER — CONDITION OF BOND.

Under MCL 600.1701(g), a court has the power to punish by fines or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct, including parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court; a bond condition is a lawful order of the court, the violation of which may be punished as criminal contempt under MCL 600.1701(g).

Daniel W. Grow, PLLC (by *Daniel Grow*), for defendant.

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

FORT HOOD, J. Defendant was convicted of criminal contempt, MCL 600.1701(g), for violating a condition of the bond set after his arrest for operating a motor vehicle while under the influence of liquor. He was sentenced to 68 days in jail with credit for 68 days served. He appeals as of right. We affirm.

Defendant argues that his violation of a bond condition ordered by the trial court was not punishable by criminal contempt. We disagree. Issues of statutory interpretation are reviewed de novo. *People v Hartwick*, 498 Mich 192, 209; 870 NW2d 37 (2015). Questions of constitutional law, such as whether a defendant has been denied his right to due process, are also reviewed de novo. *People v Smith*, 498 Mich 466, 475; 870 NW2d 299 (2015).

Contempt of court is defined as a "wilful act, omission, or statement that tends to impair the authority or impede the functioning of a court." *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). MCL 600.1701 provides statutory authority for a court to punish a person for contempt. It provides, in relevant part, that courts of record

> have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> * * *
>
> (g) Parties to actions, attorneys, counselors, and all other persons for disobeying *any lawful order, decree, or process of the court*. [MCL 600.1701 (emphasis added).]

Courts also have inherent independent authority to punish a person for contempt. *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 387; 853 NW2d 421 (2014). This power is important in that it preserves the courts' effectiveness and power. *Id*. "[A] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Id*. (quotation marks and citation omitted; alteration in original). To convict a defendant of crimi-

nal contempt, the prosecution must prove that the defendant engaged in a willful disregard or disobedience of a court order. *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007). Contempt must be clearly and unequivocally shown. *Id*. "Imprisonment for criminal contempt is appropriate where a defendant does something he was ordered not to do." *In re Contempt of Dudzinski*, 257 Mich App 96, 108; 667 NW2d 68 (2003).

In this case, defendant was charged with contempt of court for violating a condition of his bond, specifically the condition that prohibited him from using alcohol. When a court determines that a release on personal recognizance will "not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate . . . ." MCR 6.106(D).

Defendant argues on appeal that a defendant may not be held in contempt of court for the violation of bond conditions because they are not court orders. We reject this argument. Under Michigan law, a court's decision in setting bond is a court order. Specifically, a bail decision is an interlocutory order. *People v Edmond*, 81 Mich App 743, 749; 266 NW2d 640 (1978). Further, the plain and ordinary definition of the word "order" clearly encompasses bond conditions.[1] *Black's Law Dictionary* (10th ed) provides that an "order" is "[a] command, direction, or instruction" or "[a] written direction or command delivered by a government offi-

[1] "Where, as here, a statute does not contain internal definitions of terms used in it, we give terms their ordinary meaning. In such instances, it is often helpful to consult dictionary definitions." *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006) (citation omitted).

cial, esp. a court or judge." Bond conditions necessarily command, direct, or instruct a defendant. Accordingly, bond conditions are court orders within the term's plain and ordinary meaning.

In this case, the trial court ordered that as a condition of defendant's bond he could not consume alcohol. The trial judge ordered orally at defendant's arraignment, "Conditions of your bond, sir, are as follows: You're not to possess or consume any alcoholic beverage at any time." This was a command, direction, or instruction made by the trial court, requiring defendant to refrain from using alcohol. The trial court then issued written mittimuses, which required defendant to have no alcohol.[2] A mittimus is "[a] court order or warrant directing a jailer to detain a person until ordered otherwise." *Black's Law Dictionary* (10th ed). Therefore, the trial court's mittimusses were court orders, and the bond condition prohibiting defendant's use of alcohol was a court order punishable by contempt.

MCL 765.6b(1) provides that, when a defendant is released subject to conditions necessary for the protection of named persons, a court must inform the defendant that he could be subject to "any other penalties that may be imposed if the defendant is found in contempt of court." Defendant argues that this provision necessarily implies that a defendant may only be found in contempt of court for violating conditions necessary to protect named persons and not for violating other bond conditions. To support his argument, defendant also cites a bond form approved by the State Court Administrative Office (SCAO), which states:

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[2] "[A] court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009) (citation omitted).

> 7. I understand that if I violate items 12 or 13 (if conditions of my release), I am subject to arrest without a warrant and may have my bond forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if I am found in contempt of court.
>
> * * *
>
> Item 12. Not harass, intimidate, beat, molest, wound, stalk, threaten, or engage in other conduct that would place any of the following persons or a child of any of the following persons in reasonable fear of bodily injury: spouse, former spouse, individual with whom defendant has a child in common, resident or former resident of defendant's household.
>
> Item 13. Not assault, harass, intimidate, beat, molest, wound, or threaten a named person or persons . . . . [SCAO, Form MC 241 (Jan 2008).]

Defendant argues that the SCAO form "demonstrates that under Michigan law, a defendant may be charged with Contempt of Court when violating Personal Protection Orders or Domestic Abuse statutes." According to defendant, bond conditions are not court orders and are therefore not punishable by contempt.

Defendant's argument is without merit. First, defendant fails to cite any authority supporting his argument that the terms in the SCAO form provide a binding interpretation of the law or that the form somehow prohibits criminal contempt charges when a defendant violates bond conditions that don't involve protective conditions related to named persons. Further, MCL 765.6b does not provide that a defendant may only be held in contempt of court for violating conditions necessary to protect named persons and not for violating other conditions. Instead, MCL 765.6b(1) provides that a defendant must be notified that a

violation of bond conditions imposed to protect named persons could lead to arrest or "any other penalties that may be imposed if the defendant is found in contempt of court." MCL 765.6b, which deals exclusively with conditions imposed to protect named persons, is silent as to whether a defendant is entitled to notification that a violation of other bond conditions could lead to arrest or a contempt charge and whether a violation of other bond conditions is punishable by contempt. Moreover, MCL 765.6b(10) specifically provides that MCL 765.6b "does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules . . . ."

We also reject defendant's argument that his right to due process of law was violated because he did not have notice that he could be held in contempt of court for violating his bond conditions. First, defendant's due-process claim is not properly presented for review because it is not within the scope of defendant's statement of questions presented. See *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Moreover, even if defendant had properly presented the issue, his right of due process was not violated. "With regard to criminal statutes, procedural due process is generally satisfied by providing a defendant with reasonable notice of the charge against him or her and an opportunity to be heard and present a defense." *People v Bosca*, 310 Mich App 1, 74; 871 NW2d 307 (2015). In this case, the record is clear that defendant had notice of the contempt charge as well as a hearing on the charge at which he was allowed to provide a defense. Additionally, "a statute provides fair notice when it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *People v Gratsch*, 299 Mich App 604, 610; 831 NW2d 462 (2013),

vacated in part on other grounds 495 Mich 876 (2013). MCL 600.1701(g) provides fair notice to afford "a person of ordinary intelligence a reasonable opportunity to know" that he could be held in contempt of court for failing to follow the court's order. *Id*. And the record supports that defendant's bond conditions were court orders. Therefore, defendant's right of due process was not violated when he was found in contempt of court for violating the conditions of his bond.

Next, defendant's argument that the trial court failed to follow the statutory procedures outlined by MCL 764.15e also fails. Under MCL 764.15e(1), "A peace officer, without a warrant, may arrest and take into custody a defendant whom the peace officer has or receives positive information that another peace officer has reasonable cause to believe is violating or has violated a condition of release imposed under [MCL 765.6b or MCL 780.582a]." When a defendant is arrested pursuant to MCL 764.15e, a peace officer must prepare a complaint, provide a copy of the complaint to the defendant, court, and prosecutor, and bring the defendant before the court within one business day of the arrest. MCL 764.15e(2). However, MCL 764.15e does not apply here. MCL 764.15e outlines the procedures that apply when a defendant is arrested for violating bond conditions imposed under MCL 765.6b or MCL 780.582a. Defendant was arrested for violating a bond condition involving alcohol, which was not imposed under MCL 765.6b or MCL 780.582a. In fact, none of defendant's bond conditions were imposed under MCL 765.6b or MCL 780.582a. Accordingly, MCL 764.15e and its procedural requirements do not apply here.

Finally, we reject defendant's argument that the trial court's refusal to grant defendant bail after his

bond violation was a violation of his right to a reasonable bond. MCR 6.106(I)(2) provides, "If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited." In this case, defendant was ordered to refrain from using alcohol, and he tested positive for alcohol on more than one occasion. Because defendant failed to comply with the conditions of his release, the court properly entered an order revoking his release order. *Id*.

Affirmed.

O'BRIEN, P.J., and K. F. KELLY, J., concurred with FORT HOOD, J.

In re PETERSON ESTATE

Docket No. 326017. Submitted May 11, 2016, at Traverse City. Decided May 24, 2016, at 9:10 a.m.

Rhonda Lovett filed a petition in the Houghton Probate Court for a declaration that Arbutus Peterson was not a surviving spouse for purposes of the statute allowing spousal election, MCL 700.2202(2), because Arbutus was willfully absent from Lyle Peterson for one year or more before his death, MCL 700.2801(2)(e)(*i*). At a hearing in January 2015, the court determined that Lovett was required to show that Arbutus was physically absent from Lyle for one year or more and that Arbutus took some action that manifested an intent to give up her marital rights. The court relied on a 1986 Court of Appeals case, *In re Harris Estate*, 151 Mich App 780 (1986), in which the Court of Appeals interpreted a statute from the Revised Probate Code, MCL 700.290(1)(a)—which was the predecessor to MCL 700.2801(2)(e)—to mean that absence referred to continuous physical separation for at least the year preceding the deceased spouse's death and that the statute required proof of intent to abandon one's marital rights. The court, Fraser T. Strome, J., denied Lovett's petition because nothing in the record demonstrated that Arbutus intended to give up her marital rights. Lovett appealed.

The Court of Appeals *held*:

MCL 700.2801(2)(e) provides that a surviving spouse does not include an individual who did any of the following for one year or more before the death of the deceased person: (*i*) was willfully absent from the decedent spouse, (*ii*) deserted the decedent spouse, or (*iii*) willfully neglected or refused to provide support for the decedent if required to do so by law. Because MCL 700.2801(2)(e) refers to someone who "did" certain acts, including being "willfully absent," MCL 700.2801(2)(e)(*i*) refers to physical absence. Furthermore, because MCL 700.2801(2)(e) includes the preposition "for," the physical separation must be continuous. The Legislature's use of the term "willfully" established the requisite intent: in order for an individual to be willfully absent within the meaning of MCL 700.2801(2)(e)(*i*), the individual must have done

something with the intent to bring about his or her absence from the deceased spouse. Therefore, the probate court erred when it determined that Lovett was required to show that Arbutus intended to give up her marital rights before MCL 700.2801(2)(e)(*i*) would apply. However, the Legislature did not intend to require that a deserted or abandoned spouse make a continuous effort to restore cohabitation or maintain the marital relationship or risk being deemed willfully absent from his or her spouse within the meaning of MCL 700.2801(2)(e)(*i*). The Legislature stated that an individual "who did" certain acts would not be deemed a surviving spouse. The word "did" suggests acts rather than omissions, and the word "willfully" indicates that the individual must act or fail to act with the intent to bring about a specific result—in this context, to bring about the physical separation from his or her spouse. Even accepting that a spouse can deliberately fail to act with the required intent, under MCL 700.2801(2)(e)(*i*), mere omissions do not amount to being willfully absent unless the failure to act caused the continued separation. In this case, Lyle began to have an extramarital affair with Susan Strieter in the early 1990s, and in 2007, Lyle moved from the marital home he had shared with Arbutus to a home that he began sharing with Strieter. Despite the affair, Arbutus still interacted with Lyle when he visited their marital home, and all the evidence showed that Arbutus remained faithful to the marriage. The evidence amply demonstrated that Lyle left the marital home and that he alone caused the continued separation; there was no evidence that Arbutus took some act or failed to act with the intent to cause her physical separation from Lyle. Lyle died in 2011, and Arbutus testified that she last saw Lyle in 2009. However, while Arbutus did not contact or visit Lyle during the last year of his life, she did not do so because Lyle did not want her involved with his extramarital life. Therefore, while Arbutus may have acquiesced to the separation, her decision to acquiesce to Lyle's wishes was not sufficient to establish that she was willfully absent from Lyle within the meaning of MCL 700.2801(2)(e)(*i*). Given the undisputed evidence, the trial court's erroneous imposition of an intent requirement did not warrant relief pursuant to MCR 2.613(A) and MCR 5.001(A).

Affirmed.

ESTATES AND PROTECTED INDIVIDUALS CODE — SURVIVING SPOUSE STATUS — WORDS AND PHRASES — "WILLFULLY ABSENT."

MCL 700.2801(2)(e)(*i*) provides that a surviving spouse does not include an individual who, for one year or more before the death of the deceased person, was willfully absent from the decedent

spouse; "willfully absent" refers to physical absence; the physical separation must be continuous; the individual must have done something with the intent to bring about his or her absence from the deceased spouse; even accepting that a spouse can deliberately fail to act with the required intent, mere omissions do not amount to being willfully absent unless the failure to act caused the continued separation; the Legislature did not intend to require that a deserted or abandoned spouse make a continuous effort to restore cohabitation or maintain the marital relationship or risk being deemed willfully absent from his or her spouse.

Eliason Law Office, PC (by *Matthew C. Eliason*), for Rhonda Lovett.

Vairo, Mechlin & Tomasi, PLLC (by *Paul J. Tomasi*), for Arbutus Peterson.

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM. In this dispute over the probate of Lyle Seth Peterson's estate, appellant, Rhonda Lovett, appeals by right, MCL 600.861(a), the probate court's order denying her motion for a declaration that Lyle's widow, Arbutus Peterson, was not a surviving spouse because Arbutus was "willfully absent" from him for one year or more before his death, MCL 700.2801(2)(e)(*i*). We conclude that the probate court did not clearly err when it found that Arbutus did not willfully absent herself from Lyle. Accordingly, we affirm.

I. BASIC FACTS

Arbutus testified that she and Lyle married in 1959. In 1973, they purchased a store in Phoenix, Michigan, which is in Keweenaw County, and renovated it to include living quarters above the retail area. After the store and living space were ready in 1974, they occu-

pied it as their marital home. Arbutus operated the store, and Lyle worked for the federal park service until he retired in 1988 or 1989.

In the early 1990s, Lyle began to have an extramarital affair with Susan Strieter. Testimony established that Lyle and Strieter took steps to keep the affair from being obvious, but it was still widely known. Arbutus testified that, even though she "never really came right out and asked him," she knew that Lyle was having an affair with Strieter. Lyle, however, refused to acknowledge the affair; he preferred that she not know where he was. Ron Lahti, who is the Keweenaw County Sheriff, testified that he had known Arbutus and Lyle for about 35 years and stated that "it was no secret [that] Lyle had affairs . . . ." Lyle's daughter, Susan Gherna, likewise testified that she knew "through the rumor mill" that her father was having an affair with Strieter. Even so, it was clear to her that her father "would have never told [her]" about Strieter because "he didn't want us to know that part of his life."

Despite the affair, Arbutus did not treat Lyle any differently; she did not ask him to leave the marital home, she continued to cook for him, she did his laundry, she operated the store, and she "never refused [him] anything." She also did not divorce him: "I was married and that is the way I stayed." She denied that she ever willfully refused to see Lyle or to perform whatever services he expected of her or asked from her as a wife. Lahti agreed that Arbutus did not change the way she treated Lyle even though he was having an affair. Gherna testified that her mother "might grumble a little bit," but she always did what she was expected to do for Lyle. In addition, Lyle never took steps to divorce Arbutus.

In 2006, Lyle moved into a cabin that he and Arbutus owned adjacent to the store. In October 2006, Lyle and Strieter went to see a lawyer to draft a will for Lyle. The lawyer drafted the will, and Lyle executed it, but he went to a different lawyer in order to obtain a revised will. Lyle executed the revised will in November 2006. In the summer of 2007, Lyle moved into a home with Strieter. The home was in Lake Linden, Michigan, which is in Houghton County. Even after moving away, Lyle continued to visit the store and helped Arbutus with the store's maintenance. She also continued to cook him meals and interact with him on his visits.

Lyle apparently struggled with dementia at the end of his life and was at some point unable to drive. Others would drive him to the store for visits, but he eventually stopped going to the store. Arbutus testified that she last saw Lyle in 2009. Gherna testified that she continued to make an effort to see her father in his last years and last saw him in June 2011. She would go to Strieter's home and visit him while Strieter was at work. Arbutus, however, admitted that she did not make any effort to contact Lyle or visit him at Strieter's home. She stated that she did not bother Lyle because she was sure he would be uncomfortable with her doing so. Arbutus also stated that Strieter made no effort to update her about her husband's situation; Gherna would keep her informed about her husband.

Lyle died in September 2011. The probate court in Keweenaw County appointed Arbutus to be the personal representative of Lyle's estate, and Arbutus sought to have his estate probated as an intestate estate. The probate court eventually transferred the case to Houghton County because Lyle died while domiciled there. There was some dispute over the

validity of the wills, and, in January 2012, Arbutus gave notice that she might elect to take her spousal share depending on the outcome of the dispute. The probate court accepted Lyle's November 2006 will for probate in January 2013 and appointed Lyle's sister, Hazel Sutherland, to be the personal representative for his estate in April 2013. Arbutus gave formal notice of her decision to elect against the will in October 2014.

In December 2014, Lyle's daughter from a previous relationship, Rhonda Lovett, petitioned the probate court for a declaration that Arbutus was not a surviving spouse for purposes of the statute allowing a spousal election, MCL 700.2202(2), because Arbutus "[w]as willfully absent" from Lyle for one year or more before his death, MCL 700.2801(2)(e)(*i*). The probate court held a hearing on the petition in January 2015. At the hearing, the court considered various exhibits and heard the testimony summarized earlier in this opinion. At the close of proofs, the probate court discussed this Court's interpretation of the forfeiture provision from the now-repealed Revised Probate Code, MCL 700.101 *et seq*. See *In re Harris Estate*, 151 Mich App 780; 391 NW2d 487 (1986) (interpreting MCL 700.290). Because the forfeiture provision from the Revised Probate Code had similar language to the forfeiture provision stated under MCL 700.2801(2)(e)(*i*) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., the probate court applied the test from *In re Harris Estate* to the forfeiture provision at issue. Accordingly, the court determined that Lovett had to show that Arbutus was physically absent from Lyle for one year or more and that Arbutus took some action that manifested an intent to give up her marital rights.

Turning to the facts, the court found that Arbutus did not do anything "that was unacceptable" concerning her husband's decision to live with Strieter; rather, she chose to honor her marital vows:

> That is her right to honor her vows and it's nobody else's right to look at her badly or any other way for that. We don't hear this. I see marriages entered into very loosely in this court and thrown away very quickly. And, all of us have seen that in our own families and our own friendships and I'm not here to talk about those folks, but here's a woman who, regardless of what anybody else does, took those vows as seriously—incredibly seriously.

The court further opined that it was reasonable for Arbutus to avoid calling Lyle under the circumstances: "I can't imagine a spouse feeling that, oh, I'm gonna call my husband up at his mistress's. That makes absolutely no sense, whatsoever." Because there was "absolutely nothing on this record that would demonstrate that" Arbutus intended to give up her marital rights, the probate court denied Lovett's petition for a declaration that Arbutus was not a surviving spouse.

Lovett now appeals in this Court.

II. ANALYSIS

A. STANDARDS OF REVIEW

Lovett argues on appeal that the probate court erred when, relying on the decision in *In re Harris Estate*, it required her to show that Arbutus had the specific intent to abandon her marital rights. She argues that the probate court should not have applied *In re Harris Estate* because this Court's discussion of intent in that case was merely dicta and, in any event, did not accurately reflect the language of the statute. This Court reviews de novo whether the probate court

properly interpreted and applied the statute at issue. *Pransky v Falcon Group, Inc*, 311 Mich App 164, 173; 874 NW2d 367 (2015). This Court, however, reviews for clear error the probate court's findings of fact. *In re Raymond Estate*, 483 Mich 48, 53; 764 NW2d 1 (2009) (plurality opinion), citing *In re Wojan Estate*, 126 Mich App 50; 337 NW2d 308 (1983), and *In re Burruss Estate*, 152 Mich App 660, 663-664, 394 NW2d 466 (1986).

B. FORFEITING SPOUSAL RIGHTS

When a decedent who was domiciled in this state dies testate, his or her surviving spouse may elect to "abide by the terms of the will" or may elect to "take 1/2 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by 1/2 of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death." MCL 700.2202(2). For purposes of these elections, the Legislature has provided that a "surviving spouse does not include," in relevant part:

> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (*i*) Was willfully absent from the decedent spouse.
>
> (*ii*) Deserted the decedent spouse.
>
> (*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law. [MCL 700.2801(2).][1]

In determining what constitutes being "willfully absent from the decedent spouse" under MCL 700.2801(2)(e)(*i*), the probate court relied on this Court's

[1] The Legislature amended this statute effective June 27, 2016. See 2016 PA 57. However, the amendment does not implicate the provisions at issue here.

decision in *In re Harris Estate*. In that case, this Court had to determine whether the probate court properly interpreted and applied MCL 700.290(1)(a) of the Revised Probate Code, which was the predecessor to MCL 700.2801(2)(e). *In re Harris Estate*, 151 Mich App at 783. MCL 700.290(1)(a) had provided: "A surviving spouse does not have a right of election against the will of the deceased spouse . . . if the surviving spouse . . . for 1 year or more previous to the death of the deceased spouse" was "willfully absent from the decedent spouse." On appeal, the personal representative argued that the trial court erred by requiring proof of physical separation because a "surviving spouse's emotional absence or desertion" was "sufficient to extinguish" the right to elect against the will under MCL 700.290. *In re Harris Estate*, 151 Mich App at 783-784.

This Court examined the statute and concluded that it would be absurd to interpret the statute to encompass emotional separation: "Since all of us are subject to inattentiveness, whether wilful or not, at some time or another, such an interpretation of absent would render the statute so broad in application as to put in jeopardy every surviving spouse's right to election under the Revised Probate Code." *Id*. at 785. The Court, therefore, determined that to be "absent" referred to physical separation and held that the separation must have been continuous for at least the year preceding the deceased spouse's death. *Id*. at 785-786. Having clarified the proper construction of the statute, the Court went further and stated that, because forfeitures were disfavored in the law, it would construe MCL 700.290 "as showing an intent by the Legislature that a spouse must intend to give up his rights in the marriage before such can be lost." *Id*. at 786. "The

requisite intent," the Court explained, can be "shown by actions indicating a conscious decision to permanently no longer be involved in the marriage." *Id*. at 787.

We agree with this Court's conclusion in *In re Harris Estate* that the phrase "[w]as willfully absent," as used in MCL 700.2801(2)(e)(*i*), refers to physical absence.[2] The word "absent" ordinarily refers to being physically away. See *The Oxford English Dictionary* (2d ed, 1991) (defining the adjective "absent" as "[b]eing away, withdrawn from, or not present (at a place)" and defining the verb "absent," in relevant part, to mean "[t]o be or stay away; to withdraw"). Undoubtedly, the term "absent" can be used in ordinary speech to refer to mental or emotional absence; a person who is physically absent generally does not provide emotional support, and so, figuratively speaking, one may refer to a person who does not provide emotional support as being emotionally "absent." However, whether the term is used in this way, rather than in the ordinary sense, will normally follow from the context. And in the absence of context indicating such use, we will give the term its ordinary meaning. Here, the statute refers to someone who "did" certain acts, including being "willfully absent," deserting, or willfully neglecting or refusing to support the decedent spouse for "1 year or more" before the deceased spouse's death. See MCL 700.2801(2)(e). This context suggests physical separation. See *Hayes v Parole Bd*, 312 Mich App 774, 779; 886 NW2d 725 (2015). We also agree that the physical separation must be continuous because the Legislature provided that the individual must have done "any of the following *for* 1 year or more . . . ." MCL 700.2802(2)(e) (em-

[2] We recognize that we are not bound by the decision in *In re Harris Estate*. See MCR 7.215(J)(1).

phasis added). The preposition "for" establishes that the phrase refers to a continuous span of time.

We do not, however, agree that the statute requires proof of intent to abandon one's marital rights. The majority in *In re Harris Estate* held that a surviving spouse cannot forfeit his or her marital rights in the absence of evidence that the surviving spouse took acts "indicating a conscious decision to permanently no longer be involved in the marriage." *In re Harris Estate*, 151 Mich App at 787. The Legislature provided that an individual will not be deemed a surviving spouse if he or she "[w]as willfully absent from the decedent spouse." MCL 700.2801(2)(e)(*i*). The Legislature's use of the term "willfully" established the requisite intent that the individual must have in order to be disqualified as a surviving spouse: the individual must have acted with the specific intent to bring about the particular result addressed in the statute. See *In re Napieraj*, 304 Mich App 742, 745-746; 848 NW2d 499 (2014). Specifically, in order for an individual to be "willfully absent" within the meaning of MCL 700.2801(2)(e)(*i*), the individual must have done something with the intent to bring about his or her absence from the deceased spouse. Consequently, we agree with Lovett's contention that the probate court erred when it determined that she had to show that Arbutus intended to give up her marital rights before MCL 700.2801(2)(e)(*i*) would apply. The Legislature did not include such a requirement, and we are not at liberty to read one into the statute. *Pransky*, 311 Mich App at 186-187.

Lovett argued before the probate court that Arbutus's failure to make an effort to contact Lyle, visit Lyle, or otherwise be a part of his life is evidence that she was willfully absent from him. She similarly

argues that the statute does not preclude the possibility that both spouses might be willfully absent from each other. We agree that both spouses can be willfully absent from each other, but we do not agree that the Legislature intended to require a deserted or abandoned spouse to make a continuous effort to restore cohabitation or maintain the marital relationship or risk being deemed "willfully absent" from his or her spouse within the meaning of MCL 700.2801(2)(e)(*i*). The Legislature stated that an individual "who did" certain acts would not be deemed a surviving spouse. MCL 700.2801(2)(e). The word "did" suggests acts rather than omissions. Similarly, the word "willfully" in the phrase "[w]as willfully absent" indicates that the individual must act or fail to act with the intent to bring about a specific result—in this context, to bring about physical separation from his or her spouse. Therefore, even accepting that a spouse can deliberately fail to act with the required intent, we conclude that mere omissions do not amount to being "willfully absent" unless the failure to act caused the continued separation. MCL 700.2801(2)(e)(*i*).

In this case, there is no evidence that Arbutus took some act or failed to act with the intent to cause her physical separation from Lyle—that is, there was no evidence that she "[w]as willfully absent" from him during the year preceding his death. MCL 700.2801(2)(e)(*i*). There is no evidence that she forced Lyle from the marital home or that she removed herself from his presence. All the evidence showed that Lyle absented himself from Arbutus and that Arbutus remained faithful to the marriage. She continued to interact with Lyle when he came around the store, she prepared him meals, operated the store, and used her

own funds to maintain the marital property. As Lahti testified at the hearing, Arbutus was always there for Lyle:

> [S]he stayed right where she's been for the last fifty years, doing what she'd done for the last fifty years. Lyle is the one that left. You know, I don't know what went on between them, at that point, but I do know that she always knew what Lyle was up to. And even at one point we discussed it that if he was there she would take care of him.

It is true that the evidence demonstrated that Arbutus did not contact or visit Lyle during the last year of his life, but it was also undisputed that she did not do so because Lyle did not want her involved with his extramarital life. Nothing within the statute requires an innocent spouse to repeatedly attempt to reconcile or maintain physical proximity to his or her spouse against his or her spouse's wishes.

Although there was evidence that Lyle and Arbutus were physically separated for one year or more before his death, the evidence amply demonstrated that Lyle left the marital home and that he alone caused the continued separation. While Arbutus may have acquiesced to the separation, her decision to acquiesce to Lyle's wishes was not sufficient to establish that she "[w]as willfully absent" from Lyle within the meaning of MCL 700.2801(2)(e)(*i*). Given the undisputed evidence, the trial court's erroneous imposition of an intent requirement does not warrant relief. MCR 2.613(A); MCR 5.001(A).

III. CONCLUSION

The probate court erred when it construed MCL 700.2801(2)(e)(*i*) to require proof that a spouse intended to give up his or her marital rights before he or

she will be deemed not to be a surviving spouse under that statute. Nevertheless, because the undisputed evidence showed that Arbutus did not willfully cause her absence from Lyle, the error does not warrant relief. MCR 2.613(A).

Affirmed. As the prevailing party, Arbutus may tax her costs. MCR 7.219(A).

GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ., concurred.

21ST CENTURY PREMIER INSURANCE COMPANY v ZUFELT

Docket No. 325657. Submitted March 8, 2016, at Detroit. Decided May 24, 2016, at 9:15 a.m.

Plaintiff, 21st Century Premier Insurance Company, brought an action in the Oakland Circuit Court against Barry Zufelt, Nancy Zufelt, University of Michigan Regents, and others, seeking to rescind the no-fault automobile insurance policy it had issued to Barry. The policy issued by 21st Century to Barry contained an eligibility clause that required the applicant to have less than six points on his or her driving record. 21st Century issued the policy under the belief that Barry had four points on his driving record, but Barry failed to disclose the additional points he had received from a recent accident that had not yet appeared on his driving record. Because points from previous violations subsequently dropped off his driving record, Barry only had five points on his driving record when 21st Century renewed the policy in December 2012. Barry was thereafter injured in an automobile accident, and Regents provided medical care for him. In a separate proceeding, the driver of the other automobile involved in that accident brought an action against the Zufelts, who in turn sought from 21st Century, under the terms of the policy, indemnity and the provision of a defense. Regents and others sought reimbursement for medical expenses related to their treatment of Barry in that action. 21st Century then filed this action, seeking a declaration that the Zufelts were not entitled to indemnity or a defense in the underlying action and seeking reimbursement of benefits paid under the policy. In this action, the court, Martha D. Anderson, J., granted 21st Century's motion for summary disposition and ordered the policy rescinded because Barry had provided false information to 21st Century on the original insurance application. The court also entered a judgment against Regents and in favor of 21st Century in the amount of $53,673.95. Regents appealed.

The Court of Appeals *held*:

1. A renewal contract for an insurance policy is a new, separate and distinct contract unless the intention of the parties clearly demonstrates that the original and renewal agreements

constitute one continuous contract. The rights of the parties are controlled by the original contract unless otherwise provided, and the insured may assume that the terms of the renewal policy are the same as those of the original contract. In this case, the language of the renewal agreement did not indicate an intention by the parties to alter the terms of the policy related to eligibility and the right of 21st Century to rescind the policy because of a misstatement of material fact, a false statement, or a failure to disclose requested information. The terms and conditions of the original policy applied to the renewal policy because there was no indication in the renewal that the original terms changed in a significant manner.

2. An insurer may rescind *ab initio* a policy when an insured makes a material misrepresentation in his or her application for no-fault insurance. Rescission is justified without regard to the intentional nature of the misrepresentation when it is relied on by the insurer. Reliance may exist when the misrepresentation relates to the insurer's guidelines for determining coverage eligibility. The trial court correctly concluded that 21st Century had the right to rescind the policy and deny coverage for Barry's 2013 automobile accident. Barry admitted that he failed to disclose the points he received for the earlier accident—which occurred immediately before 21st Century issued the original policy, making him ineligible for that policy—and 21st Century relied on that misrepresentation when the company determined he was eligible for the original policy. It was not relevant that Barry had less than six points on his driving record at the time the policy was renewed because Barry was not eligible for the policy when it was first issued, and the material terms in the initial contract applied to the renewal.

3. Estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract. Equitable estoppel may apply when a party, by representations, admissions, or silence intentionally or negligently induced another party to believe facts that the other party justifiably relied and acted on, and which would result in prejudice if the first party were allowed to deny the existence of those facts. In this case, the Zufelts' equitable-estoppel claim failed as a matter of law. There was no evidence that 21st Century intentionally or negligently induced Barry to believe facts that it later denied or that Barry justifiably relied on representations made by 21st Century when renewing the policy. In addition, there was no evidence that 21st Century was aware of Barry's misrepresentation when the policy was renewed. 21st Century was entitled to

rescind the policy once it discovered Barry's misrepresentation even though that discovery occurred after the automobile accident and after the renewal.

Affirmed.

INSURANCE — NO-FAULT INSURANCE POLICY — MATERIAL MISREPRESENTATION IN APPLICATION — RENEWAL OF POLICY — RESCISSION OF RENEWED POLICY.

An insurer may rescind *ab initio* a policy when an insured makes a material misrepresentation in his or her application for no-fault insurance; rescission is justified without regard to the intentional nature of the misrepresentation when it is relied on by the insurer, including when the misrepresentation relates to the insurer's guidelines for determining coverage eligibility; when there is no indication in an insurance renewal contract that the parties intend to change the terms of the original policy, an insurer may rescind the renewed policy if it was issued on the basis of misrepresentations related to the insured's eligibility even though at the time of renewal the insured would have been eligible under the original policy.

Wheeler Upham, PC (by *Gary A. Maximiuk* and *Catherine M. Sullivan*), for 21st Century Premier Insurance Company.

Dale L. Hebert and *Miller & Tischler, PC* (by *Wayne J. Miller*), for University of Michigan Regents.

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

PER CURIAM. On January 5, 2015, the trial court entered an order dismissing the complaint of plaintiff, 21st Century Premier Insurance Company, against defendant Daniel Novak after the court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and ordered rescission of the no-fault automobile insurance policy plaintiff had issued to defendants Barry and Nancy Zufelt. The trial court also entered judgment against defendant University of Michigan Regents (Regents) in the amount of

$53,673.95 as reimbursement to plaintiff for the cost of medical services paid under the policy. Regents appeals the order as of right, and for the reasons set forth in this opinion, we affirm.[1]

I. FACTS

On June 17, 2012, plaintiff issued to Barry Zufelt a no-fault automobile insurance policy that required the insured have less than 6 points on his or her driving record to be eligible for the policy. At the time, Barry had 7 points; however, in the application for insurance, Barry failed to disclose 3 points that resulted from an April 18, 2012 accident. Although plaintiff's underwriting department investigated, the recent accident did not appear in Barry's driving record. By the end of September 2012, 4 points accumulated in September 2009 from other violations "dropped off" Barry's record, and in December 2012, plaintiff automatically renewed Barry's policy for six months. At the time of renewal, Barry had 5 points on his driving record.

Shortly thereafter, in March 2013, Barry was involved in an automobile accident. Both Barry and the driver of the other vehicle, Daniel Novak, suffered injuries. Barry's injuries were severe, and Regents provided medical care for Barry's injuries.

Thereafter, Novak sued Barry and Nancy Zufelt for damages resulting from the automobile accident. Barry and Nancy then sought defense and indemnity from plaintiff under the insurance policy. Regents, and the other named medical-services providers, sought reim-

[1] Defendants Barry and Nancy Zufelt, Daniel Novak, Botsford General Hospital, ABC Transportation, Botsford Medical Imaging, Farmington Emergency Medicine, and Orthopedic Surgery Specialists, PLLC, are not parties to this appeal.

bursement of over $600,000 in medical expenses from plaintiff under Barry's policy.

On July 19, 2013, plaintiff filed this lawsuit against the Zufelts, Regents, and others, alleging that Barry was ineligible to be insured at the time the policy was issued because he had made material misrepresentations on his application, specifically he had not disclosed the April 2012 accident. Plaintiff sought a judgment declaring that the insurance policy was rescinded and that the Zufelts were not entitled to indemnity for damages awarded or a defense in the underlying lawsuit involving Novak. Plaintiff requested that the court order the Zufelts to reimburse plaintiff for any benefits paid under the policy. Plaintiff also sought a judgment declaring that the other defendants who had provided services related to the accident were not entitled to no-fault personal protection insurance (PIP) benefits. Alternatively, plaintiff sought to reform the policy to limit plaintiff's liability to the statutory minimum standards.

On September 17, 2013, the Zufelts filed a counterclaim against plaintiff for breach of contract, seeking no-fault PIP benefits, along with interest and attorney fees. On March 10, 2014, Regents also filed a counterclaim against plaintiff, seeking reimbursement of medical expenses associated with the medical care it provided to Barry. The lawsuit ultimately became a matter of dispute between plaintiff and the Zufelts, Novak, and Regents while the other named defendants were dismissed.

On June 12, 2014, plaintiff moved for summary disposition, arguing that because there was no genuine issue of material fact that Barry had made false statements in obtaining the insurance policy at issue, rescission of the policy was proper. Plaintiff asserted that it was permissible under the policy language, as well as

state law, to void the policy it issued to Barry on the basis of fraud, misrepresentation, concealment, or misstatement of a material fact. Plaintiff argued that it relied on the misrepresentation when it issued the insurance policy. Plaintiff noted that, in Barry's response to plaintiff's request to admit, Barry admitted his involvement in the April 18, 2012 accident and admitted to the nondisclosure of the accident. Plaintiff also noted that Eric Meier, an underwriter for plaintiff, averred that plaintiff would not have written the original insurance policy for Barry had it known of the prior accident.

In its response, Regents argued that Barry was an eligible driver when the policy was renewed and, therefore, was properly covered under the policy at the time of the accident. Regents sought summary disposition in its favor under MCR 2.116(I)(2).

On November 5, 2014, following oral argument, the trial court agreed with plaintiff that, under the policy, rescission was proper because Barry had provided false information when he obtained the policy. The court granted plaintiff's motion for summary disposition and ordered that the policy be rescinded.

To resolve the remaining matters, the trial court entered a judgment in favor of plaintiff and against Regents in the amount of $53,673.95 on December 2, 2014. The trial court entered an order on January 5, 2015, reflecting the parties' stipulation that plaintiff agreed to the dismissal of its complaint against the Zufelts and Novak, and the Zufelts agreed to dismiss their counterclaim against plaintiff. Regents now appeals by right.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition to determine whether

the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In reviewing a motion brought under MCR 2.116(C)(10), we review the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Interpretation of a contract and whether the trial court properly applied equitable principles involve questions of law that we review de novo. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008); *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011).

III. ANALYSIS

As an initial matter, Regents asserts that we should ignore plaintiff's fraud-based arguments because plaintiff failed to assert and prove that Barry committed fraud when he applied for the insurance policy. Although plaintiff included the word "fraud" in a list of reasons to void the policy, the crux of its argument was that rescission was permissible because of Barry's misrepresentation on the application and its reliance on that misrepresentation. To that end, plaintiff cited the language of the policy itself and caselaw to show that a misrepresentation or failure to disclose was sufficient to rescind the contract. Accordingly, this argument lacks merit.

Next, Regents contends that the policy renewal created a new and distinct contract that was not tainted by the initial misrepresentation. In *Russell v State Farm Mut Auto Ins Co*, 47 Mich App 677, 680; 209 NW2d 815 (1973), this Court discussed a renewal contract:

> "A renewal contract has been stated by many jurisdictions to be a new, and a separate and distinct contract,

> unless the intention of the parties is shown clearly that the original and renewal agreements shall constitute one continuous contract. It has thus been stated to be a new or separate contract which is based upon and subject to the same terms and conditions as were contained in the original policy. Unless otherwise provided, the rights of the parties are controlled by the terms of the original contract, and the insured is entitled to assume, unless he has notice to the contrary, that the terms of the renewal policy are the same as those of the original contract." [*Id*., quoting 13 Appleman, Insurance Law & Practice, § 7648, pp 419-420.]

In this case, there was no language in the renewal agreement that indicated the parties intended to alter the terms governing eligibility and plaintiff's right to rescission as set forth in the original agreement. *Id*. Therefore, although Barry's policy was renewed, because there was no indication that the original terms changed in any significant manner, the terms and conditions that governed the original policy applied to the renewal. *Id*.; see also *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 605-606; 576 NW2d 392 (1997) (noting that, generally, a contract is a fully integrated instrument and is to be interpreted by looking within the four corners of the document).

The original policy provides that plaintiff may void the policy, even after an accident, for a material misrepresentation. Specifically, the policy provided in relevant part:

> GENERAL PROVISIONS
>
> * * *
>
> MISREPRESENTATION OR FRAUD
>
> To determine *your* eligibility for coverage under this policy and to determine *your* premium, *we* relied upon the statements and representations *you* provided to *us*. If *you*

> knowingly made any false statements or representations concerning a material fact or circumstance to *us* when applying for this policy or applying for any coverage under this policy, *we* may void this policy. In addition, *we* may void this policy *if you concealed or misrepresented any material fact or circumstance*, or engaged in any fraudulent conduct, when applying for this policy.
>
> *Following an accident or loss, we may still void this policy* for fraud, misrepresentation, concealment or misstatement of a material fact or circumstance by *you* in applying for this policy or in connection with a claim under this policy. . . . If *we* void this policy, you must reimburse *us* if *we* make a payment. [Some emphasis added.]

In addition, the insurance application provided in relevant part:

> I warrant that all information provided on this Application is complete and accurate and agree it becomes the basis for both my acceptance by the Company, and the premium charged for my policy, along with any information provided to the Company or its representatives during the premium quotation process. I understand that *if I provide false information on this Application, or fail to fully disclose requested information* such as drivers listed who operate my vehicles, use of my vehicles, and registration/ownership of my vehicles, accidents and violations, *the Company may cancel or rescind my policy and deny any claim made after the issuance of the policy*, as provided by the conditions of the policy. [Emphasis added.]

The plain terms of the contract did not require a finding of fraud or intentional misstatement, but rather allowed plaintiff to rescind the contract based on a false statement, misstatement of a material fact, or a failure to disclose. Indeed, it is well settled that an insurer is entitled to rescind a policy *ab initio* on the basis of a material misrepresentation made in an application for no-fault insurance. *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995);

Burton v Wolverine Mut Ins Co, 213 Mich App 514, 517; 540 NW2d 480 (1995). "Rescission is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon by the insurer. Reliance may exist when the misrepresentation relates to the insurer's guidelines for determining eligibility for coverage." *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998).

In this case, there was no requirement of fraud or intentional misrepresentation. All that was necessary for rescission was a misrepresentation, failure to disclose, or a false statement, all of which were present in this case. Although Barry did not admit to an intentional fraud, he admitted that he had failed to disclose the accident that made him ineligible under the terms of the policy. Plaintiff relied on Barry's misrepresentation when it determined he was eligible for the insurance policy. Had Barry disclosed the April 2012 accident, he would have been unable to obtain the insurance policy. Therefore, given the plain language of the policy, after discovering the nondisclosure, plaintiff had the right to rescind the policy and deny coverage. *Lash*, 210 Mich App at 103; *Lake States*, 231 Mich App at 331.

Regents argues, however, that Barry's initial ineligibility was subsequently "cured" when eligibility resumed, or in other words when the points "dropped off" his record. Although the policy provides, "We will insure or continue to insure all eligible persons with respect to eligible vehicles subject to the following guidelines," that provision does not apply in this case. In this case, Barry was not an "eligible person," because he made a material misrepresentation in the application. Eligibility for the renewal turned on the representations that Barry made on the initial appli-

cation, and the material terms in the initial contract applied to the renewal. Therefore, the renewal was inextricably linked to the initial application, and plaintiff was entitled to rescind the contract based on Barry's misrepresentations even after the renewal issued. There was no evidence that plaintiff was aware of the misrepresentation at the time the renewal issued, and plaintiff was not obligated to recheck Barry's record. See, e.g., *Titan Ins Co v Hyten*, 491 Mich 547, 571; 817 NW2d 562 (2012) (holding that an insurer may assert legal and equitable remedies to avoid liability under an insurance policy even when the fraud of the applicant was "easily ascertainable"). In short, plaintiff did not have a duty to insure Barry under the plain terms of the policy, and the renewal did not cure the initial misrepresentation.

Next, Regents argues that plaintiff was barred from denying coverage by the doctrine of equitable estoppel. Regents argues that plaintiff sent a renewal declaration and confirmation letter to Barry regarding his policy, which led Barry to believe that he had no-fault coverage.

"The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract." *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998). "Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998).

In this case, there is no evidence to support that plaintiff intentionally or negligently induced Barry to believe facts that it later denied or to support that Barry justifiably relied on plaintiff's representations. Importantly, there was no evidence to support that plaintiff was aware of Barry's misrepresentation at the time the policy renewed. Furthermore, because Barry made the misrepresentation in obtaining the policy, he could not show justifiable reliance. As noted earlier in this opinion, an insurer may rescind a policy *ab initio* if there is a material misrepresentation in the application for insurance. *Burton*, 213 Mich App at 517. Therefore, plaintiff had the right to declare the policy void once it determined there was a material misrepresentation, even though that determination occurred after the automobile accident. Barry was precluded from relying on the original policy and the renewal when his misrepresentation tainted both agreements and rescission was permissible. Accordingly, Regents' equitable-estoppel claim fails as a matter of law. *West American Ins Co*, 230 Mich App at 310.

In short, the trial court did not err by granting plaintiff's motion for summary disposition because plaintiff was entitled to rescind the insurance policy under the plain terms of the contract and the rescission was not barred by the doctrine of equitable estoppel.

Affirmed. No costs awarded. MCR 7.219(A).

K. F. KELLY, P.J., and FORT HOOD and BORRELLO, JJ., concurred.

STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS

Docket No. 323226. Submitted December 1, 2015, at Lansing. Decided May 24, 2016, at 9:20 a.m. Leave to appeal denied 500 Mich 919.

Karen L. Streng brought a negligence action in the Mackinac Circuit Court against the Board of Mackinac County Road Commissioners, alleging that her injuries were the result of a motorcycle accident that was caused by a defect in a highway under the jurisdiction of defendant and that defendant was liable under the highway exception, MCL 691.1402, to the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Plaintiff notified defendant's chairperson and the Mackinac County Clerk of the fact and location of the accident 56 days after it had occurred in accordance with the requirements set forth in MCL 224.21(3) of the highway code, MCL 220.1 *et seq*. Defendant moved for summary disposition, arguing that the notice requirements set forth in the GTLA, MCL 691.1401(1), not those provided for in MCL 224.21(3) of the highway code, applied to the case and that plaintiff's notice of intent was therefore defective because it failed to identify the exact location of the accident. Defendant also argued that it was not liable for any damages that did not constitute bodily injury or property damage. The trial court, William W. Carmody, J., denied defendant's motion, concluding that MCL 224.21 controlled in relation to the issue of notice, defendant's argument that notice was not sufficient was without merit, and plaintiff was not precluded from claiming damages beyond bodily injury and property damage. Defendant appealed.

The Court of Appeals *held*:

1. Under the GTLA, governmental agencies are generally statutorily immune from tort liability. The highway exception to the GTLA, MCL 691.1402, applies when the agency fails to properly maintain a highway or county road in reasonable repair so that it is reasonably safe and convenient for public travel. The requirements for notifying a governmental agency of a negligence cause of action are different under the GTLA and the highway code. The GTLA requires the notice to specify the exact location and nature of the highway defect, the injury sustained, and the

names of the witnesses known at the time by the complainant, MCL 691.1404(1), while the highway code requires the notice to set forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident, and that the complainant intends to hold the county liable for damages, MCL 224.21(3). The version of MCL 691.1402(1) in effect at the time of plaintiff's accident in 2011 provided that the liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission was under MCL 224.21. In this case, the trial court properly concluded that the more specific procedural and remedial provisions of MCL 224.21 apply to claims of liability against county road commissioners for accidents that occur on county roads rather than the more general notice provisions of the GTLA, MCL 691.1404(1); to hold otherwise would render the MCL 224.21 notice provisions nugatory.

2. To be sufficient, a claimant's notice of injury and defect to a governmental agency must substantially comply with statutory requirements. While the written notice and the text of the police report located the accident a mile south of where the accident occurred, the police report drawing that accompanied the report properly located it on a curve that only existed in the correct location of the accident. Plaintiff's description of the accident was legally sufficient under MCL 224.21 because it placed defendant on notice of the claim and permitted it to fully investigate the accident.

3. Under MCL 224.21(3), service of a negligence action against a county road commission must be on the clerk and on the chairperson of the board, while written notice of the claim must be served on the clerk and on the chairperson of the board of county road commissioners. For purposes of MCL 224.21(3), the term "the clerk" refers to the county clerk, not to the clerk of the board of county road commissioners. In this case, defendant was properly served by plaintiff when she served notice of her claim on both the chairperson of the county board of road commissioners and the Mackinac County Clerk.

4. In *Hannay v Dep't of Transp*, 497 Mich 45 (2014), our Supreme Court held that the phrase "liable for bodily injury" as used in the motor vehicle exception to the GTLA, MCL 691.1405, means legally responsible for damages flowing from a physical or corporeal injury to the body. Bodily injury is the category of harm for which the government waives immunity and thus for which damages that naturally flow are compensable, including noneconomic damages. Noneconomic damages may include damages for

loss of the ability to work and earn money, pain and suffering, and mental and emotional damages. The highway exception to the GTLA, MCL 691.1402(1), provides that a person who sustains bodily injury or damage to his or her property may recover the damages he or she suffered from the governmental agency. The *Hannay* definition of bodily injury applies to the defective-highway exception because the wording of the statutes is substantially similar. The trial court correctly concluded that plaintiff's damages were not limited to physical bodily injury and property damage but for the wrong reasons.

Affirmed.

1. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — COUNTY ROADS UNDER JURISDICTION OF COUNTY ROAD COMMISSION — NOTICE REQUIREMENTS — HIGHWAY CODE.

Under the highway exception to the governmental tort liability act, MCL 691.1402, governmental agencies are liable for bodily injury or damage to property resulting from the failure of the agency to properly maintain highways and county roads in reasonable repair so that they are reasonably safe and convenient for public travel; when a person is injured on a county road under the jurisdiction of a county road commission, the claimant must follow the notice requirements of MCL 224.21(3) of the highway code, MCL 220.1 *et seq*., when notifying the agency of his or her negligence action.

2. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — COUNTY ROADS UNDER JURISDICTION OF COUNTY ROAD COMMISSION — NOTICE REQUIREMENTS.

Under the highway exception to the governmental tort liability act, MCL 691.1402, governmental agencies are liable for bodily injury or damage to property resulting from the failure of the agency to properly maintain highways and county roads in reasonable repair so that they are reasonably safe and convenient for public travel; when a person is injured on a county road under the jurisdiction of a county road commission, MCL 224.21(3) requires that service of the action be on the county clerk and the chairperson of the board of county road commissioners.

3. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — LIABLE FOR BODILY INJURY — DAMAGES — ECONOMIC AND NONECONOMIC DAMAGES.

Under the highway exception to the governmental tort liability act, MCL 691.1402, governmental agencies are liable for bodily injury or damage to property resulting from the failure of the agency to properly maintain highways and county roads in reasonable repair so that they are reasonably safe and convenient for public

> travel; the phrase "liable for bodily injury" means legally responsible for damages flowing from a physical or corporeal injury to the body; a plaintiff who suffers bodily injury may recover under the defective-highway exception tort damages that naturally flow from the injury, including economic and noneconomic damages; noneconomic damages may include damages for loss of the ability to work and earn money, pain and suffering, and mental and emotional damages.

Kluczynski, Girtz & Vogelzang (by *Richard Radke, Jr.*) for plaintiff.

Henn Lesperance PLC (by *William L. Henn*) for defendant.

Before: SAAD, P.J., and STEPHENS and O'BRIEN, JJ.

STEPHENS, J. Defendant, the Board of Mackinac County Road Commissioners, appeals as of right the trial court order denying defendant's motion for summary disposition, which was premised on governmental immunity and the alleged insufficiency of a notice of intent to sue sent by plaintiff, Karen L. Streng. We affirm.

I. BACKGROUND

On July 8, 2011, plaintiff was injured in a motorcycle accident when she lost control of her motorcycle because of extensive patching with a tar-like substance on Highway 33, about a mile north of its intersection with Camp A Road. On September 2, 2011, plaintiff sent a document titled "MCL 224.21 NOTICE OF INTENT TO PURSUE CLAIM" to the chairperson of defendant and the Mackinac County Clerk. The notice document stated that plaintiff was heading north toward Curtis, Michigan, described the location of the accident as "Highway 33 near the intersection of Camp A Road in Mackinac County, Michigan," and indicated

that "Rick and Sue Fowler . . . have a vacation home adjacent to the crash site." Attached to the notice was a copy of the police report, which described the location of the accident as being 1,000 feet north of the intersection of Camp A Road and Highway 33 and included a rough sketch of the accident scene.

The police officer who wrote the report contacted defendant's west-district garage foreman and noted in the report, "Road commission was notified of the potential hazard." The foreman met the officer at the scene and was able to identify where the accident had occurred by the skid marks. The foreman noted that the accident occurred at a curve in the road and that the rest of that road did not have a curve like that one. When the officer insisted that something be done about the curve, the foreman called his supervisor, defendant's engineer/manager, and they decided to apply Dura-Patch to accommodate the officer's request. During the week after the accident, the foreman and the engineer/manager (who testified that he is defendant's chief administrative officer, chief executive officer, and point of contact for the public and the township) met at the site to confirm that the application of Dura-Patch had been completed.

Plaintiff filed this action on July 1, 2013. She claimed injury to her shoulder and knee and damage to several teeth. Plaintiff's alleged damages included "medical expenses; wage loss and/or loss of earnings capacity; great mental anguish; fright and shock; pain and suffering; embarrassment; humiliation; loss of mobility and disability; the need for replacement services; and . . . the loss of the joys and pleasure and the vitalities of life."

After discovery was closed, defendant moved for summary disposition, arguing that plaintiff's notice of

intent failed to identify the exact location of the accident as required by the notice provision of MCL 691.1404(1) and that it could not be held liable for any damages that did not constitute bodily injury or property damage. Defendant provided the affidavit of a road commission employee, who stated he had measured the exact location of the accident and it was 5,647 feet (1.07 miles) north of Camp A Road on Highway 33. There is no dispute that this was, in fact, the precise location of the accident. Plaintiff responded by arguing that MCL 224.21(3) was the applicable notice provision, which requires that the notice only "set forth substantially the time when and place where the injury took place." She asserted that under either statute the notice was sufficient because the police report included a sketch showing the curve of the road, and both defendant's foreman and engineer/manager went to the scene to inspect the road condition and its subsequent repair. From these events, plaintiff argued that defendant had actual notice of the location well before the notice of intent was sent. Plaintiff also countered defendant's attempt to limit her recoverable damages, asserting that her physical injury meant she was entitled to recover whatever tort damages arose therefrom.

In its written opinion, the trial court agreed with plaintiff on all points, holding that "the language contained in [MCL] 224.21 is controlling under these facts," and that the notice would satisfy either statute because the location "was sufficiently stated with the additional circumstances surrounding the events [sic] development." Defendant's argument that the notice was not sufficient, even though defendant had actual notice of the exact location of the accident, involved "form over substance" that the court found without merit. The court also concluded that plaintiff was not

precluded from claiming damages beyond bodily injury and property damage, "based on Plaintiff's arguments and the elements of damages listed in [M Civ JI] 50.01 and the Supreme Court's ruling in [*Hagerty v Bd of Manistee Co Rd Comm'rs*], 493 Mich 933 (2013)." Thus, the trial court denied defendant's motion, and this appeal followed.

II. THE GOVERNING NOTICE PROVISION

As a preliminary matter, we must resolve the conflict as to which notice provision governs this case: MCL 691.1404 under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., or MCL 224.21 under the highway code, MCL 220.1 *et seq*.

The GTLA grants immunity from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The act enumerates several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency. Relevant here is the defective-highway exception, MCL 691.1402. See *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202-203; 731 NW2d 41 (2007) (noting that there are numerous exceptions to governmental immunity that allow a plaintiff to pursue a claim against a governmental agency and analyzing the notice provision related to the defective-highway exception). At the time of the accident,[1] the statute controlling the liability of a governmental agency for defects in highways provided, in relevant part:

> Except as otherwise provided in [MCL 691.1402a], each governmental agency having jurisdiction over a highway

[1] MCL 691.1402 was amended by 2012 PA 50, effective March 13, 2012.

> shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. 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. *The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in* section 21 of chapter IV of 1909 PA 283, *MCL 224.21*. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [MCL 691.1402(1) (emphasis added).]

The GTLA also includes the following notice provisions:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency . . . . [MCL 691.1404.]

MCL 224.21, the statute expressly referred to in MCL 691.1402(1), addresses county roads under the jurisdiction of county road commissions and provides in relevant part:

> (2) A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel. The provisions of law respecting the liability of townships, cities, villages, and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control apply to counties adopting the county road system.
>
> (3) An action arising under subsection (2) shall be brought against the board of county road commissioners of the county and service shall be made upon the clerk and upon the chairperson of the board. The board shall be named in the process as the "board of county road commissioners of the county of .....". Any judgment obtained against the board of county road commissioners in the action shall be audited and paid from the county road fund as are other claims against the board of county road commissioners. However, a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a defective county road, bridge, or culvert under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners. The notice shall set forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident, and that the person receiving the injury intends to hold the county liable for damages. This section applies to all county roads whether they become county roads under this chapter or under Act No. 59 of the Public Acts of 1915, being sections 247.418 to 247.481 of the Michigan compiled laws.

There are several potential conflicts between the notice provisions of the GTLA and those of MCL 224.21. For example, the latter gives the plaintiff only 60 days to serve notice, while the former gives 120

days.[2] In *Brown v Manistee Co Rd Comm*, 452 Mich 354, 363; 550 NW2d 215 (1996) (*Brown II*), overruled by *Rowland*, 477 Mich at 200, the Michigan Supreme Court was "unable to perceive a rational basis" why "an injured person with a negligent highway cause of action against a 'political subdivision' must comply with the 120-day notice provision in MCL 691.1404 . . . , whereas a person with an identical cause of action against a county road commission must comply with the sixty-day notice provision in MCL 224.21 . . . ." Accordingly, the Court held that the 60-day notice provision "required for claims against a county road commission" was unconstitutional. *Id*. at 363-364. The Court applied the 120-day GTLA notice provision, but held that the defendant had not been prejudiced by the lack of timely notice and summary disposition was not properly granted. *Id*. at 368-369.

Later, in *Rowland*, 477 Mich at 205-206, the Supreme Court traced the history of governmental immunity and explained that, until 1970, it was well established that the defendant governmental agency did not need to show it was actually prejudiced by an untimely notice; the notice provisions were enforced according to their plain language. However, the Court noted a line of cases—starting with *Grubaugh v St Johns*, 384 Mich 165; 180 NW2d 778 (1970), abrogated by *Rowland*, 477 Mich 197, and culminating in *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), over-

[2] As an aside, neither party disputes that plaintiff's notice of intent was timely. The accident in this case is said to have occurred on July 8, 2011, and notice of intent was provided on September 2, 2011, 56 days later. Plaintiff's notice would be considered timely under either the GTLA, affording 120 days, or MCL 224.21, providing for 60 days. The parties' arguments are centered on the sufficiency of notice and service, which compels the determination of which act, the GTLA or the highway code, governs.

ruled by *Rowland*, 477 Mich at 200, and *Brown II*, 452 Mich at 356-357—in which the Court had ruled unconstitutional the Legislature's enactment of laws treating governmental tortfeasors differently from private tortfeasors. Those same cases engrafted onto the GTLA the requirement that the governmental defendant show it suffered actual prejudice from an untimely notice to enjoy immunity. *Rowland*, 477 Mich at 206-209. Ultimately, the *Rowland* Court overruled *Hobbs* and *Brown II*:

> The simple fact is that *Hobbs* and *Brown* [*II*] were wrong because they were built on an argument that governmental immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced. This reasoning has no claim to being defensible constitutional theory and is not rescued by musings to the effect that the justices " 'look askance' " at devices such as notice requirements or the pronouncement that other reasons that could supply a rational basis were not to be considered because in the Court's eyes the "only legitimate purpose" of the notice provisions was to protect from "actual prejudice." [*Rowland*, 477 Mich at 210 (citations omitted).]

In conclusion, the *Rowland* Court repudiated the entirety of the rulings in *Hobbs* and *Brown II*, stating, "Nothing can be saved from *Hobbs* and *Brown* [*II*] because the analysis they employ is deeply flawed." *Id*. at 214. The Court stated that its decision would "return our law to that which existed before *Hobbs* and which was mandated by MCL 691.1404(1)" and that the "controlling legal authority" was MCL 691.1404(1). *Id*. at 221, 222.

The *Rowland* Court made no mention of MCL 224.21, nor did it discuss the reasoning in *Brown II* regarding the notice period. Both *Brown II* and *Hobbs* (in the latter, the defendant was a state department),

applied the GTLA's notice period instead of the MCL 224.21(3) notice period. *Rowland* expressed neither approval nor disapproval regarding that choice but simply focused on the lack of statutory language in MCL 691.1404 allowing exceptions to the time limit.

Other than *Brown II*, no precedential case has substantively considered the potential conflicts between the highway code and the GTLA. It appears that "the sixty-day notice provision [of MCL 224.21] has not been applied in any reported cases involving county road commissions since MCL 691.1404 . . . was amended in 1970." *Brown v Manistee Co Rd Comm*, 204 Mich App 574, 579; 516 NW2d 121 (1994) (*Brown I*) (NEFF, P.J., dissenting), rev'd on other grounds 452 Mich 354 (1996).[3] Instead, both the Supreme Court and this Court have regularly applied the GTLA without consulting MCL 224.21 in cases involving the highway exception to governmental immunity and county road commissions.[4]

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[3] The 60-day notice provision of former MCL 691.1404, 1964 PA 170, was last enforced in *Reich v State Hwy Dep't*, 17 Mich App 619, 621; 170 NW2d 267 (1969) (*Reich I*). Therein, this Court held that the provision was constitutional, despite its potentially "harsh results." On August 1, 1970, the Legislature amended MCL 691.1404, 1970 PA 155, with immediate effect, changing the notice provision in the GTLA to 120 days; the Legislature did not similarly amend MCL 224.21. The Michigan Supreme Court granted leave to appeal and concluded that the former GTLA's 60-day notice provision violated equal protection rights by arbitrarily treating governmental tortfeasors (to whom notice was required within 60 days) different from private tortfeasors (to whom notice was not required). *Reich v State Hwy Dep't*, 386 Mich 617, 623; 194 NW2d 700 (1972) (*Reich II*). Shortly thereafter, this Court applied *Reich II* to the 60-day notice provision of MCL 224.21 and concluded that it, too, was unconstitutional and therefore void. *Crook v Patterson*, 42 Mich App 241, 242; 201 NW2d 676 (1972). *Reich II*, however, was abrogated by *Rowland*, 477 Mich at 206-207, 222, which called the decision "simply incorrect" and "an anomaly."

[4] Those unpublished cases applying the notice provision of MCL 691.1404 to county road commissions include: *Whitmore v Charlevoix Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals,

In addition to the notice period, there are other inconsistencies in the language of the two statutes that have not been addressed by precedent. The GTLA allows service on "any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency," without expressly requiring notice in writing, MCL 691.1404(2), while the highway code requires that notice be served "in writing upon the clerk and upon the chairperson of the board of county road commissioners," MCL 224.21(3). Expressly at issue in this case, the GTLA requires the notice to "specify the *exact location* and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant," MCL 691.1404(1) (emphasis added), while the highway code requires the notice to "set forth *substantially the time when and place where* the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident, and that the person receiving the injury intends to hold the county liable for damages," MCL 224.21(3) (emphasis added).

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issued October 7, 2010 (Docket Nos. 289672 and 291421), p 3, rev'd in part on other grounds 490 Mich 964, 965 (2011) (the defendant did not challenge the timeliness of the notice); *Ells v Eaton Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2006 (Docket No. 264635), p 3, rev'd 480 Mich 902, 903 (2007) (the defendant's manager was at the scene of the crash the same day, but plaintiff's total failure to provide notice as required by MCL 691.1404 required reversal under *Rowland*).

Reported cases discussing the duty imposed on counties as arising under MCL 691.1402 include: *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492; 638 NW2d 396 (2002); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000); *Sebring v City of Berkley*, 247 Mich App 666; 637 NW2d 552 (2001) (Oakland County Road Commission was codefendant); *Taylor v Lenawee Co Bd of Co Rd Comm'rs*, 216 Mich App 435; 549 NW2d 80 (1996); *Reese v Wayne Co*, 193 Mich App 215; 483 NW2d 671 (1992); *Zyskowski v Habelmann (On Remand)*, 169 Mich App 98; 425 NW2d 711 (1988).

"[W]here there is an apparent conflict between two statutes, a fundamental rule of statutory construction requires that the specific statute control over the general and that the specific statute be viewed as an exception to the general rule." *In re Johnson Estate*, 152 Mich App 200, 205; 394 NW2d 136 (1986). We are also required, however, to harmonize the two statutes whenever possible. "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007).

In accord with this reasoning, in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 596; 363 NW2d 641 (1984), the Court explained its approach when interpreting the GTLA: "In resolving the questions presented by this [governmental immunity] act, our goal has been to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability." Having two sets of rules that vary depending on the type of agency being sued is contrary to this goal of uniformity. Moreover and importantly, a dual system of interpretation fails to consider the effect of the second sentence of MCL 224.21(2): "The provisions of law respecting the liability of townships, cities, villages, and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control apply to counties adopting the county road system." This in effect sends the reader back to the GTLA, since those provisions are the ones that deal with the liability of townships, cities, villages, and municipal corporations.

A close reading of the language of MCL 224.21(2) dictates that only those GTLA provisions of law that deal with "liability" apply to counties, while under

MCL 691.1402(1), procedural and remedial provisions for counties should be those of MCL 224.21. MCL 691.1402(1) expressly directs a person injured on a county road to proceed in accordance with MCL 224.21 ("The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in . . . MCL 224.21."). While the GTLA is a statute of general governmental immunity, MCL 224.21 is the specific statute that applies to claims of liability against county road commissioners for accidents that occur on county roads. Despite multiple legislative amendments to the GTLA and the highway code, the notice provisions of MCL 224.21 remain in effect and have not been substantively changed. To follow the procedural requirements of the GTLA rather than those of MCL 224.21—particularly in light of the fact that the GTLA expressly points in the direction of the latter—would render the specific terms of MCL 224.21 nugatory, something we avoid, whenever possible. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

In sum, appellate courts appear to have overlooked the time limit, substantive requirements, and service procedures required by MCL 224.21(3) when the responsible body is a county road commission. Nothing in either the GTLA or the highway code indicates that the Legislature intended that result. Despite the precedent of applying the GTLA to the exclusion of MCL 224.21, the procedures and remedies provided by MCL 224.21 are what apply to county road commissions, and if the Legislature wants the laws to be more uniform, it has the power to make the changes necessary.

A. SUFFICIENCY OF THE NOTICE

Under MCL 224.21(3), the written notice need only "set forth substantially the time when and place where

the injury took place . . . .” The judicial policy favoring liberal construction of notice provisions “is based on the theory that the inexpert layman with a valid claim should not be penalized for some technical defect.” *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969). “ ‘[A] notice of injury and defect will not be regarded as insufficient because of a failure to comply literally with all the stated criteria. Substantial compliance will suffice.’ ” *Plunkett v Dep’t of Transp*, 286 Mich App 168, 178; 779 NW2d 263 (2009), quoting *Hussey v Muskegon Hts*, 36 Mich App 264, 269; 193 NW2d 421 (1971).

In *Pearll v Bay City*, 174 Mich 643, 648-649; 140 NW 938 (1913), the plaintiff’s notice gave the wrong name of the street where she fell and was injured; however, the facts showed that the street was generally known by that name and bore a signpost with that name. The Court held that the notice substantially complied with the city charter’s requirement, which was worded nearly identically to the relevant part of MCL 224.21 (albeit with a 30-day limit): “setting forth substantially the time when, and place where, the injury occurred.” *Id*. at 646. The Court stated that the purpose of the provision was to provide notice to the authorities “that a claim for damages is made, and advise them of the time, place, nature, and result of the alleged accident, and a sufficient statement of the main facts, together with names of witnesses, to direct them to the sources of information that they conveniently may make an investigation.” *Id*. at 647.

Similarly, here, the description plaintiff provided was sufficient to put defendant on notice of the claim and to investigate possible sources of further information from witnesses. The written notice, including the text of the police report, placed the location about a

mile south of where the accident actually occurred. However, the drawing in the police report showed that the accident occurred on the curve of the road, and defendant's own garage foreman testified that there was no other curve on the highway. "[T]o be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself." *Overton v Detroit*, 339 Mich 650, 657; 64 NW2d 572 (1954), quoting *Barribeau v Detroit*, 147 Mich 119, 125; 110 NW 512 (1907). In this case, there is no evidence that the "interested parties" were unable to identify the location from the notice that was provided. The written and drawn descriptions render the notice sufficient under MCL 224.21 to put defendant on notice and to permit defendant to fully investigate the accident.

B. SUFFICIENCY OF THE SERVICE

MCL 224.21(3) directs that "service [of an action] shall be made upon the clerk and upon the chairperson of the board" and "notice in writing [served] upon the clerk and upon the chairperson of the board of county road commissioners." Defendant asserts that the modifier "of the board of county road commissioners" applies to both "the clerk" and "the chairperson," while plaintiff asserts that "the clerk" means the county clerk.

Under the "last antecedent" rule of statutory construction, "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). Because "the clerk" in other sections of the act is used to refer to the county clerk (see, e.g., MCL 224.2, expressly referring to "the county clerk,"

followed by MCL 224.3, "said clerk," MCL 224.6(2), "the clerk," and MCL 224.7, "the clerk of such county"), we conclude that "the clerk" refers to the county clerk in MCL 224.21 as well.

The statute's legislative history also supports this conclusion. Originally, the statute allowed service of a complaint on "the chairman of the board of supervisors or the county clerk" and had no notice requirement. 1909 PA 283. This was amended by 1919 PA 388, which added the requirement of notice served within 60 days "upon the county clerk or deputy county clerk." The Legislature then amended both the service of the complaint and the service of notice provisions; service of the action was on "a member of the board of county road commissioners of the county and upon the clerk of the board," and service of notice of intent was on "a member of such board of county road commissioners and the clerk and upon the chairman of the board of county road commissioners of such board." MCL 224.21, as amended by 1951 PA 234. In 1954, the language was simplified and made consistent so that both service-related provisions referred to service "upon the clerk and upon the chairman of the board." MCL 224.21, as amended by 1954 PA 12. This language was later updated to the gender-neutral "chairperson." MCL 224.21(3), as amended by 1996 PA 23. Thus, the statute at one time specified "the clerk of the board," but the Legislature changed it to read "the clerk." "[I]n construing an amendment to a statute, it is presumed that a change in phraseology implies that a change in meaning was also intended." *Greek v Bassett*, 112 Mich App 556, 562; 316 NW2d 489 (1982), citing *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 205; 13 NW2d 260 (1944), and *Mich Transp Co v Secretary of State*, 41 Mich App 654, 665; 201 NW2d 83 (1972). The Legislature's change therefore

supports an interpretation that "the clerk" means the county clerk. Accordingly, the phrase "the clerk" would not be modified by "of the board of county road commissioners."

Regardless, defendant was properly served. In this case, plaintiff served her notice of intent on both the chairperson of the county board of road commissioners and the county clerk.

III. DAMAGES

Appellant also argues that the plain language of MCL 691.1402 does not permit a claimant to recover damages for anything beyond bodily injury or damage to property. We disagree. Our Supreme Court's decision in *Hannay v Dep't of Transp*, 497 Mich 45; 860 NW2d 67 (2014), compels a conclusion in favor of plaintiff. Extending the reasoning of *Hannay* to the highway exception is a question of first impression.

This issue presents a question of statutory interpretation, which we review de novo. *Id*. at 57.

The Michigan Supreme Court held in *Hannay* that the phrase "liable for bodily injury" in MCL 691.1405 "means legally responsible *for damages flowing from* a physical or corporeal injury to the body." *Hannay*, 497 Mich at 64. The Court explained that " 'bodily injury' is simply the category of harm (i.e., the type of injury) for which the government waives immunity under MCL 691.1405 and, thus, for which damages that naturally flow are compensable." *Id*. The Court explained that such damages include noneconomic damages, noting:

> It is a longstanding principle in this state's jurisprudence that tort 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 emphasized that " 'damages' and 'injury' are not one and the same—damages *flow from* the injury." *Id*. at 64. Under this analysis, a person suffering an injury because of an improperly maintained highway may recover the damages naturally flowing from that injury.

However, defendant argues that *Hannay* is limited to the motor vehicle exception, and that the rhetorical differences between the two statutes preclude extending *Hannay*'s holding to the highway exception. The text of *Hannay* itself instructs otherwise. The *Hannay* Court found applicable the analysis employed in *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), which did not involve the motor vehicle exception, in which the Court had interpreted the phrase "tort liability" found in "the GTLA's broad grant of immunity, MCL 691.1407(1)." *Hannay*, 497 Mich at 60-61.

> [O]ur interpretation of "tort liability" in MCL 691.1407(1) informs how to interpret the phrase "liable for" in the motor vehicle exception. We see no reason why this Court's prior analysis of the word "liability," which stems from the word "liable," should not likewise apply in this case, particularly given that the phrases "tort liability" and "liable for" are contained within the same statute—the GTLA. [*Id*. at 61-62, citing *Robinson*, 486 Mich at 17 ("[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute.").]

In this case, the wording of the two statutory exceptions is substantially similar. Because the statutes of the GTLA should be read with consistency where

possible, we conclude that the reasoning set forth in *Hannay* should be applied to MCL 691.1402. *Robinson*, 486 Mich at 17.

The essential language of the highway exception reads, "A person who sustains bodily injury or damage to his or her property . . . may recover the damages suffered by him or her from the governmental agency." MCL 691.1402(1). In comparison, the motor vehicle exception, MCL 691.1405, reads, "Governmental agencies shall be liable for bodily injury and property damage . . . ." Under either statute, damages must arise from bodily injury. The specificity of MCL 691.1402(1) that the person may "recover the damages suffered" is clearer than the motor vehicle exception in permitting a plaintiff to "recover the damages" flowing from the "bodily injury or damage to his or her property." The trial court correctly concluded that plaintiff's damages should not be limited in the way defendant favored, albeit for the wrong reasons. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989). Plaintiff is entitled to all damages naturally flowing from her injury.

Affirmed.

SAAD, P.J., and O'BRIEN, J., concurred with STEPHENS, J.

In re SKIDMORE ESTATE (ON RECONSIDERATION)

Docket No. 323757. Submitted January 12, 2016, at Lansing. Decided January 19, 2016, at 9:05 a.m. Reconsideration granted and opinion vacated by Court of Appeals order entered May 24, 2016, and new opinion issued May 24, 2016, at 9:25 a.m. By order of the Michigan Supreme Court, 500 Mich 967 (2017), the May 24, 2016 opinion reported at 315 Mich App 470 was vacated and the January 19, 2016 opinion reported at 314 Mich App 777 was reinstated and clarified.

Ralph Skidmore, Jr., individually and as personal representative of the estate of Catherine D. Skidmore, deceased, brought an action in the Calhoun Circuit Court against Consumers Energy Company, alleging that Consumers failed to exercise reasonable care to maintain its power lines when an elevated power line fell in a residential area on a calm evening and that Consumers' negligence was a proximate cause of Catherine's death because Catherine was electrocuted by the downed power line in her neighbor's yard when she ran to the neighbor's house to warn the neighbor that his van was on fire. Consumers moved for summary disposition, alleging that it was not reasonably foreseeable that Catherine would run to the house where the power line had fallen and that Consumers therefore owed her no duty. The court, James C. Kingsley, J., granted Consumers' motion for summary disposition. The Court of Appeals, SHAPIRO, P.J., and O'CONNELL and BORRELLO, JJ., reversed and remanded in an opinion issued on January 19, 2016. Both plaintiff and defendant timely moved for reconsideration, asserting that the January 19, 2016 opinion required clarification. On May 24, 2016, the Court of Appeals, SHAPIRO, P.J., and BORRELLO, J. (O'CONNELL, J., dissenting), granted both motions for reconsideration and vacated the January 19, 2016 opinion.

On reconsideration, the Court of Appeals *held*:

1. To prove negligence, a plaintiff must show that a defendant owed the plaintiff a duty of care, the defendant breached that duty, the plaintiff was injured, and the defendant's breach caused the plaintiff's injury. A power company has a duty to

reasonably inspect and repair wires and other instrumentalities in order to discover and remedy defects, which involves more than merely remedying defective conditions actually brought to its attention. This duty includes an obligation to reasonably inspect for fraying power lines; however, this duty does not include guarding or warning against every possible contact with elevated power lines. In this case, defendant's duty to maintain its power lines in reasonable condition was directly at issue, and the allegation was that it was foreseeable that a failure to do so would result in a line falling to the ground, creating a new and distinct potential for electrocution, not that Consumers should have foreseen accidental contact with an elevated power line. Moreover, it was reasonably foreseeable that persons in a residential area would act in response to an emergency to aid a neighbor.

2. Consumers' argument that Catherine did not take reasonable care to avoid the power line that had fallen in the neighbor's yard failed on both factual and legal grounds. Factually, too many questions of fact remained for summary disposition to be appropriate, including whether Catherine understood that a power line had fallen when she ran toward the neighbor's house, whether any of the neighbors had called out to warn Catherine that a power line had fallen, and whether Catherine herself had seen the power line given that all the witnesses unanimously testified that it had been very dark that night, that there was no sparking or fire in the area where Catherine was walking, and that they had been unable to see the power line in the yard until Catherine made contact with it and the fire of her electrocution lit the area. Legally, Consumers' argument failed because it depended on treating this general negligence case as a premises liability case. The open-and-obvious-danger doctrine had no applicability because only a party that owns or controls the subject property may assert that its duty was limited by an open and obvious hazard. Consumers had neither ownership nor control of the property that its power line fell onto, and Consumers was not allowed to assert the legal privileges of that owner. The mere fact that the injury had occurred on a third party's premises did not transform this case about proper maintenance of high-voltage power lines into a premises liability case.

Reversed and remanded.

O'CONNELL, J., concurring in part and dissenting in part, concurred with the result reached and the reasoning regarding

duty in the opinion on reconsideration, but dissented from the portion of the majority opinion that rejected Consumers' arguments on both factual and legal grounds. Judge O'CONNELL would have denied the motions for reconsideration and remained with the analysis in the original opinion because the original opinion clearly recognized that the existence of a disputed question of fact regarding the reasonableness of Catherine's actions did not affect whether Consumers owed Catherine a duty and because the discussion of premises liability—an issue neither raised before the trial court nor argued by the parties on appeal or reconsideration—was unnecessary.

Mark Granzotto, PC (by *Mark Granzotto*), and *Kline & Specter, PC* (by *Shanin Specter* and *Charles L. Becker*), for Ralph Skidmore, Jr.

Smith Haughey Rice & Roegge (by *John R. Oostema*, *E. Thomas McCarthy, Jr.*, and *D. Adam Tountas*) and *Jacobs and Diemer, PC* (by *John P. Jacobs* and *Timothy A. Diemer*), for Consumers Energy Company.

ON RECONSIDERATION

Before: SHAPIRO, P.J., and O'CONNELL and BORRELLO, JJ.

SHAPIRO, P.J. Defendant, Consumers Energy Company, is an electrical utility and transmits high-power electricity over elevated wires. Shortly after dark, on July 19, 2011, one of Consumers' high-voltage power lines fell to the ground in a residential neighborhood. Catherine Skidmore (Cathy) was electrocuted when she came into contact with the fallen line. Plaintiff Ralph Skidmore, individually and as personal representative of his wife's estate, brought suit, alleging that the elevated power line fell due to a failure by

Consumers to exercise reasonable care to maintain its lines and that Consumers' negligence was a proximate cause of his wife's death. Consumers filed a motion for summary disposition, asserting that it was not reasonably foreseeable that Cathy would run to the house where the downed power line had fallen and that it therefore owed her no duty. The trial court agreed and granted summary disposition. We reversed and remanded. Both plaintiff and defendant timely filed motions for reconsideration asserting that our opinion required clarification, and we granted both motions. We again reverse and remand.

I. FACTUAL BACKGROUND

Cathy was electrocuted as she ran onto the side yard of her across-the-street neighbor, Roddy Cooper, and came in contact with a high-voltage wire that was on the ground. The incident occurred after dark.

Cooper's house sat on the corner of Shirley Avenue and Winnifred Street. Its front door and enclosed porch faced onto Shirley, and it had a long side yard fronting on Winnifred with several windows. The Skidmores lived on Winnifred, directly across the street from Cooper's side yard. At the end of the long side yard, where the backyard began, there was a driveway on which Cooper's red van was parked.

A. EYEWITNESSES TO THE INCIDENT

The lower court record contains portions of the deposition testimony of four eyewitnesses to the incident. Ralph Skidmore (Ralph), James Beam, and Don Stutzman viewed the events from outside Cooper's house, and Cooper viewed the events from inside his

house. Each eyewitness testified that the evening of July 19, 2011, was warm and calm and that shortly after dark they heard a loud boom, following which the street lights in the area went out. Beam, Stutzman, and Ralph all observed sparks and light at the red van in Cooper's driveway. Concerned that the van might explode or set fire to Cooper's house, Beam, Stutzman, and Cathy each went to Cooper's house to warn him.

1. JAMES BEAM'S TESTIMONY

Beam testified that after hearing the boom, he stepped out onto his porch, at which point "I seen [sic] the sparks on top of the van which was flashing light." Stutzman was next to him, and together they ran to Cooper's house "[t]o let them know that their van had sparks shooting off of it. It looked like it was going to catch on fire, maybe explode. It was just kind of a panicked instinct, I guess, to try to warn them to just get away from it."[1] He and Stutzman banged on the front door and front window and yelled to Cooper that there was a fire. While he was at the front of Cooper's house, Beam saw Cathy run across Winnifred Street going from her house to Cooper's side yard. As she entered Cooper's side yard, Beam yelled "[s]top," but Cathy did not turn in his direction, and he did not know if she heard him. He then heard a "loud pop," and "[s]he dropped to the ground and burst in[to] flames." Cathy's husband, Ralph, came running over with a fire extinguisher, which Stutzman took from him and used to try to put out the flames.

[1] When asked what he and Stutzman planned to do next if Cooper did not come to the door, Beam stated, "There was no planning. There was no thought. It was just a reaction to an emergency."

On cross-examination by plaintiff's counsel, Beam was asked whether he had seen the power line in the grass before Cathy came into contact with it. He testified as follows:

> *Q*. Now you talked to counsel about Mrs. Skidmore coming in contact with the wire . . . and things of that nature. Is it fair to say, Mr. Beam, that before she contacted the wire you didn't actually know it was even in the yard?
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> * * *
>
> *A*. Yes.
>
> *Q*. Was there any sparking that you saw at any point prior to the accident, any sparking on the grass?
>
> *A*. No.
>
> *Q*. Anything at all that would suggest to you visibly that a power line was laying in the grass?
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> * * *
>
> *A*. No.

2. DON STUTZMAN

Stutzman testified that he heard a loud pop and went outside with Beam to see what was going on. He testified that he could see sparks in two places, at the transformer at the top of the utility pole at Shirley and Winnifred and by Cooper's van in the driveway on Winnifred. Although he could not see the rest of the line, he concluded that it was somewhere along the side of Cooper's house. When he saw Cathy "fast walk[ing]" into the side yard, he yelled for her to stop, but could not tell if she heard him over the noise. He testified:

> *Q*. Did it look like she heard you?
>
> *A*. Can't tell.

Q. And so you saw Ms. Skidmore come in contact with the wire?

A. Not visually seen it, but she was there one minute and gone the next.

Q. So you saw her walking across the yard and then just fall.

A. Correct.

Q. And you're assuming that's because she touched the wire?

A. Yes.

Stutzman also testified that until Cathy went down and caught fire, there had been no fire in the yard and that the area had been dark. When asked to further describe the visibility of the wire, he stated that it was dark and that the line was "black-grey." He stated that "you can barely pick out most of [the] lines. So if it's dark outside and you can't see anything, it's kinda hard to see a black line." He explained:

Q. Was there any sparking or lighting in the proximity of the line on the grass before that incident?

A. Not that I could see.

Q. Was there anything at all visually that would tell somebody running by there that there was a power line in the grass at that time?

* * *

A. No.

After Cathy fell to the ground and caught fire, Ralph approached with a fire extinguisher. Stutzman took it from him, went to Cathy, and sprayed her with it.

3. RODDY COOPER

According to Cooper, the power line that broke runs above the southeastern corner of his house. Cooper

heard a loud boom, followed by a brilliant flash and a buzzing sound. He looked out his back door and saw flames and a wire on the ground next to his van, and he saw the wire sliding toward a bush. He realized a power line had come down, so he called 911. While he was speaking with the 911 operator, he heard several people (apparently Beam and Stutzman) knocking at his front door. He heard various people yelling "fire." He stood at his dining room window, which is about halfway along the side of the house. He could see across the street to the Skidmore house. He saw Cathy, who lived across the street, come out onto her side porch and call out, "Oh, my God, there's a fire. Ralph, Ralph." As he looked from the dining room window to the rear of the house (his left as he stood looking out the dining room window), he saw sparks and flames by the van. To his right, along the side yard, there were no flames or sparks. Nor were there any by the kitchen windows that were between the dining room and the driveway.

Cooper was asked whether there was any reason that Cathy would have had trouble "see[ing] a power line down when she ran across from her house to go warn you at your house[.]" He answered that "it was dark out in the yard. I didn't even see the line. I couldn't see the line, and I was right there." He stated that the line was sparking and arcing by the back door next to the van, "but out in the yard or wherever it was it came from, I couldn't see where it was going from there. . . . The only lights that I could see out there was street lights and window lights in the distance but everything in between was black. I mean I saw a silhouette. Even after Cathy was down, I saw a silhouette of people out in the road and they were just dark shadows. They were dark shadows. It was dark out there."

4. RALPH SKIDMORE

Ralph testified that as he was getting into bed that evening at about 10:00 p.m., the lights flickered briefly. A few minutes later, Cathy, who was in the front room of the house where the window provided a view of Cooper's house across the street, called out that Cooper's van was on fire and that she was afraid it would explode. Ralph came to the front room, looked out the window with Cathy, and saw that "the van was on fire. You could see glowing and everything." They saw "sparks" and "bright flashes of light" on the side of the van facing toward the rear of the Cooper house. He heard sounds that "sounded like somebody was welding." Ralph stated, "I thought the van was on fire. I'm not sure exactly what was making all the sparks and the smoke and everything. . . . In my mind, there was something going on with the power lines." He agreed that he thought a power line had likely fallen.

According to Ralph, Cathy made no statements to him other than that she thought the van was on fire and that they needed to get Cooper out of his house. She said she thought the van might explode, and she ran out of the house to warn him. Ralph followed her outside and saw her run towards Cooper's dining room windows, inside of which he could see Cooper standing. He then saw her fall and catch fire.

Cathy died from her injuries.

B. TESTIMONY CONCERNING DEFENDANT'S ALLEGED FAILURE TO SECURE AND MAINTAIN ITS ELEVATED POWER LINE

According to Ralph, the power lines in the neighborhood had been a problem for about 25 years, and the power would go out two or three times each summer. Stutzman and Beam also testified about frequent

power outages and electrical problems. Ralph testified that following a windstorm in May 2011, Consumers worked on the lines, but neighbors complained about the power lines being too tight, including the line that broke on the night of the accident. Beam testified that the line in question had been suspended from a short pole anchored to the remaining portion of the original pole that had broken during the May storm.

Ralph testified that a power line had also fallen one year before the accident, and Cooper testified that the subject incident was the second consecutive summer that a high-voltage line had fallen in his yard. Cooper testified that he told the workers that the trees needed to be trimmed and that neighbors had complained about the trees causing arcing and sparking during wind and rain. James Leahy, a journeyman line worker, testified that if a tree touches a line and causes a repeated arc, the power line may fall. However, other deponents testified that there are many reasons why a power line could fall, including the activities of weather and animals.

Dr. Campbell Laird, one of the estate's experts, opined that Consumers lacked a "systematic inspection system" for the maintenance of vegetation surrounding power lines. Laird averred that a properly maintained power line should not fall absent some trauma to the line. Richard L. Buchanan, a public-utility expert, opined that Cathy's death was caused by poor vegetation management. Buchanan further opined that the same power line that had fallen on the night of July 19, 2011, had also fallen in July 2010. Therefore, Buchanan asserted that the 2010 incident with the power line should have alerted Consumers about the condition of the power lines in Cathy's neighborhood. Buchanan concluded that Consumers violated industry

standards by failing to conduct preventative vegetation trimming.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When a party moves for summary disposition under MCR 2.116(C)(8) and (10), and the trial court considers documents outside the pleadings when deciding the motion, we review the trial court's decision under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. (citation and quotation marks omitted). A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013). Whether a defendant owed a plaintiff a duty is a question of law that this Court reviews de novo. *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 504; 740 NW2d 206 (2007).

III. DUTY

To prove negligence, a plaintiff must show that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the defendant's breach caused the plaintiff's injury. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Every person engaged in the performance of an undertaking has a duty

to use due care or to not unreasonably endanger the person or property of others." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). But if it is not foreseeable that the defendant's conduct could pose a risk of injury to a person with whom the defendant has a relationship, then there is no duty not to engage in that conduct. *Certified Question*, 479 Mich at 508.

The extent of duty that an electric utility company owes the public has been a topic of this state's jurisprudence for over a century. See *Huber v Twin City Gen Electric Co*, 168 Mich 531; 134 NW 980 (1912); *Laney v Consumers Power Co*, 418 Mich 180; 341 NW2d 106 (1983).

The issue was extensively explored in *Schultz v Consumers Power Co*, 443 Mich 445; 506 NW2d 175 (1993). In *Schultz*, the plaintiff's decedent was electrocuted while helping a friend paint his house. *Id*. at 447. The plaintiff's decedent was moving a 27-foot aluminum extension ladder and was electrocuted even though the ladder never touched the elevated wires. *Id*. at 447-448. The plaintiff alleged that a fray in the wire, which resulted from inadequate maintenance, allowed the electrical current to arc, i.e., jump through the air, to the nearby ladder. *Id*. at 448-449.

Our Supreme Court held that "a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects." *Id*. at 451. This duty "involve[s] more than merely remedying defective conditions actually brought to its attention." *Id*. at 454.[2] It

[2] In *Case v Consumers Power Co*, 463 Mich 1, 7-8, 8 n 8; 615 NW2d 17 (2000), the Supreme Court clarified that a utility's general duty is always one of reasonable care, but that when the risk "involve[s] the dangers of unintended contact with high-voltage electricity," the "spe-

is not a leap to conclude that this duty includes an obligation to reasonably inspect for fraying lines, as is alleged here, because a frayed line was responsible for the injury in *Schultz*.

This duty does not, however, include guarding or warning against every possible contact with elevated power lines. In Chief Justice BRICKLEY's lead opinion resolving the consolidated cases in *Groncki v Detroit Edison Co*, 453 Mich 644, 657, 660; 557 NW2d 289 (1996) (opinion by BRICKLEY, C.J.), the Supreme Court rejected several claims involving incidents in which individuals accidentally came in direct contact with power lines that were elevated and that were not alleged to be defective or improperly maintained. The Court held that the defendant could not have foreseen that equipment would come into contact with its reasonably maintained elevated powerlines. *Id*. Similarly, in *Valcaniant v Detroit Edison Co*, 470 Mich 82, 84-85; 679 NW2d 689 (2004), the Supreme Court rejected a case in which the plaintiff was shocked when the highest edge of a dump truck severed the overhead power lines. Again, the Court explicitly noted that there were no allegations that the lines were not properly inspected and maintained. *Id*. at 86.

Consumers contends that this case is on all fours with *Groncki* and *Valcaniant*. We disagree. Both cases are plainly distinguishable. First, in *Groncki* and *Valcaniant*, the Court specifically noted that the defendant's duty to maintain the lines in reasonable condi-

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cific standard of care required in order to avoid breaching the general standard" includes "an obligation to reasonably inspect and repair wires." When the danger is of a different magnitude, as in *Case*, in which the danger was merely of "stray voltage" affecting the milk production of dairy cows, the Court held that only the general duty instruction should be given and that it is for the jury to determine what precise actions are required to meet the duty of reasonable care. *Id*. at 9-11.

tion was *not* at issue. By contrast, in this case the state of repair of Consumers' lines is directly at issue.[3] Second, the allegation in this case is not that Consumers should have foreseen accidental contact with an *elevated* power line; it is that Consumers should have foreseen accidental contact with a *power line that fell to the ground*. The risks of accidental contact with a live power line suspended in the air and accidental contact with a live power line on the ground are fundamentally different.[4]

Consumers argues that the unforeseeability of contact with a properly elevated power line necessitates a finding that contact with a power line that has fallen to the ground is also unforeseeable. However, this case bears no resemblance to the cases cited by defendant in which a person using a large ladder or piece of industrial equipment made contact with a properly maintained *elevated* power line well out of the reach of individuals passing by. Rather, this case involves the question of whether Consumers breached its duty to reasonably maintain its power lines and that as a result of that breach, a line fell to the ground, thereby creating a new and distinct potential for electrocution.

Moreover, it is reasonably foreseeable that persons in a residential area would act in response to the emergency to aid a neighbor. Indeed, both Beam and Stutzman also attempted to rescue Cooper. "[R]escu-

[3] Plaintiff has not alleged that the lines should not have been placed where they were or that they should have been placed at a higher elevation, only that they should have been maintained so as not to fall to the ground on a calm day.

[4] As stated by Chief Judge Cardozo of the New York Court of Appeals in an axiom familiar to any first-year law student, "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v Long Island R Co*, 248 NY 339, 344; 162 NE 99 (1928).

ers, as a class, are foreseeable." *Solomon v Shuell*, 435 Mich 104, 135; 457 NW2d 669 (1990) (opinion by ARCHER, J.).

> If the rescue attempt itself is reasonable, then the rescuer is not deemed *comparatively* negligent merely for voluntarily exposing himself to an increased risk of harm in order to save another. The second step of the analysis is to determine whether the rescuer carried out the rescue attempt in a reasonable manner. If the rescuer did not, then the rescuer's recovery is reduced by his comparative degree of fault. [*Id*. at 136.][5]

While rescuers must act reasonably, whether they did so is a question of fact, not a question of law. *Id*. at 135-136.[6]

Defendant nevertheless argues that this case had to be dismissed because Cathy failed to take reasonable care to avoid the wire that had fallen in Cooper's yard. Even putting aside the rescue doctrine, we reject this argument on both factual and legal grounds.

We reject defendant's argument factually because defendant may not simply wish away the many questions of fact that are present in this case. Whether Cathy even understood that a power line had fallen

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[5] Two other Justices concurred in Justice ARCHER's opinion in full. Justice BOYLE wrote a separate concurrence signed by two other Justices in which she agreed that "the rescue doctrine provides that a rescuer is not deemed comparatively negligent merely for exposing himself to an increased risk of harm in order to save another so long as 1) it is not unreasonable to undertake the rescue, and 2) the rescue is carried out in a reasonable manner." *Id*. at 151 (BOYLE, J., concurring). The seventh Justice did not disagree, but concluded that an erroneous jury instruction regarding the rescue doctrine was harmless. *Id*. at 153-154 (GRIFFIN, J., dissenting).

[6] That the reasonableness of a rescue is a question of fact holds true to the general principle that a plaintiff's comparative negligence does not alter the nature of the defendant's initial duty. See *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 98; 485 NW2d 676 (1992).

anywhere on Cooper's property is a question of fact. She presumably saw what her husband saw when looking out the window, which supports the view that she saw that a line was down. However, Ralph testified that the only statement his wife made was that the "neighbor's van is on fire," and Cooper testified that Cathy called out to him that there was a "fire." She made no statement about a downed power line to anyone. In addition, no one testified that they called out to her that a live power line had fallen. Moreover, even if she was aware that a line had fallen on the van, there is no evidence that she saw the power line in the yard, let alone in her path. The eyewitnesses all agreed that the only place the line could be seen was at Cooper's van, a significant distance from the dining room window that she was approaching. They unanimously testified that it was very dark, that there was no sparking or fire in the area where Cathy was walking, and that they had been unable to see the downed line in the grass where Cathy was electrocuted or even anywhere in the yard until the glow and fire of her electrocution lit the area.

We also reject the argument legally because Consumers is essentially claiming that this case should be treated as a premises liability case and that the fallen power line was an open and obvious hazard. However, the open-and-obvious-danger doctrine has no applicability to this case. It is axiomatic that only a party that owns or controls the subject property may assert that its duty was limited by the open-and-obvious-danger doctrine. Had the estate sued the owner of the subject property, the owner could properly argue that his duty is limited to dangers that are not open and obvious and do not "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518-519; 629 NW2d

384 (2001). However, Consumers had neither ownership nor control of the property its power line fell onto, and Consumers may not assert the legal privileges of that owner. The mere fact that the injury occurred on a third party's premises does not transform a case about proper maintenance of elevated high-voltage power lines into a premises liability case.

We reverse and remand for further proceedings consistent with this opinion.[7] We do not retain jurisdiction. As the prevailing party, the estate may tax costs. MCR 7.219.

BORRELLO, J., concurred with SHAPIRO, P.J.

O'CONNELL, J. (*concurring in part and dissenting in part*). The adage "be careful what you wish for" comes to mind. In asking this Court to clarify our previous opinion on the basis of concerns of what Consumers might argue based on overblown and distorted readings of this Court's prior opinion,[1] the estate opens a can of worms. The opinion on remand does not "correct" what either party contends are deficiencies with the previous opinion, but instead raises premises liability issues that were not raised or briefed below and are frankly irrelevant in this general negligence case.

[7] To the extent that Consumers raises causation issues on appeal, Consumers did not raise these issues below. "[A]n appellee need not file a cross-appeal to argue alternative reasons" to affirm, but the appellee must have presented the reasons to the trial court. *Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). We decline to address these unpreserved issues because they do not concern issues of law, they are not necessary to the resolution of the remaining issues, and our failure to rule on them will not work a manifest injustice. See *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

[1] Consumers, meanwhile, essentially restates the same arguments this Court previously rejected.

Rather than clarify or reach a different result than the previous opinion, the opinion on reconsideration simply confuses the issues more. I would therefore not grant reconsideration, and I remain with the analysis in the original opinion, which I restate here for convenience:

> A live power line on the ground is far more hazardous than a live power line in the air. In this wrongful death action, plaintiff Ralph Skidmore, Jr., individually and as the personal representative of the estate of Catherine Dawn Skidmore (collectively, the estate), appeals of right the trial court's order granting summary disposition in favor of defendant, Consumers Energy Company (Consumers), under MCR 2.116(C)(10). The trial court concluded that Consumers did not owe Catherine a duty because it was not foreseeable that she would run across her neighbor's darkened yard to warn him of a fire that resulted from a downed power line. We reverse and remand.
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> I. FACTUAL BACKGROUND
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> According to Ralph, the evening of July 19, 2011, was warm and clear. As Ralph was getting into bed that evening, the lights flickered and Catherine began screaming that a neighbor's van was on fire. Ralph looked out a window and saw sparks and fire coming from the van across the street. He could see that a power line had fallen on top of the van, and he explained that he could only see movement and light because it had fallen on the opposite side of the van.
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> Ralph testified that Catherine thought that the van might explode and was frantic with concern for the man who lived in the house across the street. Catherine "bolted out of the house" to warn the neighbor, Roddy Cooper. Ralph testified that Catherine ran for the window where the neighbor Cooper was standing. Ralph heard people yell for her to stop, but he opined that she likely did not hear them over the loud crackling of the electricity.

According to Cooper, the power line that broke runs above the southeastern corner of his house. Cooper heard a loud boom, followed by a brilliant flash and a buzzing sound. He looked outside and saw flashing sparks in a bush, so he called 911. The line was sliding "like it was pulling itself through the bush." Cooper saw Catherine on the porch on the northwestern corner of his home. She yelled to him that there was a fire, and he shouted back that he heard. As he was traveling to the other end of his house, he heard a sharp crack and a lot of yelling.

Cooper, Don Stutzman, and James Beam testified that Cooper's yard was dark. Stutzman and Beam testified that they could not see where the line was in the yard. They yelled at Catherine to stop but could not tell if she heard them. Ralph saw a wire twist around Catherine's legs. Catherine began shaking and then caught on fire. Despite efforts to put Catherine out with a fire extinguisher, she repeatedly lit on fire and died.

According to Ralph, the power lines in the neighborhood had been a problem for about 25 years, and the power would go off two or three times each summer. Stutzman and Beam also testified about frequent power outages and electrical problems. Ralph testified that following a windstorm in May 2011, Consumers worked on the lines, but neighbors complained about the power lines being too tight, including the line that broke on the night of the accident. Beam testified that the power line that broke was a short pole anchored to a pole that had been broken.

Ralph testified that a power line had also fallen one year before the accident, and Cooper testified that the incident in 2011 was the second consecutive summer that a high-voltage line had fallen in his yard. Cooper testified that he had told the workers that the trees needed to be trimmed and that neighbors had complained about the trees causing arcing and sparking during wind and rain. James Leahy, a journeyman line worker, testified that if a tree touches a line and causes a repeated arc, the power line may fall. However, other deponents testified that there are many reasons why a power line could fall, including the activities of weather and animals.

Dr. Campbell Laird, one of the estate's experts, opined that Consumers lacked a "systematic inspection system" for the maintenance of vegetation surrounding power lines. Laird averred that a properly maintained power line should not fall absent some trauma to the line. Richard L. Buchanan, a public-utility expert, opined that Catherine's death was caused by poor vegetation management. Buchanan asserted that the 2010 incident with the power line should have warned Consumers about the power lines in Catherine's neighborhood. Buchanan concluded that Consumers violated industry standards by failing to conduct preventative vegetation trimming.

The estate filed suit in May 2012. The estate asserted claims of negligence and negligent infliction of emotional distress, based, in pertinent part, on Consumers' duty to reasonably inspect and maintain its power lines. In July 2014, Consumers filed a motion for summary disposition, asserting that it was not reasonably foreseeable that Catherine would run into the downed power line. Following a hearing on the motion, the trial court concluded that Catherine's actions were not reasonable and, therefore, that Consumers did not owe Catherine a duty. It granted summary disposition. The estate now appeals.

II. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When a party moves for summary disposition under MCR 2.116(C)(8) and (10), and the trial court considered documents outside the pleadings when deciding the motion, we review the trial court's decision under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

A party is entitled to summary disposition 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 if, when viewing the record in the light most favorable to

the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013). Whether a defendant owed a plaintiff a duty is a question of law that this Court reviews de novo. *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 504; 740 NW2d 206 (2007).

III. DUTY

The estate contends that the trial court improperly conflated questions concerning whether Consumers owed Catherine a duty, a question of law, with comparative negligence, which is a question of fact for a jury to decide. We disagree, but we conclude that a question of fact precludes summary disposition.

To prove negligence, a plaintiff must show that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the defendant's breach caused the plaintiff's injury. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). But if it is not foreseeable that the defendant's conduct could pose a risk of injury to a person with whom the defendant has a relationship, then there is no duty not to engage in that conduct. *Certified Question*, 479 Mich at 508.

The extent of duty that an electric utility company owes the public has been a topic of this state's jurisprudence for over a century. See, e.g., *Huber v Twin City Gen Electric Co*, 168 Mich 531, 535; 134 NW 980 (1912). More recently, the Michigan Supreme Court has applied modern tort principles to explain an electrical utility company's duty to the general public. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993).

In *Schultz*, the plaintiff's decedent was electrocuted while helping a friend paint his house. *Id*. at 447. While

moving a 27-foot aluminum extension ladder, the defendant's medium-voltage electrical wires electrocuted the decedent. *Id*. at 447-448. The plaintiff alleged that a fray in the wire allowed the electrical current to arc to the nearby ladder. *Id*. at 448-449.

The Court held that "a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects." *Id*. at 451. This duty "involve[s] more than merely remedying defective conditions actually brought to its attention." *Id*. at 454. The Court reasoned that "it is well settled that electricity possesses inherently dangerous properties requiring expertise in dealing with its phenomena." *Id*. at 451.

However, this duty does not include guarding against every possible contact with the power lines. In Chief Justice BRICKLEY's lead opinion resolving the consolidated cases in *Groncki v Detroit Edison Co*, 453 Mich 644; 557 NW2d 289 (1996),[1] the Michigan Supreme Court rejected several claims involving accidental contacts with overhead wires. The Court explicitly recognized that the cases did not involve allegations of poorly maintained wires. *Id*. at 657, 660. Rather, in the specific circumstances of the cases, the defendant had no reason to foresee that equipment would come into contact with its reasonably placed power lines. *Id*. at 657, 660. And in *Valcaniant*, the Michigan Supreme Court rejected a case in which a dump truck's driver was shocked after accidentally severing overhead power lines. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 84-85; 679 NW2d 689 (2004). Again, the Court explicitly noted that the lines' state of repair was not pertinent to its holding, and the holding did not implicate the defendant's duty to inspect its lines. *Id*. at 86.

Consumers contends that it had no more duty in this case than the defendants had in *Groncki* and *Valcaniant*. We disagree.

First, each of these cases is distinguishable because the Court specifically noted that the state of repair of the

lines was not at issue. In this case, the state of repair of Consumers' lines is directly at issue. Second, Consumers fails to comprehend that the risks of accidental contact with a live power line suspended in the air and accidental contact with a live power line on the ground are fundamentally different. As stated by Chief Judge Cardozo of the New York Court of Appeals in an axiom familiar to any first-year torts student, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v Long Island R Co*, 248 NY 339, 344; 162 NE 99 (1928). If nothing else, people are more likely to be in close proximity to a power line on the ground than they are likely to be if the power line is suspended in the air.

The question is whether it is reasonably foreseeable that failing to reasonably inspect and maintain power lines would result in a dangerous situation to a person on the ground. *Schultz* answers this question in the positive, providing that "a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects." *Schultz*, 443 Mich at 451. It is not a leap to conclude that this duty includes an obligation to reasonably inspect for fraying lines because a frayed line was responsible for the injury in *Schultz*. An injury due to a live power line on the ground is far more foreseeable than an injury due to a power line in the air.

Consumers contends that it could not have expected that Catherine would run toward, rather than away from, the power line. However, that argument focuses too closely on the particular act that resulted in injury. The *Schultz* Court explained that the foreseeability of an injury depends, in part, on the expected uses of an area:

> Those engaged in transmitting electricity are bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard the attendant risks. *The test to determine whether a duty was owed is not whether the company should*

> *have anticipated the particular act from which the injury resulted*, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure. [*Id*. at 452 (emphasis added).]

The area surrounding the power line was residential. It is foreseeable that people would be using the surrounding streets and yards and would be at risk if the power line fell. We conclude that it was reasonably foreseeable that an injury could follow from failing to inspect and maintain a power line in a residential area.

Additionally, it is reasonably foreseeable that those persons in the residential area would act in response to the emergency. "[R]escuers, as a class, are foreseeable . . . ." *Solomon v Shuell*, 435 Mich 104, 135; 457 NW2d 669 (1990) (opinion by ARCHER, J.); *id*. at 151 (opinion by BOYLE, J.). Rescuers must act reasonably. *Id*. at 135 (opinion by ARCHER, J.). But whether the rescuer acted reasonably is a question of fact, not a question of law. *Id*. at 136.[2]

We conclude that there is an issue of material fact regarding whether Catherine acted reasonably. Ralph testified that he and Catherine both were aware that a power line had fallen. However, Ralph also testified that Catherine was frantic, concerned for her neighbor, and went to his home to warn him of the danger. Cooper testified that Catherine approached his southwestern door, away from obvious sparks and fire around the van at the house's southeastern corner. On the other hand, with the knowledge that there was a downed power line nearby, Catherine also ran across a darkened yard while people were yelling for her to stop. Even the trial court stated that whether Catherine's actions were reasonable constituted a close question. We conclude that reasonable minds could differ on this issue. Accordingly, the trial court erred when it granted summary disposition on the estate's claims on the basis that Consumers did not owe Catherine a duty.[3]

[1] The *Groncki* Court was fractured regarding its rationale. See *Valcaniant v Detroit Edison Co*, 470 Mich 82, 87 n 7; 679 NW2d 689 (2004) (providing an overview of the Justices' positions in *Groncki*).

[2] That the reasonableness of a rescue is a question of fact holds true to the general principle that the fact that a plaintiff was also negligent does not alter the nature of the defendant's initial duty. *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 98; 485 NW2d 676 (1992).

[3] To the extent that Consumers raises causation issues on appeal, Consumers did not raise these issues in the trial court. An appellee need not file a cross-appeal to argue alternative reasons to affirm, but the appellee must have presented the reasons to the trial court. *Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). We decline to address these unpreserved issues because they do not concern issues of law, they are not necessary to the resolution of the remaining issues, and our failure to rule on them will not work a manifest injustice. See *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

In sum, I concur in the result reached and the reasoning regarding duty in the opinion on reconsideration, but dissent from that portion of the majority opinion rejecting "on both factual and legal grounds" Consumers' arguments. Our prior opinion recognized that the existence of a disputed question of fact regarding the reasonableness of Catherine's actions did not affect whether Consumers owed Catherine a duty (indeed, regardless of the estate's stated confusion on the issue, it is hard to imagine that this Court could have been more clear than stating in the second footnote that the fact the plaintiff was also negligent did not alter the nature of the defendant's initial duty). And the discussion of premises liability, an issue neither raised below

nor argued by the parties on appeal *or reconsideration*, is unnecessary. The only question was whether the trial court properly granted summary disposition on the basis that Catherine did not act reasonably and, therefore, Consumers did not owe her a duty. I stand by this Court's initial analysis.

BANK v MICHIGAN EDUCATION ASSOCIATION-NEA

Docket No. 326668. Submitted May 3, 2016, at Detroit. Decided May 26, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 919.

Susan R. Bank brought an action in the Oakland Circuit Court against Michigan Education Association-NEA and Novi Education Association MEA-NEA, seeking declaratory and injunctive relief premised on the Public Employee Relations Act (PERA), MCL 423.201 *et seq*. Plaintiff was a member of the defendant unions and, in 2002, had authorized the deduction of her dues and fees unless she revoked the authorization between August 1 and August 31 of any year. Plaintiff attempted to resign her membership and revoke the authorization in September 2013. Defendants rejected that resignation. Plaintiff alleged that changes in the law rendered any contractual agreement to pay dues or resign only in August illegal or unenforceable, permitting her to resign at any time and leaving her not owing any outstanding fees or dues. Plaintiff further alleged that defendants breached their duty of fair representation by failing to advise her of the change in the law and its relevant effect. The court, Rae Lee Chabot, J., held that plaintiff's PERA claims were under the exclusive jurisdiction of the Michigan Employment Relations Commission (MERC), her claims of breach of duty of fair representation should be heard by MERC under the doctrine of primary jurisdiction, and the remainder of her claims were either outside the court's jurisdiction or were hypothetical and moot; the court granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. The gravamen of plaintiff's claims was that PERA, as amended in 2012, absolved her of any obligation to defendants, and defendants should have both advised her of that fact and honored it. Plaintiff's assertion that she alleged a valid contract claim was without merit. Plaintiff's contractual arguments were not primary arguments but were raised to rebut arguments made by defendants. Such arguments did not transform any of plaintiff's claims into contractual claims.

2. Under MCL 423.216, violations of MCL 423.210 are unfair labor practices remediable by MERC. MCL 423.210(2)(a) prohib-

its labor organizations or their agents from restraining or coercing public employees in the exercise of their rights guaranteed in MCL 423.209. MCL 423.209(2) prevents persons from using force, intimidation, or unlawful threats to compel or attempt to compel public employees to (a) become or remain members of labor organizations or bargaining representatives or affiliate with or financially support labor organizations or bargaining representatives, or (b) refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative. Therefore, defendants' actions as alleged by plaintiff were unfair labor practices pursuant to MCL 423.216 that were remediable by MERC. The trial court properly granted summary disposition in favor of defendants under MCR 2.116(C)(4).

3. Although claims of breach of the duty of fair representation by a labor organization may be raised in either an administrative or judicial proceeding, the doctrine of primary jurisdiction may be raised if enforcement of the claim requires resolution of issues that have been placed in the special competence of an administrative body. The doctrine requires the trial court to stay further proceedings to permit the parties a reasonable opportunity to obtain an administrative ruling. The three-part test to determine application of the primary-jurisdiction doctrine requires consideration of (1) to what extent the agency's specialized knowledge makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue would have an adverse impact on the agency's performance of its regulatory responsibilities. In this case, all three factors weighed in favor of deferring to MERC. Therefore, the trial court did not err by dismissing plaintiff's claim of breach of the duty of fair representation.

4. Defendants accepted a letter of resignation from plaintiff in August 2014. Plaintiff's claim for declaratory or injunctive relief to the effect that she had the right to resign earlier was moot because it was impossible for this or any other Court to craft any relief that would improve plaintiff's ability to do what she had already done. Plaintiff's claim for declaratory or injunctive relief to the effect that she owed outstanding fees or dues was not moot, but nothing in the record supported more than a possibility that a collections action would be initiated against her in the future. A threat was sufficient to warrant declaratory relief even if the threat remained dependent on future contingencies, but in this case, the communications did not rise to that level.

Affirmed.

Mackinac Center Legal Foundation (by *Patrick J. Wright* and *Derk A. Wilcox*) for plaintiff.

White, Schneider, Young & Chiodini, PC (by *Jeffrey S. Donahue* and *Catherine E. Tucker*), for defendants.

Before: MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Plaintiff appeals by right the trial court's dismissal of her claims on the ground that the trial court lacked subject-matter jurisdiction. We agree and affirm.

Plaintiff is a teacher in the Novi Community School District and was a member of defendants, the Michigan Education Association (MEA) and the Novi Education Association, both of which are unions. When plaintiff became a member in 2002, she signed a "Continuing Membership Application" authorizing the deduction of dues and fees "unless I revoke this authorization in writing between August 1 and August 31 of any year." Plaintiff's collective-bargaining agreement expired on June 30, 2013, but defendants deemed the Continuing Membership Application as a separate basis for ongoing membership and payment of dues or fees. Plaintiff attempted to resign her membership in September 2013, outside the August window, without sending a letter of resignation. Defendants rejected that resignation, but accepted plaintiff's subsequent letter of resignation in August 2014.

Plaintiff commenced the instant action, seeking several items of declaratory and injunctive relief, all premised on the Public Employee Relations Act (PERA), MCL 423.201 *et seq*., as amended in 2012 by the law called, in the vernacular, the "right to work" law, which permits employees to take advantage of

collective-bargaining agreements without actually paying any collective-bargaining units for their collective-bargaining efforts. Specifically, plaintiff contends that the changes in the law rendered any contractual agreement to pay dues or resign only during August illegal or unenforceable, so she, therefore, was entitled to resign at any time and owed no outstanding fees or dues. Plaintiff also contends that defendants breached their duty of fair representation by failing to advise her of the change in the law and its relevant effect. The trial court concluded that plaintiff's PERA claims were under the exclusive jurisdiction of the Michigan Employment Relations Commission (MERC), her claims of breach of the duty of fair representation should be heard by MERC pursuant to the doctrine of primary jurisdiction, and the remainder of her claims were either outside the court's jurisdiction or were "hypothetical and moot." The trial court therefore granted summary disposition in favor of defendants.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "[A] challenge to subject-matter jurisdiction may be raised at any time, even if raised for the first time on appeal." *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996). "Whether the trial court had subject-matter jurisdiction is a question of law that this Court reviews de novo." *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999). We review de novo questions of statutory interpretation, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003). We, likewise,

review de novo as a question of law the propriety of a trial court's decision regarding equitable relief on the facts as found by the court, but we will disturb those factual findings only if we find them clearly erroneous. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). A trial court's decision whether to grant or deny injunctive relief is reviewed for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

Plaintiff contends that she alleged a valid contract claim. We disagree. Her complaint asserts no such claim. The gravamen of her claims as articulated in her complaint is that PERA, as amended in 2012, absolved her of any obligations to defendants, and defendants should have both advised her of that fact and honored it. Plaintiff articulates an argument to the general effect that no *other* contractual clauses or agreements to which she assented exist that alternately bind her to any dues or membership obligations. However, it appears plaintiff raised those arguments not for the purpose of asserting a claim based on contract, but rather to rebut an argument made by defendants. A contractual argument does not necessarily transform any of plaintiff's claims into contractual claims.

PERA governs public-sector labor relations, and "MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA." *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 630; 227 NW2d 736 (1975); see also *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 463 Mich 353, 354-364, 359; 616 NW2d 677 (2000) (distinguishing a FOIA request made to a union from a request "to remedy a violation of the PERA or of the collective

bargaining agreement"). Pursuant to MCL 423.216, "[v]iolations of the provisions of [MCL 423.210] shall be deemed to be unfair labor practices remediable by [MERC]." One such provision, MCL 423.210(2)(a), prohibits labor organizations or their agents from "[r]estrain[ing] or coerc[ing] public employees in the exercise of the rights guaranteed in section 9 [i.e., MCL 423.209]."

Plaintiff's claims particularly pertain to the rights contained in MCL 423.209(2) as amended by the 2012 right-to-work law; the statute now[1] states in relevant part:

> No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
>
> (b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.

We note that MCL 423.210(3) contains another similar prohibition against requiring membership in a collective-bargaining organization, and MCL 423.209(3) provides an express fine for violation of MCL 423.209(2). However, neither of those provisions affects the plain language of MCL 423.210(2)(a) or MCL 423.209(2). Notably, the Legislature did not change MCL 423.210(2)(a) when it enacted the right-to-work law in 2012. We conclude that the plain language of MCL 423.210(2)(a) makes all the provisions of MCL 423.209,

[1] MCL 423.209 was again amended in 2014. 2014 PA 414.

including MCL 423.209(2), "rights guaranteed in section 9." Therefore, the violation thereof by defendants as alleged by plaintiff is an "unfair labor practice[]" pursuant to MCL 423.216.

Because MERC has exclusive jurisdiction over plaintiff's claim regarding a PERA violation, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(4). Furthermore, because it dismissed the claims on jurisdictional grounds, the trial court did not err by denying plaintiff's motion for summary disposition under MCR 2.116(C)(10); indeed, it could have done nothing else. See *Fox v Univ of Mich Bd of Regents*, 375 Mich 238, 242-243; 134 NW2d 146 (1965).

Plaintiff next contends that the trial court erroneously dismissed her claim of breach of the duty of fair representation. We disagree.

A person may assert a claim that a labor organization has breached its duty of fair representation in either an administrative or a judicial proceeding. *Demings v Ecorse*, 423 Mich 49, 63-64; 377 NW2d 275 (1985). However, the doctrine of primary jurisdiction can be raised " 'whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.' " *Attorney General v Diamond Mtg Co*, 414 Mich 603, 613; 327 NW2d 805 (1982), quoting *United States v Western P R Co*, 352 US 59, 63-64; 77 S Ct 161; 1 L Ed 2d 126 (1956). The doctrine requires the trial court to stay further proceedings to permit the parties a reasonable opportunity to obtain an administrative ruling. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 207; 631 NW2d 733 (2001).

Our Supreme Court has set forth a three-part test for courts to consider in determining the question of primary jurisdiction:

> First, a court should consider the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue[.] Second, it should consider the need for uniform resolution of the issue[.] Third, it should consider the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities. [*Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 71; 559 NW2d 647 (1997) (quotation marks and citation omitted).]

"Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body." *Id*. at 71-72. In this case, we conclude that they weigh in favor of deferring to MERC.

First, MERC has specialized expertise in ruling on the provisions of PERA. It "is the sole agency charged with the interpretation and enforcement of" public-sector labor law. *Cherry Growers, Inc v Agricultural Mktg & Bargaining Bd*, 240 Mich App 153, 164; 610 NW2d 613 (2000). The recent amendments of PERA and their effect on defendants' duties to their members require the agency's specialized knowledge of a complicated area of law. Second, there is a need for uniform and consistent application of labor practices. See *id*. In particular, this matter of defendants' duty to inform its members of the effects of changes in the law has statewide implications. We note that MERC is, at this time, already assessing the same arguments made by plaintiff here. A ruling of the circuit court in this case would have the potential to contradict the agency's decision in a case already before it and undermine uniformity and consistency in this complex field of law.

Third, for the same reason, judicial resolution of this issue could adversely affect the agency's performance of its regulatory responsibilities. Because there are many members in defendant MEA throughout the state of Michigan, it is important to have consistent resolution of the extent of representation those members can expect. Accordingly, the trial court, in assessing the factors relating to the question of primary jurisdiction, did not err and properly applied the doctrine of primary jurisdiction to this case.

Plaintiff finally argues that the trial court erred by dismissing the remainder of her claims as moot or hypothetical. We disagree.

An "actual controversy" must exist to invoke declaratory relief, and the requirement prevents a court from deciding hypothetical issues. *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978). While courts are not prohibited from reaching issues before actual injuries occur, *id*. at 589, declaratory relief is unwarranted if there is no threat that would subject the plaintiff to any disadvantage in ultimately setting forth and maintaining its legal rights. See *Flint v Consumers Power Co*, 290 Mich 305, 310; 287 NW 475 (1939). Plaintiff has already resigned from defendants; it is impossible for this or any other Court to craft any relief that would improve plaintiff's ability to do what she has already done. Plaintiff's claim for declaratory or injunctive relief to the effect that she had a right to resign earlier is, as the trial court found, moot.

In contrast, plaintiff's claim for declaratory or injunctive relief to the effect that she owes outstanding fees or dues is not moot; it is undisputed that defendants believe plaintiff to owe some $1,075.69 in unpaid membership dues for the 2013 to 2014 school year. It is

also undisputed that defendants have contacted plaintiff expressing the possibility that they might seek to collect those dues. Defendants also apparently have a policy of desiring to collect similar unpaid dues. Nevertheless, plaintiff's contention that defendants have threatened to *actually* do so is hyperbolic. We appreciate that it might be concerning to leave such a possibility lurking. Nonetheless, we find nothing in the record supporting more than the possibility that a collections action *could* be initiated. We agree with plaintiff that a *threat* is sufficient to warrant declaratory relief, even if the threat remains dependent on future contingencies. *US Aviex Co v Travelers Ins Co*, 125 Mich App 579, 585-586; 336 NW2d 838 (1983). However, in *US Aviex*, the plaintiff was explicitly ordered to take a particular action or it *would* be subjected to a lawsuit, even though no such lawsuit had materialized by the time of the trial. *Id*. at 583-584. The communications in this case simply do not rise to that level.

Affirmed.

MURPHY, P.J., and CAVANAGH, J., concurred with RONAYNE KRAUSE, J.

CASA BELLA LANDSCAPING, LLC v LEE

Docket No. 326237. Submitted May 11, 2016, at Detroit. Decided May 26, 2016, at 9:05 a.m.

Plaintiff, Casa Bella Landscaping, LLC, moved in the Wayne Circuit Court for entry of a default judgment against defendant, Javier E. Lee. Plaintiff also moved for the appointment of David Findling as the receiver for defendant and submitted Findling's qualifications with the nomination. Defendant did not object to the nomination within the time frame set forth in MCR 2.622(B)(1). The court, John H. Gillis, Jr., J., granted plaintiff's motion but appointed Steven E. Smith as receiver, not Findling. The Court of Appeals granted plaintiff's application for leave to appeal.

The Court of Appeals *held*:

1. With regard to the appointment of a receiver to administer a receivership estate, MCR 2.622(B)(1) provides that a moving party may request, or the parties may stipulate, the selection of a receiver. In the motion, the moving party must describe how the nominated receiver meets the requirement in Subrule (B) that a receiver selected by the court have sufficient competence, qualifications, and experience to administer the receivership estate, considering the factors listed in MCR 2.622(B)(5). If the nonmoving party does not file an objection to the moving party's nominated receiver within 14 days after the petition or motion is served, or if the parties stipulate the selection of a receiver, the court shall appoint the receiver nominated by the party or parties unless the court finds that a different receiver should be appointed. The Court rules must be read in their entirety to give every word effect and to avoid an interpretation that would render any part surplusage or nugatory. The plain language of MCR 2.622(B)(1) requires that if the nonmoving party does not object to the nominated receiver or the parties stipulate a receiver, before the trial court may appoint a different receiver, it must find that the receiver nominated by the party or parties is not qualified to serve as a receiver or should not be appointed for some other grounds articulated with specificity and supported by record evidence; to hold otherwise would grant the trial court unfettered discretion to disregard the nomination of

a qualified receiver, which would be inconsistent with the language of the rule.

2. In this case, the trial court made no findings indicating that Findling was not qualified to serve as a receiver; the trial court's statement that it would not use him was conclusory and insufficient to satisfy the MCR 2.622(B)(1) requirement that the court appoint the nominated receiver unless it finds that a different one should be nominated.

3. MCL 2.622(B)(5) provides that if the trial court determines a different receiver should be appointed than the receiver nominated by a party under MCR 2.622(B)(1), the court shall state its rationale for selecting a particular receiver after considering certain enumerated factors. Even if the trial court had properly found that Findling was unqualified and that a different receiver should be appointed, the trial court erred when it failed to refer to the enumerated factors under MCR 2.622(B)(5) when appointing Smith and did not state its rationale for selecting him.

Vacated and remanded.

COURTS — APPOINTMENT OF RECEIVER — NOMINATED RECEIVER NOT QUALIFIED — FINDINGS BY TRIAL COURT REQUIRED.

Under MCR 2.622(B)(1), if a nonmoving party does not file an objection to a moving party's nominated receiver within 14 days after the petition or motion is served, or if the parties stipulate the selection of a receiver, the court shall appoint the receiver nominated by the party or parties unless the court finds that a different receiver should be appointed; MCR 2.622(B)(1) requires that if the nonmoving party does not object to the nominated receiver or the parties stipulate a receiver, before the trial court may appoint a different receiver, it shall find that the receiver nominated by the party or parties is not qualified to serve as a receiver or should not be appointed for some other grounds articulated with specificity and supported by record evidence.

The Findling Law Firm, PLC (by *David Findling* and *John D. Stoddard*), for Casa Bella Landscaping, LLC.

Amicus Curiae:

Varnum LLP (by *Robert Mollhagen* and *Bryan Walters*) for Debtor/Creditor Rights Committee, Business Law Section of the State Bar of Michigan.

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

PER CURIAM. Plaintiff, Casa Bella Landscaping, LLC, appeals by leave granted[1] the trial court's order appointing Steven E. Smith as receiver for defendant, Javier E. Lee. Because we conclude that the trial court failed to follow the mandates of MCR 2.622(B), we vacate the court's order appointing Smith and remand for further proceedings consistent with this opinion.

In conjunction with a motion for default judgment against Lee, plaintiff filed a motion for the appointment of a receiver, nominating David Findling and submitting a filing stating Findling's qualifications to serve as receiver. Defendant did not object to the nomination within the time frame provided by MCR 2.622(B)(1). The trial court granted the motion to appoint a receiver, but instead of appointing plaintiff's nominee, the court appointed Smith. Plaintiff asserts on appeal that the trial court's appointment of Smith was in error because the trial court failed to follow the mandates of MCR 2.622. We agree.

"[C]onstruing and applying a court rule presents a legal issue subject to review de novo." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000). When interpreting a Michigan Court Rule, "[t]he principles of statutory construction apply . . . ." *Decker v Trux R Us, Inc*, 307 Mich App 472, 479; 861 NW2d 59 (2014). "We begin by considering the plain language of the court rule in order to ascertain its meaning." *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). "The intent of the rule must be determined from an examination of the court rule itself

[1] *Casa Bella Landscaping, LLC v Lee*, unpublished order of the Court of Appeals, entered August 11, 2015 (Docket No. 326237).

and its place within the structure of the Michigan Court Rules as a whole." *Id*. at 495 (quotation marks and citation omitted).

Plaintiff filed its motion pursuant to MCR 2.622(B)(1), which provides in pertinent part:

> Stipulated Receiver or No Objection Raised. The moving party may request, or the parties may stipulate to, the selection of a receiver. The moving party shall describe how the nominated receiver meets the requirement in subsection (B) that a receiver selected by the court have sufficient competence, qualifications, and experience to administer the receivership estate, considering the factors listed in subsection (B)(5). If the nonmoving party does not file an objection to the moving party's nominated receiver within 14 days after the petition or motion is served, or if the parties stipulate to the selection of a receiver, *the court shall appoint the receiver nominated by the party or parties, unless the court finds that a different receiver should be appointed.* [Emphasis added.]

It is undisputed that plaintiff requested the selection of a receiver, nominated Findling, and provided information in support of its belief that Findling had "sufficient competence, qualifications, and experience to administer the receivership estate . . . ." *Id*. It is also undisputed that defendant did not object to plaintiff's nomination within 14 days after the motion was served.

The rule provides that if the nonmoving party does not object or the parties stipulate the selection of a receiver, then "the court *shall* appoint the receiver nominated by the party or parties, unless the court finds that a different receiver should be appointed." MCR 2.622(B)(1) (emphasis added). In order to "find" that a different receiver should be appointed, the trial court must first find that the nominated receiver, as to whom there has been no objection, is not qualified to serve as a receiver or should not be appointed for some

other grounds articulated with specificity and supported by record evidence. A contrary interpretation would grant the trial court unfettered discretion to disregard the nomination of a qualified receiver, which is plainly inconsistent with the rule's provision that "the court shall appoint the receiver nominated by the party or parties . . . ." Court rules, like statutes, must be read to give every word effect and to "avoid an interpretation that would render any part of the [court rule] surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted).

The trial court made no findings that Findling was not qualified to serve as a receiver. Instead, when questioned about its rationale for not appointing Findling, the court merely stated that it "won't use them." The court's conclusory statement wholly fails to satisfy the requirement that the court appoint the nominated receiver unless it finds that a different receiver should be appointed.

The trial court also failed to follow MCR 2.622(B)(5), which applies when the trial court appoints a receiver other than one nominated by a party under MCR 2.622(B)(1). The rule provides:

> If . . . the court makes an initial determination that a different receiver should be appointed than the receiver nominated by a party under subsection (B)(1), the court shall state its rationale for selecting a particular receiver after considering the following factors:
>
> (a) experience in the operation and/or liquidation of the type of assets to be administered;
>
> (b) relevant business, legal and receivership knowledge, if any;
>
> (c) ability to obtain the required bonding if more than a nominal bond is required;

> (d) any objections to any receiver considered for appointment;
>
> (e) whether the receiver considered for appointment is disqualified under subrule (B)(6); and
>
> (f) any other factor the court deems appropriate. [MCR 2.622(B)(5).]

Assuming arguendo that the trial court correctly found that Findling was unqualified and that a different receiver should be appointed, the trial court made insufficient findings to support its selection of Smith as receiver. It did not refer to the factors set forth in MCR 2.622(B)(5) and did not "state its rationale for selecting a particular receiver . . . ." MCR 2.622(B)(5). The trial court merely stated in conclusory terms that Smith was in the bar journal, had a sole receivership practice, and did a lot of work for banks. The trial court's rationale for selecting Smith was insufficient and inconsistent with the rule.

In sum, the trial court did not comply with MCR 2.622(B)(1) because it failed to make and support findings that Findling was unqualified. It also did not comply with MCR 2.622(B)(5), because it failed to state its rationale for appointing Smith after considering the enumerated factors. We therefore vacate the trial court's order appointing Smith as receiver and remand to the trial court for further proceedings. Because Findling is representing plaintiff on appeal, he is no longer qualified to serve as the receiver for Lee. See MCR 2.622(B)(6)(f). Accordingly, on remand the trial court shall permit plaintiff to nominate another receiver, who should be considered by the trial court consistently with the requirements of MCR 2.622(B). We do not retain jurisdiction.

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

MENARD, INC v CITY OF ESCANABA

Docket No. 325718. Submitted April 7, 2016, at Lansing. Decided May 26, 2016, at 9:10 a.m. Leave to appeal sought.

Menard, Inc., filed a petition in the Michigan Tax Tribunal to appeal the city of Escanaba's tax assessment on a 166,196 square foot "big box" store for tax years 2012, 2013, and 2014. The parties agreed that the property must be assessed at its highest and best use (HBU), which was as an owner-occupied freestanding building. Although they disagreed on the valuation methodology employed, they agreed that the income approach was inapplicable, which left the sales-comparison and cost-less-depreciation approaches. The tribunal rejected Escanaba's roughly $8 million cost-less-depreciation valuation and adopted Menard's sales-comparison approach for a roughly $3.5 million valuation. Escanaba appealed.

The Court of Appeals *held*:

The tribunal made an error of law by failing to value the subject property at its HBU. Six of the eight comparables used in the sales-comparison valuation had deed restrictions, but the subject property had no such restrictions, so the sales-comparison value did not reflect the full value of the unrestricted fee simple. Deed restrictions that limit the ability of prospective buyers to use a property for its HBU necessarily limit the willingness of such buyers to purchase the property. Accordingly, a deed-restricted comparable could not be sold for its HBU. Given the prevalence of deed restrictions for former big-box stores, there are essentially no big-box stores being sold for their HBU. By using six deed-restricted comparables without any adjustments for the restrictions, the subject property was valued as a former owner-occupied freestanding retail building instead of for its HBU. The tribunal also erred by rejecting the cost-less-depreciation approach advanced by Escanaba. The cost-less-depreciation approach is used when (1) the HBU of a property is its existing use and (2) when, because the property was built-to-suit, there would be little to no secondary market for the property to be used at its

HBU. Although such an approach is generally used in an industrial setting, because deed restrictions imposed by other big-box-store owners drastically limited the actual market for such properties, it was appropriate in this case. Additionally, the tribunal's reliance on functional obsolescence to discredit this approach was misplaced. The testimony was not that there was a failure to adjust for functional obsolescence but rather that there was no adjustment because there was none in the subject property. Although Menard's valuation expert testified that it would be difficult to value functional obsolescence, he did not identify any functional obsolescence in the subject property. On remand, the tribunal had to take additional evidence with regard to the market effect of deed restrictions and on the cost-less-depreciation approach and make a new independent determination of value.

Reversed and remanded.

TAXATION — TRUE CASH VALUE — BIG-BOX STORES.

If deed restrictions drastically limit the actual market for similar "big box" store properties, it may be appropriate to use the cost-less-depreciation approach to determine true cash value (1) when the highest and best use of the property is its existing use and (2) when, because the property was built-to-suit, there would be little to no secondary market for the property to be used at its highest and best use.

Dykema Gossett, PLLC (by *Carl Rashid, Jr.*, *Jill M. Wheaton*, and *Blair D. Gould*), for Menard, Inc.

Bloom Sluggett Morgan, PC (by *Jack L. Van Coevering*, *Crystal L. Morgan*, and *Scott A. Noto*), for the city of Escanaba.

Amici Curiae:

Johnson Rosati Schultz & Joppich, PC (by *Stephanie Simon Morita*), for Michigan Municipal League, Michigan Townships Association, Michigan Association of School Boards, Michigan School Business Officials, Michigan Association of Counties, and Michigan Assessors Association.

Before: TALBOT, C.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM. This case arises out of ad valorem property tax assessments for the tax years 2012, 2013, and 2014. The subject property is a 166,196 square foot "big box" store built on 18.35 acres and located in Escanaba, Michigan. After a hearing on petitioner, Menard, Inc.'s challenge to respondent, city of Escanaba's tax assessment, the Michigan Tax Tribunal (the tribunal) rejected Escanaba's assessment and found in favor of Menard. Because we conclude that the tribunal made an error of law and its decision was not supported by competent, material, and substantial evidence, we reverse and remand.

I. FACTS

Menard filed a petition to appeal the ad valorem property tax assessments for tax years 2012, 2013, and 2014 for property located in Escanaba. Escanaba made the following valuations of the property: (1) in 2012, the true cash value (TCV) was $7,815,976; (2) in 2013, the TCV was $7,995,596; and (3) in 2014, the TCV was $8,210,938. Menard contended that the TCV for each year was only $3,300,000.

In support of its position, Menard submitted a valuation appraisal prepared by Joseph Torzewski, a commercial real estate appraiser. Torzewski opined in his report that the property's highest and best use (HBU) was "for continued use of the existing improvements as a free-standing retail building." Torzewski stated that he appraised the "fee simple interest" in the subject property.

Torzewski reached his opinion on the property's TCV by using the sales-comparison and income approaches

to valuation.[1] In his sales-comparison approach, Torzewski provided eight comparable sales. Because he found no other big-box stores in the Upper Peninsula, he used buildings primarily located in southeast Michigan. The record contains the following information on the eight comparables used by Torzewski:

1. Comparable 1 was a former Home Depot built in 2006, located in Holland, Michigan, with 103,000 square feet. The structure was sold in 2014. The record does not contain any information on the current or intended future use of the building, but does state that deed restrictions limit its ability to be used as a retail space.

2. Comparable 2 was a former Circuit City built in 1996, located in Westland, Michigan, with 63,686 square feet. The structure was sold in 2013 to the city of Westland which turned it into a city hall.

3. Comparable 3 was a former Wal-Mart built in 1989, located in Alma, Michigan, with 122,790 square feet. The building was sold in 2012 for redevelopment as industrial property. The property contained deed restrictions that prohibited use of the property as a grocery store over 35,000 square feet or a discount store over 50,000 square feet.

4. Comparable 4 was a former Sam's Club built in 1986, located in Madison Heights, Michigan, with 113,262 square feet. The building was sold in 2012 for redevelopment as industrial property.

5. Comparable 5 was a former Wal-Mart built in 1995, located in Auburn Hills, Michigan, with 151,017 square feet. The building was sold in 2011 for redevel-

[1] The parties stipulated that, because the subject property was not income-producing, the income approach was inapplicable. In its final opinion and judgment, the tribunal gave no weight to the income approach. That decision has not been challenged on appeal.

opment as industrial property. The property contained deed restrictions that prohibited use of the property as a grocery store over 35,000 square feet or a discount store over 50,000 square feet.

6. Comparable 6 was a former furniture store built in 1986, located in Flint, Michigan, with 53,474 square feet. The building was sold in 2010 and continues to function as a furniture store.

7. Comparable 7 was a former Kroger built in 1981, located in Dearborn, Michigan, with 55,474 square feet. The building was sold in August 2010, but no detail is contained in the record about the current or future use of the building other than that it is intended for future retail use.

8. Comparable 8 was a former Wal-Mart built in 1993, located in Monroe, Michigan, with 130,626 square feet. The building was sold in 2009, to be divided into multi-tenant space, with current tenants being Dunham's Sports and Hobby Lobby. The property contained deed restrictions that prohibited use of the property as a grocery store over 35,000 square feet or a discount store over 50,000 square feet.

In his valuation report, Torzewski mentioned that Comparable 1 had deed restrictions. He did not refer to deed restrictions with regard to any of the other comparables, nor did he make any adjustments for the existence of deed restrictions. At the hearing, however, Torzewski testified that most of the properties contained deed restrictions. Specifically, he acknowledged that Comparables 1, 3, 5, and 8 had use restrictions, but Comparables 6 and 7 did not.[2] He testified that he took the deed restrictions into account, explaining that

[2] According to Torzewski, the "larger, more big-box-type stores did have some deed restrictions in place" as opposed to "a couple of the smaller [comparables]," which did not have restrictions.

in selecting comparables, he would inquire if the deed restrictions affected the sales price. He stated that if he could not get that information, he would not use the sale as a comparable. He testified that in "many cases" deed restrictions did not "have any effect on the sales price because the restrictions that were in place aren't anything really out of the ordinary or would affect the secondary user of the property, so, therefore, we—in the conditions of the sales adjustment . . . grid there are no adjustments for that condition of sale factor." Torzewski explained that it was "pretty common for build-to-suit" owners to put deed restrictions on their property "to exclude any sort of use that might be a competitive use." He testified that, after speaking to the brokers, sellers, and buyers, he was satisfied that the deed restrictions had no impact on the price obtained for the comparables used in the valuation for Menard. However, Torzewski's appraisal report showed that Comparables 6 and 7, the ones he noted had no restrictions, had the highest selling price per square foot.

After making adjustments for other differences in the comparables, Torzewski concluded that the subject property should be valued at $20 per square foot for tax years 2012, 2013, and 2014.

Diana Norden, the city assessor for Escanaba, opined that the comparables used by Torzewski were not great. She testified that, after researching Menard's comparables, she learned: Comparable 1 was subject to a building easement and had use restrictions, Comparable 2 was not a freestanding unit but had multiple storefronts, Comparable 3 looked like someone buying themselves out of a lease, Comparable 4 had been foreclosed on, and Comparables 5 and 8 had use restrictions. Criticism of Menard's comparable

selection was also offered by Miles Anderson, an expert in appraisal review. He, like Norden, testified that Comparable 1 had use restrictions. More generally, he criticized Menard's appraisal for failing to state, explain, or make adjustments for use restrictions on the sales comparables.

In support of its assessment of value, Escanaba submitted a valuation summary prepared by Norden. Norden primarily used the cost-less-depreciation approach to value the property. She testified that she used the cost-less-depreciation approach because there were insufficient comparable sales and because the building being valued was a newer construction. She opined that properties with deed restrictions should not be compared to the subject property, which had no use restrictions in place. She testified that she adjusted the value for depreciation, but that she did not adjust for functional obsolescence. Norden, who was admitted as an expert in appraisal, opined that there was no functional obsolescence in the property because, if purchased for its existing use, other retailers would use the components of the existing building.

By contrast, Torzewski testified that he did not use the cost-less-depreciation approach because functional obsolescence is built into built-to-suit big-box stores, and because, in a down market, a property like the subject property would have external obsolescence. He testified that both functional and external obsolescence need to be accounted for in depreciation under the cost-less-depreciation approach, but that with this building, accounting for the obsolescence would be difficult. Torzewski also stated that the buyers of similar buildings do not use the cost-less-depreciation approach and that owners of properties like the subject property are typically not concerned with reselling, but are in-

stead looking to maximize their floor space. Torzewski did not, however, identify any specific features of the building that created functional obsolescence, nor did he identify any economic factors in the subject market that would account for external obsolescence.

Following a hearing, the tribunal concluded that the TCV for 2012 was $3,325,000, the TCV for 2013 was $3,490,000, and the TCV for 2014 was $3,660,000. In its reasoning, the tribunal concluded that Escanaba's cost-less-depreciation approach should be given no weight because Norden did not account for functional or external obsolescence. The tribunal also credited Menard's assertion that the cost-less-depreciation approach should not be used to value the subject property because (1) functional obsolescence is difficult to calculate and (2) first-generation users are concerned with optimizing sales, not with optimizing market value to the property. The tribunal also concluded that Norden's sales-comparison approach did not provide sufficient data for the tribunal to arrive at an independent conclusion because Norden did not make any analytical adjustments for differences in the properties. By contrast, the tribunal concluded that the sales-comparison approach advanced by Menard was persuasive and was meaningful to an independent determination of market value. On reconsideration, the tribunal specifically found that the deed restrictions in Menard's comparables did not require an adjustment because it found credible Torzewski's testimony that the deed restrictions had no effect on the sales price of the deed-restricted comparables.

II. STANDARD OF REVIEW

In the absence of fraud, our review of the tribunal's determinations "is limited to determining whether the

tribunal made an error of law or adopted a wrong legal principle." *Meijer, Inc v Midland*, 240 Mich App 1, 5; 610 NW2d 242 (2000). "The tribunal's factual findings are upheld unless they are not supported by competent, material, and substantial evidence." *Id*. Substantial evidence is "evidence that a reasoning mind would accept as sufficient to support a conclusion." *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1995). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). "Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal." *Meijer*, 240 Mich App at 5. The entire record, "not just the portions that support the agency's findings," must be reviewed when evaluating the tribunal's final determination. *Stege v Dep't of Treasury*, 252 Mich App 183, 188; 651 NW2d 164 (2002). Further, cursory rejection of evidence is also erroneous. *Jones & Laughlin Steel Corp*, 193 Mich App at 354.

The petitioner, Menard, bears the burden of proving the TCV of the property. MCL 205.737(3).

> The burden of proof encompasses two concepts: "(1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin Steel Corp*[, 193 Mich App at 354-355]. Nevertheless, because Tax Tribunal proceedings are de novo in nature, the Tax Tribunal has a duty to make an independent determination of true cash value. *Great Lakes Div of Nat'l Steel Corp* [*v Ecorse*, 227 Mich App 379, 409; 576 NW2d 667 (1998)]. Thus, even when a petitioner fails to prove by the greater weight of the evidence that the challenged assessment is wrong, the Tax Tribunal may not automatically accept the valuation on the tax rolls. *Id*. at 409. Regardless of the method employed, the Tax

> Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485-486, 502; 473 NW2d 636 (1991). [*President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 631; 806 NW2d 342 (2011).][3]

III. APPROACHES TO VALUATION

"The Tax Tribunal is under a duty to apply its expertise to the facts of a case in order to determine the

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[3] Menard asserts that Escanaba, as the appellant, now bears the "burden of proof" in establishing the TCV of the subject property. This is not strictly accurate. On appeal, in order for the appellant to receive relief, it has the burden to demonstrate that the lower court erred as governed by the relevant standard of review. However, at the tribunal, initially and on remand, the burden of proof to establish TCV is on the petitioner. *President Inn Props*, 291 Mich App at 631. Menard relies on *Drew v Cass Co*, 299 Mich App 495; 830 NW2d 832 (2013), in suggesting that the "burden of proof" is on the taxing authority when it is the appellant. Indeed, in *Drew*, we stated, "The appellant bears the burden of proof in an appeal from an assessment, decision, or order of the Tax Tribunal." *Id*. at 499 (quotation marks and citation omitted). In that case, however, the petitioner, not the respondent, was the appellant. *Id*. at 496. The *Drew* Court cited *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005), in support of the proposition. The petitioner, not the respondent, was the appellant in *ANR Pipeline*. *Id*. at 191. The *ANR Pipeline* Court cited *Dow Chem Co v Dep't of Treasury*, 185 Mich App 458, 463; 462 NW2d 765 (1990), in support of the proposition. In *Dow Chem*, again, the petitioner was also the appellant. *Id*. at 459. The *Dow Chem* Court cited *Holloway Sand & Gravel Co Inc v Dep't of Treasury*, 152 Mich App 823, 831 n 2; 393 NW2d 921 (1986), another case in which the petitioner was the appellant. *Id*. at 831. Critically, the *Holloway Sand & Gravel* Court relied on MCL 205.7, which, at the time, had already been repealed by 1980 PA 162. Before its repeal, MCL 205.7 provided that "[t]he burden of proof in any appeal from any assessment, decision or order shall rest with the appellant," but, importantly, the statute referred to the appellant and the taxing authority as separate entities. See 1941 PA 122, § 7, now codified at MCL 205.22. Accordingly, we conclude that the statement in *Drew* that the burden of proof is on the appellant does not shift the burden to establish TCV from petitioner to respondent. Rather, in its proper context, it is apparent that the reference to "appellant" in *Holloway Sand & Gravel* and its progeny actually refers to the petitioner.

appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Great Lakes*, 227 Mich App at 389. TCV "means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale . . . or forced sale." MCL 211.27(1). TCV is the equivalent of the property's fair market value. *Great Lakes*, 227 Mich App at 389.

"[T]o determine true cash value, *the property must be assessed at its highest and best use*." *Huron Ridge, LP v Ypsilanti Twp*, 275 Mich App 23, 33; 737 NW2d 187 (2007) (emphasis added). "[T]he concept of 'highest and best use' . . . recognizes that the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay for it." *Great Lakes*, 227 Mich App at 408. "The concept . . . is fundamental to the determination of true cash value." *Detroit Lions, Inc v Dearborn*, 302 Mich App 676, 697; 840 NW2d 168 (2013). "Highest and best use" is defined as " 'the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.' " *Id*., quoting *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005) (quotation marks omitted; citation omitted in *Detroit Lions*). The tribunal is required to make a determination of a subject property's highest and best use. *Detroit Lions*, 302 Mich App at 697.

The parties agree that the highest and best use of the property is as an owner-occupied freestanding

retail building.[4] Their disagreement lies in the valuation methodologies to be employed and the data relevant to the valuation. The three valuation methodologies that have been "found acceptable and reliable by the Tax Tribunal and the courts" are the cost-less-depreciation approach, the sales-comparison or market approach, and the capitalization-of-income approach. *Meadowlanes Dividend Housing Ass'n*, 437 Mich at 484-485. Although, if possible, all three methods should be used, the "final value determination must represent the usual price for which the subject property would sell" irrespective of the specific method employed. *Id*. at 485.

As noted, the parties and the tribunal agreed that the income approach does not apply in this case. The tribunal also rejected the cost-less-depreciation approach advanced by Escanaba, but found the values in Menard's sales-comparison approach to be meaningful.

A. SALES-COMPARISON APPROACH

We first examine whether the tribunal's reliance on the sales-comparison approach advanced by Menard was supported by competent, material, and substantial evidence.

Menard owns a fee simple interest in the subject property. The property, as it currently exists, is not subject to any use restrictions. However, half of the comparables in Torzewski's sales-comparison valua-

[4] Escanaba and the amici argue that the tribunal failed to make an explicit determination of the property's HBU. However, we conclude that such a finding is implicit in the tribunal's decision, which recounted in the findings of fact that the parties did not dispute the HBU. Given that the matter was not contested and that the tribunal recognized the agreed-upon HBU, we conclude that the tribunal did not err by not expressly stating the HBU.

tion contained deed restrictions that limited the use of the properties for retail purposes, thereby preventing sale of an entire fee simple interest in the property. Torzewski failed to mention all the deed restrictions in his valuation report, did not make any adjustments for their existence, and, during his testimony, insisted that the restrictions did not affect the value of the comparables because the parties involved in the comparable sales told him that the restrictions did not affect the sale price. The tribunal accepted Torzewski's testimony and used the deed-restricted comparables in its determination of value. We conclude that the tribunal's finding was based on an error of law and was not supported by competent, material, and substantial evidence.

In *Helin v Grosse Pointe Twp*, 329 Mich 396, 407-408; 45 NW2d 338 (1951), our Supreme Court recognized that deed restrictions in property that prohibited its use for an "apartment house, multiple residence, or institutional purposes" would have an effect on the value of the property. Accordingly, it would be "error to fail to consider deed restrictions in establishing assessments[.]" *Kensington Hills Dev Co v Milford Twp*, 10 Mich App 368, 372; 159 NW2d 330 (1968). This Court emphasized further in *Lochmoor Club v Grosse Pointe Woods*, 10 Mich App 394, 397-398; 159 NW2d 756 (1968), that all factors, including "restrictions imposed" on property, must be considered in determining a property's TCV.

Although Torzewski testified that he considered the deed restrictions, the record is insufficient to support his assertion that they had no effect on the sales price for the restricted comparables. His testimony is that he consulted the brokers, sellers, and buyers of the comparables. Hence, that testimony is only sufficient to

establish that *to the parties involved in the actual transaction*, the deed restrictions did not affect the sales price they were willing to pay. In other words, the market for sale was limited to those purchasers who were willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple.

However, in assessing TCV, the property "must be assessed at its highest and best use," *Huron Ridge*, 275 Mich App at 33, which, in this case, is as an owner-occupied freestanding retail building. Deed restrictions that limit the ability of prospective buyers to use the comparable properties for the subject property's HBU necessarily limit, if not eliminate, the willingness of those buyers to purchase the restricted property. Those who would be interested in buying the property *with restrictions* would need to make modifications to convert the building from retail to something else, like industrial use. Given the need to convert, the buyers would necessarily pay a lower price.

For the same reasons, the anticompetitive nature of the deed restrictions means that the deed-restricted comparables could not be sold for their HBU. The potential buyers of the comparables were, therefore, limited to buyers willing to accept the use restrictions. Further, because of the prevalence of the self-imposed deed restrictions on big-box stores, there is essentially no market for big-box stores being sold for the HBU of the subject property. Therefore, half of Torzewski's comparables were not evaluated at the HBU of the subject property because the deed restrictions expressly prohibited their use as a freestanding retail center.

On this record, there is no evidence to account for the effect of the deed-restricted properties being sold for purposes other than the HBU of the subject prop-

erty. It is plain that no adjustments were taken for this major difference in the subject property and the restricted comparables. Accordingly, we conclude that the tribunal erred by finding Menard's sales-comparison approach meaningful to its determination of the subject property's TCV. The tribunal did not value the subject property at its HBU, an owner-occupied freestanding retail building, but instead valued it as a former owner-occupied freestanding retail building that could no longer be used for its HBU and could best be used for redevelopment for a different use. In doing so, the tribunal made an error of law by failing to value the subject property at its HBU.

B. COST-LESS-DEPRECIATION APPROACH

The tribunal rejected the cost-less-depreciation approach advanced by Escanaba. However, because the deed restrictions imposed by other big-box-store owners drastically limited the actual market for such properties, it is appropriate to examine the cost-less-depreciation approach.[5]

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[5] Menard argues that use of the sales-comparison approach over the cost-less-depreciation approach is supported by this Court's two recently issued unpublished opinions on the valuation of similar big-box stores in *Lowe's Home Ctrs v Marquette Twp*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket Nos. 314111 and 314301), and *Lowe's Home Ctrs Inc v Grandville*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket No. 317986). We disagree. In those cases, the salient issue was whether, using the sales-comparison approach, comparables should be to the fee simple alone or the fee simple plus the value to an occupier of an already existing leasehold or operating business. We determined in both cases, over the objection of the taxing authority, that because the subject property was owner occupied, it must be valued as if vacant and available. *Lowe's Home Ctrs*, unpub op at 1, and *Lowe's Home Ctrs Inc*, unpub op at 7. In other words, those cases held, as do we, that what must be valued is what would actually be sold. In those cases, the sales

"The adjusted-cost-of-reproduction-less-depreciation method is most suitable for industrial facilities for which no market, an inadequate market, or a distorted market exists." *Tatham v Birmingham*, 119 Mich App 583, 591; 326 NW2d 568 (1982). In this case, although there is evidence of a market for big-box stores when they are sold for secondary purposes, there is limited evidence about whether there is a market for big-box stores at the subject property's HBU. Instead, Torzewski testified that large big-box stores commonly had deed restrictions for anticompetitive purposes, and Norden testified that she could not locate a sufficient number of unencumbered comparables to make adjustments in her sales-comparison approach. Therefore, the cost-less-depreciation approach is appropriate to value the TCV of the property.

In *Clark Equip Co v Leoni Twp*, 113 Mich App 778, 782-783; 318 NW2d 586 (1982), this Court approached the problem of determining the TCV of an industrial facility. In that case, the appraisers determined that the industrial property's current use was "also its highest and best use." *Id*. at 782. This Court described the difficulty in determining the TCV for such property and the appropriate solution as follows:

> The reality is that these types of industrial plants are rarely bought and sold . . . . However, as we construe MCL 211.27; MSA 7.27, to the extent that an industrial plant is not so obsolete that, if a potential buyer did exist who was searching for an industrial property to perform the functions currently performed in the subject plant, said buyer would consider purchasing the subject property, the usual selling price can be based upon value in use. . . . To construe MCL 211.27; MSA 7.27, as requiring the taxing

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would be of the property without an existing lessee or operating retail business. In this case, what is being valued is the property without deed restrictions limiting its use.

> unit to prove an *actual* market for a property's existing use would lead to absurd undervaluations. Large industrial plants are constructed to order, in accordance with the exact specifications of the purchasing user. . . . It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost premised on value in use because, in actuality, such industrial facilities are rarely bought and sold. Thus, we hold that, to the extent a large industrial facility is suited for its current use and would be considered for purchase by a hypothetical buyer who wanted to own an industrial facility which could operate in accordance with the subject property's capabilities, said facility must be valued as if there were such a potential buyer, even if, in fact, no such buyer (and therefore no such market) actually exists. [*Id*. at 784-785.]

In other words, *Clark* provides that (1) when the HBU of the property is its existing use and (2) when, because the property was built-to-suit, there would be little to no secondary market for the property to be used at its HBU, then the strict application of the sales-comparison approach would undervalue the property, so the cost-less-depreciation approach is more appropriate.

In *Great Lakes*, this Court elaborated that "valuation can be determined strictly on a hypothetical basis, with the hypothetical buyer looking at the costs of building a new facility to determine the usual price of an existing facility even if a real buyer would not consider building such a facility." *Great Lakes*, 227 Mich App at 403. However, the hypothetical buyer need not "be presumed to have considered building an industrial facility as an alternative to purchasing an existing one when no such facility would be built *and* that hypothetical buyer has the ability to see what is occurring in the marketplace of existing facilities." *Id*. Therefore, *Great Lakes* states that the holding of *Clark* should not be applied when (1) no facility like the subject facility would actually be

built, and (2) a buyer has the ability to see what is occurring in the marketplace of existing facilities. In the present case, there is no indication that big-box stores like the subject property are not being built. Additionally, because such big-box stores are not typically sold on the marketplace for use as big-box stores, a buyer does not have the ability to see what is occurring in the marketplace of existing facilities. Therefore, the limitation in *Great Lakes* does not apply, and this case is governed by *Clark*.

In the present case, given that multiple valuation methods should be used when possible, *Meadowlanes*, 437 Mich at 485, and that the analysis in the first issue shows that the comparables that the tribunal used in this case were not appropriate, the tribunal committed error by refusing to consider Escanaba's evidence under the cost-less-depreciation approach. The evidence demonstrates that owner-occupied freestanding retail buildings like the subject property, which Menard describes as big-box stores, have many similar qualities to the industrial properties that this Court addressed in *Clark*. Both are constructed or built to order to conform to the specifications of the purchasing user and are rarely sold on the open market for their current use. Similar to the plant at issue in *Clark*, there is no indication in the record that the subject property is not a new, modern facility capable of fully functioning as a freestanding retail center just as the industrial center in *Clark* was modern enough for continued use of the industrial purpose for which it was designed. *Clark*, 113 Mich App at 782-783. Therefore, like the industrial plant in *Clark*, it would not be appropriate to value the subject property significantly less than its replacement costs simply because owner-occupied freestanding retail spaces are rarely bought or sold for use as owner-occupied freestanding retail

spaces on the open market. Like the industrial plant in *Clark*, the subject property is well suited for its current use and would be considered by a hypothetical buyer who wished to own a freestanding retail building in accordance with the subject property's capabilities, and, therefore, the property must be valued "as if there were such a potential buyer, even if, in fact, no such buyer . . . actually exists." *Id*. at 785.

Additionally, Menard's and the tribunal's reliance on the concept of functional obsolescence to discredit using the cost-less-depreciation approach is misplaced. The tribunal rejected the cost-less-depreciation approach advanced by Escanaba in part because it concluded that Norden failed to adjust for functional obsolescence.[6] Norden, however, testified that she did not adjust for functional obsolescence because there was none in the subject property. She explained that, considering the property's HBU, the same building would be built by Menard if it were to build a new store. Further, she testified that the existing building would be used in essentially the same fashion if a competitor were to purchase the property. Although Torzewski testified that it would be difficult to value functional obsolescence, he did not identify any functional obsolescence presently in the subject property other than to suggest that the building was automatically functionally obsolete the moment it was com-

[6] To determine the present TCV of property under the cost-less-depreciation approach, depreciation must be subtracted from the replacement costs. *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 755; 378 NW2d 590 (1985). Depreciation includes functional obsolescence. *Id*. "Functional obsolescence is a loss in value brought about by failure or inability to deliver full service." *Id*. It can include loss of value due to "shortcomings or undesirable features contained within the property itself," including characteristics "such as poor floor plan, inadequate mechanical output, or functional inadequacy or superadequacy due to size or other characteristics." *Id*.

pleted. He also suggested in general terms that there was external obsolescence because the market for big-box stores was a "down market" because there was little to no demand for the properties.

There was no evidence in the record of any deficiency in the subject property that would inhibit its ability to properly function as an owner-occupied freestanding retail building. The functional obsolescence to which Menard refers appears to be the fact that, due at least in part to self-imposed deed restrictions that prohibit competition, such freestanding retail buildings are rarely bought and sold on the market for use as freestanding retail buildings but are, instead, sold to and bought by secondary users who are required to invest substantially in the buildings to convert them into other uses, such as industrial use. However, as stated in *Clark*, to read MCL 211.27 "as requiring the taxing unit to prove an *actual* market for a property's existing use would lead to absurd undervaluations." *Clark*, 113 Mich App at 785. Therefore, the tribunal erred by failing to consider evidence under the cost-less-depreciation approach.[7]

IV. CONCLUSION

The tribunal committed an error of law requiring reversal when it rejected the cost-less-depreciation

[7] Escanaba also argues that the tribunal's decision should be reversed because it accepted a nonauthoritative definition of the phrase "big-box store." Menard's expert relied on a definition of "big-box store" from the Dictionary of Real Estate Appraisal, whereas Escanaba's expert in appraisal review relied on definitions from Investopedia, Wikipedia, and businessdictionary.com. However, the closest the tribunal came to addressing the debate over the definition of the term "big-box store" was when it criticized Escanaba's expert's use of "internet definitions." The tribunal did not, however, adopt the definition of "big-box store" advocated by Menard or base its conclusions regarding the sales-comparison approach or the cost-less-depreciation approach on Menard's definition of "big-box store."

approach and adopted a sales-comparison approach that failed to fully account for the effect on the market of the deed restrictions in those comparables. Given this error, and the fact that there is little if any evidence in the record about the effect of the deed restrictions on the comparables, we conclude that it is inadequate to simply remand to the tribunal for a new determination regarding value. Instead, on remand, the tribunal shall take additional evidence with regard to the market effect of the deed restrictions. If the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject property's HBU, then the comparables should not be used. The tribunal shall also allow the parties to submit additional evidence regarding the cost-less-depreciation approach.[8] After allowing the parties the opportunity to present additional testimony in light of the deficiencies identified in this opinion, the tribunal shall make an independent determination of the property's TCV using correct legal principles. In doing so, the tribunal must "apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Great Lakes*, 227 Mich App at 389.

Reversed and remanded. We do not retain jurisdiction.

TALBOT, C.J., and HOEKSTRA and SHAPIRO, JJ., concurred.

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[8] As noted earlier in this opinion, the parties agree that the income approach is inapplicable.

ATLANTIC CASUALTY INSURANCE COMPANY v GUSTAFSON

Docket No. 325739. Submitted May 11, 2016, at Traverse City. Decided May 26, 2016, at 9:15 a.m.

Atlantic Casualty Insurance Company brought an action for a declaratory judgment in the Ontonagon Circuit Court against Gary Gustafson and Andrew Aho to determine its coverage liability under a commercial general liability insurance policy issued to Gustafson for work performed by his business, Gustafson Excavating and Septic Systems. Aho hired Gustafson Excavating to perform work on his residential property, and he was injured by flying debris when a Gustafson Excavating employee was performing that work. Aho brought a personal injury action against Gustafson, who then contacted Atlantic Casualty for defense and indemnification for any liability related to the accident. Atlantic Casualty denied coverage, reasoning that because the policy expressly excluded from coverage bodily injury to any contractor and defined contractor as including any property owner, the injuries suffered by the homeowner, Aho, were not covered by the policy issued to Gustafson. The court, Janis M. Burgess, J., agreed with Atlantic Casualty's interpretation of the policy, granted its motion for summary disposition, and denied Aho and Gustafson's countermotion for summary disposition. Gustafson appealed.

The Court of Appeals *held*:

When a contract is ambiguous, it is construed against the drafter. When several words in a contract are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar. For that reason, words grouped together in a list should be given related meanings. In this case, under a heading entitled "Exclusion of Injury to Employees, Contractors and Employees of Contractors," the insurance policy excluded from coverage bodily injury to any contractor, which the policy defined as including "any property owner." The phrase "any property owner" could be interpreted broadly to include anyone who owns anything, but not even Atlantic Casualty supported that interpretation. Accordingly, the phrase was ambiguous, and the insurance policy had to be construed against Atlantic Casualty. Although the policy

included "any property owner" in the definition of a contractor, the policy otherwise listed in the definition only those persons and entities—including independent contractors, subcontractors, general contractors, and developers—that have a commercial interest in the project. Giving the listed persons and entities that are included in the definition of contractor related meanings, "any property owner" referred only to those property owners who have a commercial interest in the property where the bodily injury occurred; contrary to Atlantic Casualty's assertion, it is not reasonable to interpret the phrase to mean any owner of the property on which the insured performed work. The trial court erred by granting summary disposition to Atlantic Casualty. Aho's injury was not excluded from coverage under the policy because he did not have a commercial interest in the project, and he was, therefore, not a contractor for purposes of the exclusion.

Reversed and remanded.

Ward, Anderson, Porritt & Bryant, PLC (by *David S. Anderson* and *Joan Odorowski*), for Atlantic Casualty Insurance Company.

O'Dea, Nordeen and Burink, PC (by *Raymond J. O'Dea* and *William T. Nordeen*), for Gary Gustafson.

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

SAWYER, J. In this declaratory judgment action involving insurance coverage, the parties filed cross-motions for summary disposition, with the trial court granting the motion of plaintiff, Atlantic Casualty Insurance Company, and denying the joint motion of defendants, Gary Gustafson and Andrew Aho. Defendant Gustafson now appeals, and we reverse and remand.[1]

The facts are not in dispute. Defendant Gustafson (hereinafter, defendant) operates a business known as Gustafson Excavating and Septic Systems. He was hired by Aho (hereinafter, the homeowner) to perform

[1] Aho is not a party to this appeal.

landscaping and drainage work around a pond on residential property. Defendant was insured under a commercial general liability policy issued by plaintiff.

The homeowner, who was watching defendant's employee clear brush near the pond with a brushhog, was injured when a piece of debris flew from the brushhog and hit him in the eye. The homeowner brought suit against defendant. Defendant contacted his insurance agent, who assured him that the incident would be covered by the insurance policy. But plaintiff subsequently determined it had no duty to defend or indemnify because the loss came within a policy exclusion. Plaintiff then brought this action, seeking declaratory relief.

The exclusion at issue is entitled "Exclusion of Injury to Employees, Contractors and Employees of Contractors" and provides as follows:

> This insurance does not apply to:
>
> * * *
>
> (ii) "bodily injury" to any "contractor" for which any insured may become liable in any capacity . . .
>
> * * *
>
> As used in this endorsement, "contractor" shall include but is not limited to any independent contractor or subcontractor of any insured, any general contractor, any developer, *any property owner*, any independent contractor or subcontractor of any general contractor, any independent contractor or subcontractor of any developer, any independent contractor or subcontractor of any property owner, and any and all persons working for and or providing services and or materials of any kind for these persons or entities mentioned herein. [Emphasis added.]

In short, plaintiff takes the position that because the homeowner is "any property owner," the homeowner comes within the definition of "contractor" and, therefore, comes within the exclusion clause for contractors. The trial court agreed, but we do not.

The relevant standard of review was summarized by our Supreme Court in *Wilkie v Auto-Owners Ins Co*:[2]

> The proper interpretation of a contract is a question of law, which this Court reviews de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The same standard applies to the question of whether an ambiguity exists in an insurance contract. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). Accordingly, we examine the language in the contract, giving it its ordinary and plain meaning if such would be apparent to a reader of the instrument.

The interpretation of this particular insurance contract clause appears to be a question of first impression in this state, though it has been addressed elsewhere. Defendant relies on two cases from other jurisdictions to support his interpretation of the exclusion language. The first, an unpublished decision of the Connecticut Superior Court, *Turano v Pellaton*,[3] is the closer of the two factually. In that case, the plaintiff had hired one of the defendants to do work in his basement. The plaintiff was injured when he fell going down the basement stairs because of a step that had been removed and not replaced; he was not warned about the missing step. Our plaintiff in this case, Atlantic Casualty, also insured one of the subcontractors in the *Turano* case. In *Turano*, the third-party defendant,

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[2] 469 Mich 41, 47; 664 NW2d 776 (2003).

[3] Unpublished opinion of the Superior Court of Connecticut, Stamford-Norwalk Judicial District, issued January 22, 2014 (Docket No. FSTCV106005723S).

Atlantic Casualty, denied coverage on the same basis asserted in the case at bar: that because the plaintiff was "any property owner," he came within the definition of "contractor" and, therefore, the same policy exclusion at issue here applied to exclude coverage in that case. The Connecticut court disagreed, concluding that the heading of "Exclusion of Injury to Employees, Contractors and Employees of Contractors" limited the exclusions that followed to situations in which the insured had employed a third party to provide services to assist the insured, not to those situations involving a customer or property owner.[4] Specifically, it noted that "this heading seems to envision situations involving employment or, more specifically, where the insured hires or employs a third party to perform services that assist the insured to perform jobs."[5]

The other case is a published decision of the United States Court of Appeals for the Seventh Circuit, *Atlantic Cas Ins Co v Paszko Masonry, Inc*.[6] The facts in *Paszko* are somewhat different than in our case and, while the plaintiff relied on the same exclusionary clause in that case, a different portion of the exclusion was at issue. In the underlying lawsuit in *Paszko*, the injured contractor, Robert Rybaltowski, brought an action against four companies, only one of whom—Paszko—was insured by the plaintiff. The other three defendants argued that they were covered under the

[4] *Id*. at 10-11.

[5] *Id*. at 10.

[6] 718 F3d 721 (CA 7, 2013). We note that plaintiff relies on an earlier, unreported case from the Northern District of Illinois, *Atlantic Cas Ins Co v Alanis Dev Corp*, unpublished opinion of the United State District Court for the Northern District of Illinois, issued January 25, 2011 (Docket No. 09 C 6657). While the factual situation in the district court case is closer to that in the case at bar, we place greater reliance on the more recent published decision of the Seventh Circuit.

contract as well, as "additional insureds."[7] The various defendants worked on a project involving the construction of an apartment building. Rybaltowski worked for a waterproofing company, Raincoat Solutions, which had submitted a bid to perform caulking work to the general contractor, Prince Contractors (one of the defendants claiming to be an additional insured). Prince accepted the bid, subject to its advance approval of the color of the caulk and of the competency of the caulker. Therefore, Rybaltowski was sent by Raincoat to the job site to demonstrate his skill by caulking a few windows; Raincoat was not paid for this work. After completing the demonstration, but while still at the job site, a beam fell and struck Rybaltowski. It was only after Rybaltowski was injured that a contract was signed between Prince and Raincoat.[8]

The plaintiff denied coverage, relying on the same exclusion for bodily injury to a contractor at issue in our case, though the focus in *Paszko* was on the portion of the exclusion defining "contractor" as any person "providing services . . . of any kind" to Prince.[9] In his opinion, Judge Richard Posner was very critical of the language used in the contract: "The exclusion is poorly drafted. The term 'contractor' is exemplified rather than clearly defined."[10] The court also noted the broad and unusual nature of the exclusion clause:[11]

> We don't understand the attraction of an insurance policy such as Atlantic's that contains such a broad exclu-

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[7] *Paszko*, 718 F3d at 722. The issue of whether they were additional insureds was unresolved in the trial court and was not an issue on appeal, but the court noted that it could be an issue on remand. *Id*.

[8] *Id*. at 722.

[9] *Id*. at 723.

[10] *Id*.

[11] *Id*. at 725.

> sion; a Google search suggests that the exclusion is rare, and maybe it is confined to policies issued by Atlantic. Still, broad as it is, the exclusion does not render coverage illusory. Nor can we say that it can't be as broad as Atlantic believes because then no one would buy the policy. But we still must decide *how* broad it is. And resolving ambiguity as we must against the insurer, we conclude that it is not broad enough to embrace the accident to Rybaltowski.

Judge Posner's consideration of whether the portion of the clause at issue in *Paszko* rendered the policy illusory is interesting. The *Paszko* court had earlier rejected that conclusion because, even under the plaintiff's broad reading, the exclusion would have been inapplicable to passersby and others "who might be injured at a construction site without being involved in the construction."[12] In our case, that conclusion cannot be so easily reached. While the *Paszko* court could easily note any number of persons who would not fall into the category of persons who supply services or materials—and therefore would not have been a contractor under the plaintiff's argument for a broad definition in that case—it is not so easy in this case with the phrase "any property owner." Viewed on its own, that phrase would include virtually everyone in the world; even the poorest person at least owns the clothes on his back, thus making him a "property owner" and, therefore, presumably a contractor under a broad reading of the exclusion provision. Indeed, the trial court in this case rejected the argument that the clause rendered the policy illusory only after adopting plaintiff's more limited interpretation of "any property

[12] *Id*. at 724. But the court did suggest that if an interpretation of an exclusion is so broad that it would render it implausible that anyone would purchase the policy, that is reason to doubt the interpretation. *Id*.

owner" as meaning the owner of the property on which the work was being performed.

Perhaps this is why plaintiff rejects the argument that "any property owner" should be interpreted literally; indeed, plaintiff admits that this would be an absurd interpretation. Plaintiff suggests that the only reasonable interpretation of the phrase would be for it to mean the owner of the real property on which the insured is performing work. While we agree that interpreting the phrase "any property owner" to mean anyone who owns any type of property would encompass virtually the entire world (except perhaps for a newborn baby) and render the policy illusory, we fail to see how it leads us to plaintiff's more specific interpretation. But more critical at this juncture, plaintiff's argument is an admission that the phrase is ambiguous and, therefore, subject to interpretation; however, we reject plaintiff's proposed interpretation.[13]

In reaching its conclusion that the policy's definition of "contractor" included the injured party in this case as "any property owner," the trial court relied on the principle of *ejusdem generis*, reasoning that the common connection among all the terms in the exclusion is that they cover "persons or entities generally and reasonably found on a construction site . . . ." There are problems, however, with this analysis. First, the principle of *ejusdem generis* does not apply in this case because we are not called on to interpret the meaning of a general term that falls at the end of a list of specific terms. As explained in *Reading Law: The Interpreta-*

[13] It should be noted that we are not suggesting that plaintiff could not write an exclusionary clause that excludes the property owner on whose real property the insured is performing work. Rather, we merely conclude that plaintiff has not done so with the clause before us.

tion of Legal Texts,[14] under the rule, the general term must follow the specific terms (of which there must be two or more). Thus, this rule of interpretation would only apply to the last clause of the exclusion, the one which reads "any and all persons providing services or materials of any kind for these persons or entities mentioned herein." While that clause was at issue in *Paszko*, it is not at issue in this case.

The appropriate interpretative canon to employ here would be the associated-words canon, or *noscitur a sociis*. This principle states that when several words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar. The canon especially holds that 'words grouped in a list should be given related meanings.' "[15] Undoubtedly, were the trial court to apply this rule of interpretation, it would have reached the same result and concluded that the "related meanings" are those individuals or entities who are likely to be found on a construction site. We disagree. Rather, we conclude that the categories listed in the exclusion are related as those who are being compensated or who otherwise have a commercial interest[16] for being on the job site. As the Connecticut court stated in *Turano*, the "language employed in the heading is not broad enough to encompass the situation of a customer/property owner. Accordingly, it should follow that everything that falls under this heading should reflect the employment situation."[17]

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[14] Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), pp 202-205.

[15] *Id*. at 195, quoting *Third Nat'l Bank in Nashville v Impact Ltd*, 432 US 312, 322; 97 S Ct 2307; 53 L Ed 2d 368 (1977).

[16] Such as the developer of a commercial project.

[17] *Turano*, unpub op at 10-11.

That is to say, the term "contractor" should be interpreted to include the contractor, any subcontractors, or any vendors supplying materials or services, or those who are otherwise involved from a commercial standpoint. This would lead to a very reasonable conclusion about the meaning and purpose of the clause: to avoid the prospect that a commercial entity, which would (or at least should) have its own commercial liability policy, could tag onto the one issued by plaintiff to a particular commercial customer. Indeed, Judge Posner addressed this very issue in *Paszko*.[18] Ultimately, it led to the court's conclusion that the "interpretation that services are not provided until the contractor . . . begins to do compensated work on the project" was as plausible as the interpretation that a contractor is anyone in the construction business regardless of whether he or she was rendering a service at the time of injury.[19]

Similarly, we conclude that interpreting "any property owner" to mean someone, or some entity, who is commercially involved in the work being done is at least as plausible, indeed more so, than the interpretation that a residential homeowner falls within the category of contractor merely because work is being done on the homeowner's property. Of course, this interpretation necessitates being able to identify potential members of the category of "any property owner," and which falls within the more general category of persons or entities that have a commercial involvement in the project that gives rise to the injury, in order to give that phrase meaning. But that is easily enough done. As defendant suggests, it could easily refer to owners of equipment used in the project. For

[18] *Paszko*, 718 F3d at 724.

[19] *Id*. at 725.

example, if in this case the brushhog were rented rather than owned by defendant, then the injured party might have sued the rental company as well, and the exclusion would have operated to prevent the rental company from seeking coverage under the policy plaintiff issued to defendant. Instead, the hypothetical rental company could reasonably be expected to have its own commercial liability policy to provide a defense and indemnification in such a situation. Similarly, a developer, who is also included in the definition of contractor (and who may or may not also be the owner of the property on which the work is being performed), would be expected to carry his or her own commercial liability insurance (and, for that matter, workers' compensation insurance for any employees).

Plaintiff suggests that defendant's argument amounts to asking this Court to interpret the policy on the basis of defendant's reasonable expectations, a rule of interpretation that plaintiff argues our Supreme Court rejected in *Wilkie*.[20] But plaintiff overreaches in its reliance on *Wilkie*. While it is true that *Wilkie* did hold "that the rule of reasonable expectations has no application in Michigan,"[21] to merely stop at that point tells only half the story. Rather, *Wilkie*[22] drew a distinction between ambiguous and unambiguous contracts, holding that the rule has no application when interpreting *unambiguous* contracts:

> The rule of reasonable expectations clearly has no application to unambiguous contracts. That is, one's alleged "reasonable expectations" cannot supersede the clear language of a contract. Therefore, if this rule has any meaning, it can only be that, if there is more than one way

[20] 469 Mich at 60-63.

[21] *Id*. at 63.

[22] *Id*. at 60.

> to reasonably interpret a contract, i.e., the contract is ambiguous, and one of these interpretations is in accord with the reasonable expectations of the insured, this interpretation should prevail. However, this is saying no more than that, if a contract is ambiguous and the parties' intent cannot be discerned from extrinsic evidence, the contract should be interpreted against the insurer. In other words, when its application is limited to ambiguous contracts, the rule of reasonable expectations is just a surrogate for the rule of construing against the drafter.

That is, in the context of interpreting ambiguous contracts, it is merely a different name for the *contra proferentem* doctrine.[23] Thus, *Wilkie* really holds only that the rule of reasonable expectations serves no purpose. An unambiguous contract has no need of interpretation, and with ambiguous contracts, it is merely a different name for the *contra proferentem* doctrine. Having already concluded that the provision at issue here is ambiguous, this doctrine, under whichever name, leads us to conclude that the provision must be interpreted against plaintiff. That is, we believe that the better interpretation of "any property owner"—given that it is included in a list that otherwise includes only those that have a commercial interest (or their employees)—is that it does not include those without a commercial interest in the project, namely, in this case, the homeowner. As Judge Posner ultimately reasoned in *Paszko*, when faced with two plausible interpretations, we must select the one that favors the insured; therefore, the interpretation that excludes the homeowner in this case from the definition of contractor "rules the case."[24]

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[23] *Id*. at 61.

[24] *Paszko*, 718 F3d at 725.

Reversed and remanded to the trial court for entry of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant may tax costs. MCR 7.219(A).

GLEICHER, P.J., and M. J. KELLY, J., concurred with SAWYER, J.

PEOPLE v BUTLER

Docket No. 327430. Submitted May 11, 2016, at Traverse City. Decided June 2, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 938.

Rodney C. Butler was convicted following entry of his plea of guilty in the Ogemaw Circuit Court of second-degree home invasion, MCL 750.110a(3). The court, Michael J. Baumgartner, J., scored the guidelines and sentenced defendant within the guidelines recommendation to 3 to 15 years in prison. Defendant filed a delayed application for leave to appeal, challenging the scoring of the guidelines and the assessment of 20 points under the prior record variables (PRVs). Specifically, defendant argued that misdemeanors that were not cognizable under the sentencing guidelines could not be counted when applying the "10-year gap" rule in MCL 777.50, which prohibits consideration of any convictions that occurred before the gap if the defendant went a period of 10 or more years between discharge from one conviction and his or her commission of a subsequent offense. The Court of Appeals granted defendant's delayed application for leave to appeal.

The Court of Appeals *held*:

A prior conviction that was not otherwise scorable under the prior record variables of the sentencing guidelines could, nevertheless, be considered in applying the 10-year-gap rule of MCL 777.50. The language in the statute was clear and needed no further interpretation. The doctrine of *in pari materia* did not require limiting consideration of convictions under MCL 777.50 to only those offenses scoreable under MCL 777.55. Both statutes serve a common purpose of limiting which prior convictions can be considered, but their limitations are different, and the underlying purpose of their respective limitations is different, too. MCL 777.55(2) limits which prior misdemeanors can be considered, regardless of when they occurred. Thus, similar to MCL 777.51 through MCL 777.54, it considers the nature of the defendant's prior crimes and determines whether they should be scored under the sentencing guidelines based on the number and severity of the offenses. MCL 777.50, on the other hand, addresses the question of whether a defendant's prior criminal history should no longer be considered *at all* because of a period of time spent as

a law-abiding citizen. Having made this judgment, the Legislature reasonably insisted that that 10-year conviction-free period be free of all convictions, even those that would not otherwise count under the sentencing guidelines.

Affirmed.

GLEICHER, P.J., dissenting, disagreed with the majority's wholesale adoption of the term "conviction" without consideration of the limitations placed on the term in MCL 777.55(2). The general rule is that a recidivist deserves a harsher penalty than a first offender, but the Legislature carved out two exceptions from the general rule in drafting the sentencing guidelines: (1) a gap of 10 years or more between a discharge from a conviction and the commission of a subsequent offense wipes the PRV slate clean and (2) even when convictions are scored, certain offenses are off-limits because they are not predictive of future criminality and lack relevance to the proportionality principles underlying the guidelines. Limiting the term "conviction" in MCL 777.50 to mean only those convictions that can be counted under MCL 777.55 would be more in line with the policies that animate the sentencing guidelines in general and the scoring of PRVs in particular. The Legislature did not intend that a misdemeanor conviction too minor to be scored under MCL 777.55 nonetheless destroys a defendant's eligibility to benefit from the 10-year-gap rule. Judge GLEICHER would have remanded for application of the 10-year-gap rule and resentencing.

SENTENCES — SENTENCING GUIDELINES — PRIOR RECORD VARIABLES — 10-YEAR-GAP RULE.

A prior conviction that was not otherwise scorable under the prior record variables of the sentencing guidelines could, nevertheless, be considered in applying the "10-year gap" rule of MCL 777.50.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

SAWYER, J. We are asked to determine in this case whether a prior conviction that is not otherwise scorable under the prior record variables (PRVs) of the sentencing guidelines may, nevertheless, be considered

in applying the so-called "10-year gap" rule of MCL 777.50. We conclude that it may.

Defendant was convicted by plea of second-degree home invasion[1] for an offense committed on May 11, 2014. He was sentenced within the guidelines recommendation, as scored by the trial court, to 3 to 15 years in prison. Defendant has an extensive criminal record dating back to 1984. But he acquired no convictions at all from 2001 until 2012, with the exception of a 2006 conviction related to an offense committed in 1993.[2] Depending on whether that 2006 conviction may be considered in applying the provisions of MCL 777.50, defendant's prior-record level under the sentencing guidelines and, therefore, the recommended minimum sentence range, will change significantly.

MCL 777.50 provides, in relevant part, as follows:

> (1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.
>
> (2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the

[1] MCL 750.110a(3).

[2] It is unclear to us why such an extended period of time passed between the offense and the conviction, but the reason is not relevant to the disposition of this case.

> discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain.

Under these provisions, if the 2006 conviction is considered, then there is no 10-year period in which defendant went without a conviction and, therefore, PRV 5 would be scored at 20 points because defendant had "7 or more prior misdemeanor convictions."[3] This is how the trial court scored the guidelines. On the other hand, if the 2006 conviction is ignored, then there is a period of more than 10 years from his discharge on May 17, 2002, for a 2001 conviction for what the presentence report describes as "A&B," until the commission of a felony drunk-driving related offense on September 3, 2012, for which he was convicted of operating while impaired, third offense.[4] In that case, defendant would have no scorable prior misdemeanor convictions, and PRV 5 should have been scored at zero points. We believe that the trial court properly scored the guidelines.

We review de novo questions concerning statutory interpretation of the sentencing guidelines.[5] In interpreting a statute, we first look to the statute's plain language.[6] If the statute's language is clear, we apply it

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[3] MCL 777.55(1).

[4] MCL 257.625(9)(c).

[5] *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

[6] *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010).

as written.[7] We find the language of MCL 777.50 to be clear and in no need of further interpretation.

Defendant's argument is based on the fact that the offense for which he was convicted in 2006 is not itself a scorable offense under PRV 5.[8] Defendant argues that, because the two statutes must be read *in pari materia*, only offenses scorable under MCL 777.55 may be considered in applying the 10-year-gap rule under MCL 777.50 in determining which offenses may be scored under PRV 5. We disagree.

This Court explained the *in pari materia* rule in *People v Stephan*[9] as follows:

> Under this doctrine, statutes that relate to the same subject or share a common purpose are in pari materia. Such statutes must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). . . .
>
> The object of the in pari materia rule is to further legislative intent by finding an harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purpose. *Id*. Therefore, if two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id*. Two statutes that form "a part of one regulatory scheme" should be read in pari materia. *In re Complaint of Southfield Against Ameritech Mich*, 235 Mich App 523, 527; 599 NW2d 760 (1999).

The flaw in defendant's reasoning is that it rests on the presumption that, for MCL 777.50 and MCL 777.55 to

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[7] *People v Armstrong*, 305 Mich App 230, 243; 851 NW2d 856 (2014).

[8] MCL 777.55(2) limits the scoring of PRV 5 to prior misdemeanors and juvenile adjudications for offenses against persons or property, controlled substance offenses, weapons offenses, as well as various drunk-driving related offenses.

[9] 241 Mich App 482, 497-498; 616 NW2d 188 (2000).

be read harmoniously, only the same exact convictions may be considered under both sections. Defendant insists that they must be "interpreted consistently with the Legislature's judgment that only certain misdemeanors should be used in assessing the severity of a defendant's criminal history." We do not believe that is true.

Although both statutes serve a common purpose by limiting what prior convictions may be considered, the limitations are different, and the underlying purpose of each respective limitation is obviously different as well. MCL 777.55(2) serves to limit which prior misdemeanor convictions can be considered at all in scoring PRV 5, regardless of whether they occurred a week prior, a year prior, or a decade prior. The limitation is on the type of misdemeanor that the Legislature finds relevant in assessing a defendant's prior criminal history.

MCL 777.50, on the other hand, applies to the scoring of multiple PRVs, 1 through 5. Thus, if a 10-year gap between convictions exists so as to trigger the provisions of MCL 777.50, prior convictions of all sorts will be ignored: prior high-severity felonies (PRV 1),[10] prior low-severity felonies (PRV 2),[11] prior high-severity juvenile adjudications (PRV 3),[12] prior low-severity juvenile adjudications (PRV 4),[13] as well as prior misdemeanors (PRV 5). MCL 777.50 draws no distinctions between the types of crimes previously committed. When a defendant has gone 10 years between the discharge from a conviction and the commission of his or her next offense, all convictions, regard-

[10] MCL 777.51.

[11] MCL 777.52.

[12] MCL 777.53.

[13] MCL 777.54.

less of the crime, are to be ignored. The prior conviction could be a prior high-severity felony, such as second-degree murder,[14] but as long as the defendant does not commit another crime for at least 10 years after discharge from the murder conviction, that murder conviction would no longer be scorable under PRV 1.

In other words, the provisions of MCL 777.55, along with MCL 777.51 through MCL 777.54, consider the nature of the defendant's prior crimes and whether they are worthy of being scored under the sentencing guidelines, and points are to be assessed based on the number and severity of those offenses. MCL 777.50, on the other hand, addresses the question whether a defendant's prior criminal history should be considered *at all* because of a period of time spent as a law-abiding citizen. It reflects a judgment by the Legislature that, if a person is able to go 10 years without a new conviction, that person should be able to leave his or her criminal past behind, even if the person later relapses and is convicted of a new crime. In making this judgment, the Legislature, not unreasonably, insisted that the 10-year conviction-free period be exactly that: conviction-free. That is, free of *any* convictions, even ones that would not themselves be scorable under the PRVs. While the Legislature may not consider various minor misdemeanors relevant in assessing points under PRV 5, that does not compel the conclusion that it did not find those crimes relevant in determining whether a person had spent a sufficient period of time conviction-free such that a portion of his or her criminal past may be ignored and left in the past.

In sum, although MCL 777.50 and MCL 777.55 are obviously related, they nonetheless address slightly

[14] MCL 777.51(2).

different issues. Those issues reflect different policy choices made by the Legislature. And those policy choices do not require that the same convictions be considered in order to avoid a conflict between the two statutes, even when read *in pari materia*.

Defendant also makes an argument contrasting the legislative guidelines with the previous judicial guidelines. Specifically, defendant argues that in applying the judicial guidelines' 10-year-gap rule, the judicial guidelines referred to "any conviction,"[15] rather than the legislative guidelines' reference to a "prior conviction." Although that argument might be persuasive if we were comparing current legislative language to previous legislative language and, therefore, the change in language might signal a change in intent, we find it unremarkable that the Legislature chose to express itself differently than did the Supreme Court in authoring the judicial guidelines. Indeed, the reasoning of this Court in *People v Reyna*[16] in addressing the corresponding provisions of the judicial guidelines echoes our rationale here:

> With these definitions in mind, we do not believe that a conviction for purposes of determining the applicability of the ten-year rule need be a conviction for an offense which may be scored under the guidelines. Rather, we hold that any criminal conviction is sufficient to establish that the defendant did not have a ten-year period free of convictions. In so concluding, we also consider the fact that the guidelines do consider different prior convictions differently depending on the prior record variable involved. For example, the guidelines differentiate a prior high-severity felony (PRV 1) from prior low-severity felonies (PRV 2) as well as treating separately prior high-severity similar felonies (PRV 3) and prior low-severity similar felonies

[15] See *People v Reyna*, 184 Mich App 626, 631; 459 NW2d 75 (1990).

[16] *Id*. at 632.

> (PRV 4). Thus, it is conceivable that the guidelines would restrict those misdemeanor convictions which may be scored as a prior misdemeanor conviction under PRV 6, while taking a more expansive view of what constitutes a conviction under the ten-year rule. We believe that the emphasis under the ten-year rule is not on what offense was committed, but whether the defendant was able to be completely conviction-free for a period of at least ten years. The simple fact of the matter is that defendant has not been conviction-free for a ten-year period because he committed OUIL within ten years of his discharge from probation on his prior conviction.

While the source of the text being interpreted is different, as well as the wording itself, we believe that the rationale holds equally true today in interpreting the legislative guidelines as it did over a quarter of a century ago in looking at the judicial guidelines. Accordingly, we conclude that the trial court properly scored the guidelines.

Affirmed.

M. J. KELLY, J., concurred with SAWYER, J.

GLEICHER, P.J. (*dissenting*). A defendant's sentence is calculated by scoring offense and prior record variables. Prior record variables appraise a defendant's history of criminal convictions. The higher the PRV score, the longer the potential minimum term. This approach comports with one of the principles of proportionality underlying the legislative sentencing guidelines: a recidivist deserves a harsher penalty than a first offender.

The Legislature carved out two conspicuous exceptions to this maxim. A gap of 10 years or more between the date of an offender's discharge from a conviction and his commission of a subsequent offense wipes the

offender's PRV slate clean. In other words, an offender who achieves a 10-year crime-free period avoids a PRV penalty for his or her previous criminal record, regardless of the record's length, depth, or breadth. In this circumstance, a substantial interval of life inside the law palliates punishment.

And even when convictions *are* scored, the Legislature deems some offenses off-limits for PRV purposes. A misdemeanor counts only if it is classified as an offense against a person or property, a controlled-substance or alcohol-related crime, or a weapons-related offense. MCL 777.55(2). In enacting this rule, the Legislature evidently judged that minor misdemeanors should not enhance a PRV score and thereby subject an offender to greater punishment. Why not? Likely it is because minor misdemeanors simply lack relevance to the proportionality principles underlying the sentencing guidelines. The commission of nonviolent offenses unrelated to drugs or alcohol only weakly predicts future dangerousness and does not reflect an incorrigible propensity for disobeying the law. Leaving such convictions out of the mix does not violate the tenet that repeat offenders merit longer sentences than newcomers to the criminal justice system.

The question presented in this case is whether the Legislature intended that a misdemeanor conviction too minor to be scored under the guidelines nonetheless destroys a defendant's eligibility to benefit from the 10-year-gap rule. The majority focuses on the word "conviction" used in the rule's articulation, and defines the word capaciously to encompass *all* convictions, including those otherwise exempt from scoring under the guidelines. In my view, a narrower construction is warranted. Limiting the reach of the term "conviction"

to those convictions relevant to PRV calculation comports with the policies that animate the sentencing guidelines in general and the scoring of PRVs in particular. I respectfully dissent.

I

Defendant has a long criminal record. He began committing crimes in 1984, when he received probation and 90 days' incarceration after pleading guilty to unlawfully driving away an automobile, MCL 750.413. Between 1984 and 1989, he acquired eight additional convictions. Defendant avoided prosecution between 1989 and 1992. In May 1993, he pleaded guilty to malicious destruction of personal property under $100 and assault and battery. In November of that year, he was arrested for "False information to Police; Seatbelt." Defendant spent 10 days in jail for resisting arrest in 1995. He pleaded guilty to open intoxication in 1999 and to assault and battery in 2000. Between September 2000 and September 2012, defendant's record reflects no convictions of any kind.

For unknown reasons, defendant's November 1993 arrest for "False information to Police; Seatbelt," remained unresolved until 2006, when defendant entered a "[p]lea by mail" to the charge. This 2006 plea destroyed defendant's 12-year conviction-free gap. But for the delayed 2006 plea by mail, it is indisputable that defendant's many convictions before 2000 could not have been scored under the PRVs.

The impact of scoring defendant's older crimes is substantial. When the old offenses are counted, defendant's minimum guideline sentencing range for his current offense adds up to 29 to 57 months. Without them, the sentencing range drops 12 to 24 months.

II

The statutes at issue in this case (MCL 777.50 and MCL 777.55) are both located in Part 5 of the legislative sentencing guidelines, MCL 777.1 *et seq*. Part 5 addresses the scoring of PRVs. The word that separates me from the majority—"convictions"—is not expressly defined in Part 5 or anywhere else in the sentencing guidelines, despite that in § 50(4)(a), the Legislature provided two specific examples of convictions that fall within the definition.[1] I believe that the best way to locate the Legislature's intended meaning of convictions in § 50(2) is to consider the language and design of the statutory provisions in which the word is embedded, in the light of the overall object of the guidelines.

The sentencing guidelines were enacted to facilitate proportionate sentencing, *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008), and "to insure that sentencing decisions are based on a consistent set of legally relevant factors," *People v Whitney*, 205 Mich App 435, 436; 517 NW2d 814 (1994). Reading the two interrelated statutes *in pari materia*, harmonizing rather than isolating their provisions, compels me to conclude that because defendant's 2006 plea to a minor misdemeanor was not scorable as a PRV, it should not have been used to disrupt his otherwise "clean" 12-year period.

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[1] MCL 777.50(4) states:

> As used in this part:
>
> (a) "Conviction" includes any of the following:
>
> (*i*) Assignment to youthful trainee status under sections 11 to 15 of chapter II.
>
> (*ii*) A conviction set aside under 1965 PA 213, MCL 780.621 to 780.624.

MCL 777.50 applies generally to the "scoring [of] prior record variables 1 to 5." MCL 777.50(1). The statute instructs that when scoring PRVs 1 to 5, a court should "not use any conviction . . . that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication." MCL 777.50(1). MCL 777.50(2) describes the mechanics of the 10-year-gap rule as follows:

> Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain.

Thus, the statute sets the temporal boundaries of the 10-year gap as the defendant's "prior conviction or juvenile adjudication" and the date of his "sentencing offense." MCL 777.50(2). When 10 years or more separates these events, a defendant may not be penalized for crimes committed before the gap period commenced.

MCL 777.55 describes the scoring of PRV 5, which concerns misdemeanors and misdemeanor juvenile adjudications. The categories "prior misdemeanor convictions" and "prior misdemeanor juvenile adjudications" are defined for the purposes of scoring PRV 5 as follows:

> (a) "Prior misdemeanor conviction" means a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed.
>
> (b) "Prior misdemeanor juvenile adjudication" means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the order of disposition was entered before the sentencing offense was committed. [MCL 777.55(3).]

Important limits, however, restrict the reach of the broad term "prior misdemeanor conviction" used in § 55(3). Specifically, § 55(2) directs that a court scoring PRV 5 may "count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication *only if* it is an offense against a person or property, a controlled substance offense, or a weapon offense," or if it constitutes a "prior misdemeanor conviction[] . . . for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance." (Emphasis added.) I suggest that the Legislature omitted many misdemeanors from PRV consideration both because such convictions have little predictive value and because, by counting them, there is a risk that a sentence may become disproportionate.

Defendant's 2006 conviction for providing false information to the police, MCL 257.324(1)(h), a misdemeanor under the Michigan Vehicle Code, MCL 257.1 *et seq*., is an uncountable offense. For precisely the same reasons that the Legislature exempted this crime from scoring under MCL 777.55, it should not serve to interrupt defendant's otherwise conviction-free, 12-year gap period.

"Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). As our Supreme Court recently explained,

> "[I]n the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same *general* purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another." [*Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014), quoting *Rathbun v Michigan*, 284 Mich 521, 543; 280 NW 35 (1938) (emphasis added).]

MCL 777.50 and MCL 777.55 relate to the same subject, share the same general purposes, and were enacted together. In my view, they must be interpreted *in pari materia*. The *in pari materia* canon of statutory interpretation has deep roots in Michigan's jurisprudence and is frequently employed to reconcile apparent inconsistencies and definitional lapses by finding meaning through consideration of related statutes addressing the same subject matter.

The majority uses a different canon—plain meaning—to conclude that "conviction" means exactly that and no further interpretation bears contemplation. According to the majority, although the two stat-

utes "serve a common purpose of limiting what prior convictions may be considered, the limitations are different, and the underlying purpose of the respective limitations are obviously different as well." The majority concedes that MCL 777.55(2) limits "the type of misdemeanor that the Legislature finds relevant in assessing a defendant's prior criminal history," yet holds that MCL 777.50 "reflects a judgment" that "the 10-year conviction-free period be exactly that: conviction free." I don't disagree that this is one possible interpretation of the term "conviction" as used in § 50(1). It's just not the most accurate one.

The majority hinges its "plain meaning" analysis on the rationale expressed in *People v Reyna*, 184 Mich App 626, 632; 459 NW2d 75 (1990), in which this Court considered whether an unscorable misdemeanor extinguished the defendant's ability to utilize the 10-year-gap rules set forth in the *judicial* sentencing guidelines. Notably, those guidelines included a specific definition of the word "conviction,"[2] and that definition (appropriately) controlled the Court's decision. The legislative sentencing guidelines do not include a definition of "conviction," an omission I find telling.

As did the judicial guidelines, the legislative guidelines include a 10-year-gap rule. Had the Legislature intended application of the 10-year-gap rule enunciated in MCL 777.50(1) to mirror application of the judicially created rule, it would have enacted the judicially created definition of "conviction." Examining the Legislature's words in linguistic and historical context signals that the Legislature did not intend to "affirm" *Reyna*. Rather, the Legislature omitted a defi-

[2] Under the judicial guidelines, a "conviction" was defined as "criminal charges to which the defendant pleads guilty or is found guilty in a court of law." *Reyna*, 184 Mich App at 632.

nition of "conviction" and included only limited examples in MCL 777.50(4)(a).

Our Supreme Court has elucidated regarding the *in pari materia* canon that "[t]he endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time." *Remus v Grand Rapids*, 274 Mich 577, 581; 265 NW 755 (1936) (quotation marks and citation omitted). The Legislature adopted a 10-year-gap rule but neglected to accompany it with an expansive definition of the word "conviction." And in the same part of the statute, the Legislature declared certain convictions unworthy of scoring. It makes sense to read the two sections together and to conclude that the commission of minor misdemeanors does not eliminate the value of crime-free periods. "[W]ords are chameleons," Judge Learned Hand once said, "which reflect the color of their environment." *Internal Revenue Comm'r v Nat'l Carbide Corp*, 167 F2d 304, 306 (CA 2, 1948). The statutory environment in which the Legislature placed § 50(1) does not countenance the use of minor misdemeanors as sentence enhancers. Accordingly, a conviction that cannot be counted because it lacks probity or predictive value should not be counted.

The facts of this case solidify my conclusion. Defendant committed the offense that destroyed his 10-year-gap eligibility in 1993, seven years before the start of the 12-year period in which he remained otherwise conviction-free. No one knows why his prosecution for "False information to Police; Seatbelt" was delayed for 13 years. But given that the essential purpose of the 10-year-gap rule is to acknowledge the insignificance of

old criminal conduct in predicting future offending, it makes no sense to resurrect defendant's relatively ancient and unscorable misdemeanor to disrupt the rule's operation.

If one harmonizes the word "conviction" with the rest of Part 5 rather than reading it in a vacuum, the term should not reanimate an otherwise irrelevant minor misdemeanor. In the context of the prior record guidelines, and in particular MCL 777.55(2), the word "conviction" should be construed to include only those convictions otherwise relevant in calculating a defendant's sentence. I would remand for resentencing after application of the 10-year-gap rule.

PEOPLE v RICHARDS

Docket No. 325192. Submitted April 12, 2016, at Grand Rapids. Decided April 26, 2016. Approved for publication June 7, 2016, at 9:00 a.m. Leave to appeal sought.

Kyle B. Richards was convicted following a jury trial in the Ionia Circuit Court, Suzanne H. Kreeger, J., of assault of a prison employee, MCL 750.197c, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to 50 months to 40 years' imprisonment. Defendant appealed, arguing that he had asserted and was denied his right to self-representation, that he was denied due process by the destruction of evidence, that he was entitled to resentencing because his sentence was based on inaccurate sentencing guidelines and was unreasonable under *People v Lockridge*, 498 Mich 358 (2015), that the retroactive application of *Lockridge* violated the Ex Post Facto Clause, US Const, art I, § 10, and that he was denied due process because the prosecution failed to timely file its notice seeking to enhance defendant's sentence.

The Court of Appeals *held*:

1. A defendant has a constitutional right to proceed without counsel when he or she voluntarily and intelligently elects to do so. Before a court may allow a defendant to proceed *in propria persona*, the court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. MCR 6.005(D) provides, in pertinent part, that the court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation. A defendant's request for self-representation may be denied if it is untimely. While no bright-line rule for timeliness exists, a factor to be considered when determining whether a

defendant's request for self-representation was timely is the date of trial relative to the date of the defendant's request. In this case, defendant filed numerous pretrial motions with the trial court, but defendant never made a request for self-representation in those motions, and defendant emphatically replied "no" when specifically asked by the trial court if he wanted to represent himself. The trial court honored defendant's pretrial requests to be appointed a different attorney to represent him; by the date of trial, defendant had the benefit of three separate trial counsel. On the day of defendant's trial, it was not until after the jury had been sworn that defendant, through counsel, made the request to proceed *in propria persona*, and the trial court denied the request, finding it untimely. Defendant was not deprived of his constitutional right to self-representation because the record clearly revealed that defendant was afforded every opportunity to the effective assistance of counsel and because defendant declined to affirmatively assert his right to self-representation until the date of trial, which made the request untimely. The trial court was not required to inquire into the basis of defendant's request for self-representation pursuant to MCR 6.005(D) prior to denying the request as untimely because the underlying rationale for the inquiry is to inform the defendant of the hazards of self-representation, not to determine whether a request is timely. Furthermore, the evidence in the record supported the conclusion that granting defendant's request to proceed *in propria persona* at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business. The denial of defendant's request for self-representation was well within the range of reasonable and principled outcomes and was not an abuse of discretion.

2. To warrant reversal on a claimed due-process violation involving the failure to preserve evidence, a defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith. When the evidence is only potentially useful—such as when no more can be said than that the evidence could have been subjected to tests, the results of which might have exonerated the defendant—failure to preserve the evidence does not amount to a due-process violation unless a defendant can show bad faith on the part of law enforcement. In this case, defendant allegedly spat on a corrections officer after the corrections officer placed him into a shower cell. Defendant moved to dismiss the case based on the failure to preserve the officer's shirt, which defendant argued contained samples of the alleged saliva. The trial court denied the motion, stating that it was not reasonable for the officer to wait for a forensic team to

collect a sample. Defendant was not entitled to appellate relief. Defendant failed to demonstrate that the evidence was exculpatory as opposed to potentially exculpatory, and the corrections officer did not act in bad faith when he washed his arm and his clothing after photographs of the areas containing the alleged saliva had been taken because the officer followed standard Michigan Department of Corrections operating procedures to collect evidence in cases—such as this one—that involve spitting incidents.

3. A minimum sentence that departs from the applicable guidelines range is reviewed by an appellate court for reasonableness. In *People v Steanhouse*, 313 Mich App 1, 44-48 (2015), the Court of Appeals held that the reasonableness of a sentence is determined by using the principle-of-proportionality standard set forth in *People v Milbourn*, 435 Mich 630 (1990). In this case, defendant raised a scoring challenge to Offense Variable 19, MCL 777.49, in a motion for resentencing, and the prosecution agreed with the scoring change at a hearing on the motion, which changed defendant's guidelines range and made his minimum sentence of 50 months outside the applicable range. The trial court considered the new sentencing guidelines range but nonetheless determined that the sentence was reasonable. Because the trial court's ruling on the issue occurred before the *Steanhouse* decision was issued, the trial court was not aware of, and not expressly bound by, the reasonableness standard rooted in the *Milbourn* principle of proportionality at the time of sentencing.

4. A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right. Specifically, a defendant should not be allowed to assign error on appeal to something that defendant's own counsel deemed proper before the trial court because to do so would allow a defendant to harbor error as an appellate parachute. In this case, because defense counsel argued that defendant's sentence was unreasonable under *Lockridge*, defense counsel deemed the application of *Lockridge* to defendant's case proper at the trial court level; therefore, defendant's argument that the retroactive application of *Lockridge* violates the Ex Post Facto Clause, US Const, art I, § 10, was waived, and the alleged error was extinguished. Even if defendant had not waived the issue, defendant did not demonstrate plain error. Because it is well established that a new rule for the conduct of criminal prosecutions that is grounded in the United States Constitution applies retroactively to all cases, state or federal, pending on direct review or not yet

final, and because defendant's case was pending on direct review when *Lockridge* was issued, *Lockridge* applied retroactively.

5. MCL 769.13(1) provides, in pertinent part, that in a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense. A distinction exists between an arraignment on the information, MCR 6.113, and an arraignment on the warrant or complaint, MCR 6.104. In this case, defendant did not waive his arraignment; therefore, the 21-day period began with the date of defendant's arraignment on the information charging the underlying offense. Defendant's argument that his due-process rights were violated as a result of the prosecution's failure to timely file its notice seeking to enhance defendant's sentence failed because defendant was arraigned on the information in circuit court on February 13, 2014, and the prosecution filed the first amended information containing the fourth-offense habitual offender notice on that same day, which was well within the 21-day period after defendant's arraignment on the information.

Affirmed, but case remanded for further inquiry as to whether resentencing was required.

1. CRIMINAL LAW — WAIVER OF COUNSEL — SELF-REPRESENTATION — TIMELINESS OF REQUEST FOR SELF-REPRESENTATION.

Before a court may allow a defendant to proceed *in propria persona*, the court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business; a defendant's request for self-representation may be denied if it is untimely; while no bright-line rule for timeliness exists, a factor to be considered when determining whether a defendant's request for self-representation was timely is the date of trial relative to the date of the defendant's request.

2. CRIMINAL LAW — WAIVER OF COUNSEL — SELF-REPRESENTATION — TIMELINESS OF REQUEST FOR SELF-REPRESENTATION — INQUIRY INTO BASIS OF REQUEST UNDER MCR 6.005(D).

MCR 6.005(D) provides that a court may not permit the defendant

> to make an initial waiver of the right to be represented by a lawyer without first advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation; a trial court is not required to inquire into the basis of defendant's request for self-representation pursuant to MCR 6.005(D) before denying the request as untimely because the underlying rationale for the inquiry is to inform the defendant of the hazards of self-representation, not to determine whether a request is timely.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *David H. Goodkin*, Assistant Attorney General, for the people.

State Appellate Defender (by *Kristin E. Lavoy*), and Kyle B. Richards, *in propria persona*, for defendant.

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

PER CURIAM. Following a jury trial, defendant Kyle Brandon Richards was convicted of assault of a prison employee, MCL 750.197c. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 50 months to 40 years' imprisonment. The sentence is to be served consecutively "to any other sentence currently being served." Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm defendant's conviction, but we remand for further proceedings.

I. BACKGROUND

This appeal arises from an incident that occurred while corrections officers transported defendant to the segregation unit at Bellamy Creek Correctional Facility. On January 3, 2013, corrections officers Christopher Balmes and Christopher Hudson escorted defen-

dant to the segregation unit. Balmes, the victim in this case, testified that he had not previously dealt with, seen, or heard of defendant before January 3, 2013. According to the victim, defendant was handcuffed behind his back, and Hudson and the victim were each on one side of defendant holding one of his arms while escorting him. The victim testified that defendant was not yelling but that he seemed upset. Hudson testified that defendant made some statements directly to him during the escort. Hudson further testified that defendant made a comment that the officers would not be able to do anything if he assaulted them. The victim testified that they first took defendant to the shower because, before inmates go to the segregation unit, they are strip-searched in the shower to make sure they do not have any contraband. Once they arrived at the shower cell, defendant was placed into the shower cell. The victim testified that the door closed behind defendant and automatically locked.

According to the victim, he turned to walk away after defendant was placed in the shower cell, and defendant "crouched down next to an opening in the wall [known as a 'restraint slot'] and spit through it, hitting [the victim] in the arm." Hudson testified that through his peripheral vision he also saw defendant bend down, spit through the restraint slot, and hit the victim's arm with saliva. The victim, who was wearing a short-sleeved uniform, testified that the saliva landed on his right forearm and pant-leg area and that the saliva "was basically a spit spray." The victim further testified that the saliva was "[n]ot a big wad," did not contain phlegm or blood, and hit a section of him rather than just one spot. According to the victim, it was not possible for the substance on his arm to be water or something else from the shower because he

saw defendant spit on him and because there were no other inmates in the shower cell besides defendant.

The victim's supervisor, John Nicewicz, was standing in the vicinity when the incident happened. The victim testified that, as a reaction to being spat on, he walked over and told his supervisor because the supervisor needed to know about misconduct. Nicewicz testified that he was turned away and did not see defendant spit on the victim but that the victim told him that "he just got spat on." According to Nicewicz, the saliva "was basically clear" and "kind of looked like a spray or a mist." Nicewicz further testified that he believed that the substance was spit because the shower was not on and because it did not look like water. The victim testified that he made a written report of the misconduct and that Nicewicz took pictures of the areas containing saliva. Using a digital camera, Nicewicz took pictures of the victim's arm and pant leg, which were admitted at trial. The victim testified that, after the pictures were taken, he washed his arm off with soap and water. The victim further testified that, after work, he washed his pants. With respect to spitting incidents, Nicewicz testified, "[W]e . . . train the officers and have them leave the saliva on their body and we try to photograph it and then obviously have them wash it off as soon as what we get what we think are good photographs." Nicewicz further testified that he had never collected clothing that had very small amounts of saliva on it—such as the victim's pants in this case—as evidence. Defendant was eventually charged with one count of assault of a prison employee.

During the pretrial phase, defendant filed numerous motions *in propria persona* and changed attorneys several times. Defendant also raised numerous other

motions, including filing a "[n]otice of change of plea and request for D.N.A[.] and polygraph examination" that requested to change his plea, DNA testing of the victim's clothing, and a polygraph examination of all witnesses; a motion to remove and disqualify his current attorney, coupled with a request for reappointment of counsel; and a "[m]otion to quash and bar 4th habitual sentence enhancement upon constitutional challenge of habitual application." After a hearing on April 22, 2014, the trial court granted defendant's request for a new attorney.

The trial court heard yet another motion for new counsel on June 3, 2014. At this hearing, defendant's second appointed attorney stated that there was a breakdown in the attorney-client relationship. According to counsel, defendant told counsel not to visit him, and defendant refused to see counsel or listen to any of his advice. Appointed counsel further stated that he could not prepare for trial because of those reasons and that it was "a hostile work environment" for him because of "threats here of Judicial Tenure Commission [and] the Attorney [Grievance] Commission." In response, the prosecution noted that trial was scheduled for that week. After some dialogue between defendant and the trial court, the trial court asked defendant, "Do you wish to represent yourself in these proceedings?" Defendant responded, "No, I do not. I want [c]ounsel that is effective . . . . I want an attorney who will do their job." Defendant subsequently threatened to seek legal reprimand by going to the Judicial Tenure Commission, the Attorney Grievance Commission, the Civil Rights Commission, and to the Governor, "if [he] ha[d] to." Thereafter, the trial court granted the motion for new counsel. A third attorney was appointed as defendant's counsel. Not long thereafter, there was another motion for new counsel, and,

on August 12, 2014, there was a hearing to address this motion, during which defense counsel withdrew his motion. At the hearing, defense counsel stated, "Your Honor, [defendant] and I had an opportunity to discuss the case and discuss our differing opinions. I respect him. I believe he respects me and now we will withdraw the motion." On October 20, 2014, voir dire began with defendant's third appointed counsel as defendant's attorney.

On the morning of the sole day of trial, and right after the prospective jurors swore to truthfully answer the voir dire questions, defense counsel asked the trial court if he could approach. After the potential jurors exited the courtroom, defense counsel stated that defendant indicated that he now wanted to represent himself. Following argument from the prosecution, the trial court then allowed defendant an opportunity to speak, and he stated that he had questions for the jury and that he should be allowed to ask them because he was going to represent himself. In response, the trial court stated:

> [Defendant], I'm going to interrupt you because you are not representing yourself. We have had numerous pretrial motions in this matter and this is now the 3rd attorney who has been appointed to represent you. [Defense counsel] has worked very hard to accommodate your requests and to present those to the Court. The Court finds that your request to represent yourself is *untimely*. Again, you've had multiple opportunities to present this issue to the Court and so your request to represent yourself is denied here today.
>
> [Defendant], I'm not going to entertain this further at this point in time in light of the fact that [defense counsel] has presented to me a list of questions that you provided to him, that we reviewed this morning and have found to be fair questions that the Court will be asking the jurors. But as argued by the Prosecution, the Court Rules do

> provide the Court with the discretion and authority to conduct voir dire and this Court will be doing that. Very quickly. I'm not going to be leaving the jurors out in the hallway long. Was there something else you wanted to say? [Emphasis added.]

Defendant then stated that he wanted to call other prisoners as witnesses to discredit the testimony from the corrections officers. The trial court concluded the matter by stating that they were in the middle of voir dire, that the issue of witnesses could be addressed at a later time, and that defendant's request to represent himself was denied. After the prosecution's case-in-chief, defendant stated, "As stipulated to at the beginning before the jury came here, I did want to represent myself and there were things I would like to address with the Court. There were witnesses I wanted to bring. None of those things were allowed. So the least the Court could do is grant me the right to take the stand." Defendant then proceeded to testify against the advice of counsel. Subsequently, before closing arguments occurred, defendant placed an objection regarding his witnesses on the record. Specifically, he stated, "I want to let the Court know my dissatisfaction [of] not being allowed to call several prisoners as witnesses who would have been used to discredit the officers and prove they were engaging in perjury." He further stated that he was not able to call these witnesses because of the trial court's denial of his request to represent himself and that the witnesses could testify that the officers routinely falsify statements. The trial court stated that the objections were noted but overruled because, "[a]s [it] underst[ood] [the issue], there were no other inmates that were directly involved in this situation and [defendant] did not have any prior knowledge, particularly of [the victim] prior to this incident." The trial court concluded that attacking the

"fabrication of reports" did not have an adequate basis in this case. The jury subsequently found defendant guilty of assaulting a prison employee, and defendant was sentenced. He now appeals as of right.

II. RIGHT TO SELF-REPRESENTATION

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Martinez v Court of Appeal of California, Fourth Appellate Dist*, 528 US 152, 154; 120 S Ct 684; 145 L Ed 2d 597 (2000). However, a "defendant also 'has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so.' " *Id*., quoting *Faretta v California*, 422 US 806, 807; 95 S Ct 2525; 45 L Ed 2d 562 (1975). See also *Faretta*, 422 US at 835-836 (holding that the defendant was denied the constitutional right to conduct his own defense when he "clearly and unequivocally" requested to do so "weeks before trial"). Further, "[a]lthough the right to proceed in propria persona is guaranteed by the United States Constitution, the Michigan Constitution, and state statute, this right is not absolute." *People v Ahumada*, 222 Mich App 612, 616; 564 NW2d 188 (1997). Generally, before a court may allow a defendant to proceed *in propria persona*,

> [the] court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the

> court's business. [*People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004).]

Defendant argues, and we agree, that the right to self-representation is an established federal and state constitutional right. *Faretta*, 422 US at 807; Mich Const 1963, art 1, § 13; *Ahumada*, 222 Mich App at 616. However, the right to self-representation is not without its limitations. Since *Faretta*, the consensus that has emerged from state and federal appellate courts is that a request for self-representation can only be denied for three reasons: (1) if it is untimely, ordinarily if made after trial has begun, (2) if there is sufficient certainty of serious obstructionist misconduct, or (3) if no valid waiver can be accomplished. 3 LaFave, Israel & King, Criminal Procedure (2d ed), § 11.5(d), pp 582-584.

In *People v Hill*, 485 Mich 912, 912 (2009), our Supreme Court held that the trial court's decision "denying [a] request for self-representation 'at this time' did not deny [the] defendant his constitutional right to self-representation where the defendant's request was *not timely* and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business." (Emphasis added.) As was the case here, the trial court in *Hill* simply denied the defendant's request and failed to make any pertinent inquiry into whether the defendant's request to represent himself was unequivocal or whether he knowingly, intelligently, and voluntarily wished to waive his right. *People v Hill*, 282 Mich App 538, 551; 766 NW2d 17 (2009), vacated in part by *Hill*, 485 Mich at 912. Nonetheless, as previously noted, our Supreme Court found that the defendant's right to self-representation was not violated because the request was untimely. *Hill*, 485 Mich at 912.

Subsequently, the Sixth Circuit Court of Appeals analyzed the issue in further detail and denied Hill habeas corpus relief on the issue. *Hill v Curtin*, 792 F3d 670, 674 (CA 6, 2015).[1] The Sixth Circuit explained that, on the first day of the defendant's trial, "as potential jurors were 'on their way up to the courtroom,' " the defendant informed the trial court that he wanted to represent himself. *Id*. at 674. The trial court denied the request and stated:

> No. The court is not going to allow that, especially at the last minute. Also, it's not going to be helpful. There is no early indication of this. We are ready to proceed with the trial at this time. To be prepared for that, and to inform the defendant and have him prepared for following the rules of asking questions and rules of evidence, the court is going to have to do that during the trial. So at this point it's not going to work.
>
> You may consult with your attorney. We are going to have you sitting right next to him. If you would like paper and pen to tell him what you would like, how you would like things, you can do that.
>
> We expect and want you to have all the participation you want. We also want you to have a legal representative to follow the rules of the courtroom. So at this time it is denied. [*Id*.]

With respect to the timeliness of asserting the right, the Sixth Circuit explained:

> However, "[a]s the *Faretta* opinion recognized, the right to self-representation is not absolute." *Martinez v. Ct. of Appeal of Cal., Fourth App. Dist.*, 528 U.S. 152, 161 (2000). First, a defendant may forfeit his self-representation right if he does not assert it "in a timely manner." *Id*. at 162. Such a limit reflects that "[e]ven at the trial level . . . the

[1] "Decisions of federal courts of appeals, while not binding on this Court, may be persuasive." *People v Bosca*, 310 Mich App 1, 76 n 25; 871 NW2d 307 (2015).

> government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id*. In other words, if the right is asserted in an untimely manner, it may be deemed forfeited as a threshold matter. [*Hill*, 792 F3d at 677 (citations omitted).]

The Sixth Circuit further explained that "*Faretta* did not establish a bright-line rule for timeliness," that the defendant's request in *Faretta* occurred weeks before trial, and that "the Supreme Court has never defined the precise contours of *Faretta's* timing element." *Id*. at 678-679. However, " 'most courts require [a defendant] to [assert his right] in a timely manner,' " *id*. at 679, quoting *Martinez*, 528 US at 161-162, and "[g]iven the general standard articulated in *Faretta*, 'a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard,' " *Hill*, 792 F3d at 679, quoting *Knowles v Mirzayance*, 556 US 111, 123; 129 S Ct 1411; 173 L Ed 2d 251 (2009). "[T]o the extent that *Faretta* addresses timeliness, as a matter of clearly established law it can only be read to require a court to grant a self-representation request when the request *occurs weeks before trial*." *Hill*, 792 F3d at 678 (emphasis added). In making its conclusion that the Michigan Supreme Court's holding (that the defendant was not denied his constitutional right to self-representation) was not unreasonable, the Sixth Circuit reasoned that "[a] trial judge may fairly infer on the day of trial—as the jurors are on their way to the courtroom—that a defendant's last-minute decision to represent himself would cause delay, whether or not the defendant requests a continuance." *Id*. at 681.

The Sixth Circuit also addressed defendant's main argument in this appeal, namely that it is error requiring reversal when a trial court fails to set forth findings

under MCR 6.005(D). In holding that caselaw imposes no such requirement, the Sixth Circuit opined:

> First, the U.S. Supreme Court has never held that a court must inquire into the basis of a defendant's request before denying it as untimely. In other words, the trial court's denial of Hill's motion was not at odds with clearly established law. Second, the Michigan Supreme Court's holding was not based on a determination that the trial court's inquiry was *Faretta*-compliant. Rather, the Michigan Supreme Court held that the trial court did not violate Hill's Sixth Amendment right because his "request was not timely and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business." *Hill*, 773 N.W.2d at 257. The Michigan Supreme Court's decision was not therefore contrary to or an unreasonable application of *Faretta's* requirement to inquire into whether Hill's request was knowing, intelligent, and voluntary. [*Hill*, 792 F3d at 678.]

We are in accord with the Sixth Circuit's holding. We do not glean from any caselaw presented or reviewed that a trial court *must* conduct a *Faretta* inquiry prior to denying a request as untimely, *Hill*, 792 F3d at 678; *Faretta*, 422 US at 835, because the underlying rationale for a trial court to conduct an inquiry pursuant to MCR 6.005(D) "is to inform the defendant of the hazards of self-representation, not to determine whether a request is timely," *Hill*, 792 F3d at 678. The issue of whether defendant intelligently and voluntarily waived his right to self-representation was not at issue in *Hill*. Similarly, it is not an issue in this case. Rather, the dispositive issue in both cases was whether defendant asserted his right to self-representation in a timely manner. Therefore, it was unnecessary for the trial court to engage in an inquiry pursuant to MCR 6.005(D).

The difficulty in deciding whether a request for self-representation is timely lies in the fact that *Faretta* did not establish a bright-line rule for timeliness. Likewise, our Supreme Court has been reluctant to establish a bright-line rule for timeliness, going so far as to hold:

> The people would have us announce a guideline which would preclude the assertion of the right to proceed without counsel if it is not made before the trial begins. We cannot accede to this request. Although the potential for delay and inconvenience to the court may be greater if the request is made during trial, that will not invariably be the case. [*People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976).]

Recognizing that *Anderson* precludes us from establishing a bright-line rule does not lead us to opine that we are forbidden from using the date of the request relative to the date of trial as *a factor* when considering the issue of timeliness. Clearly, timeliness is established, at least in part, by the date of trial relative to the date of the request. Indeed, to the extent the Supreme Court considered the issue of timeliness in *Faretta*, it did so by correlating the date that defendant's request was made to the date of the trial, finding that defendant's request was made "[w]ell before the date of trial" and "weeks before trial." *Faretta*, 422 US at 807, 835; *Hill*, 792 F3d at 678.

Having decided that the date of the request relative to the date of trial is a factor to be considered, we next turn to the entirety of the record to determine whether the request for self-representation was timely.

In this case, defendant brought numerous pretrial motions. Importantly, defendant never made a request for self-representation. In fact, when specifically asked by the trial court if he wanted to represent himself,

defendant emphatically replied: "No." Rather than proceed *in propria persona*, he told the trial judge that he wanted an "effective" attorney. In direct response to his request, the trial court appointed a different attorney to represent defendant. Following that ruling, defendant continued to file motions with the trial court, but at no time did defendant make a request for self-representation. Then, approximately one week from the scheduled date of trial, defendant again requested that the trial court appoint a different attorney to represent him. Again, the trial court honored defendant's request. Shortly thereafter, defendant resumed filing motions with the trial court. It was not until after the jury had been sworn that defendant, through counsel, made the request to proceed *in propria persona*. It was at that juncture that the trial court denied the request, finding the request untimely.

Viewing the entirety of the record, we hold that defendant was not deprived of his constitutional right to self-representation. The trial court placated defendant's proclivity to request substitute counsel. By the date of trial, defendant had the benefit of three separate trial counsel. On these facts, we cannot find how defendant's constitutional right to counsel was denied. Rather, the record clearly reveals that defendant was afforded every opportunity to have the effective assistance of counsel, including the right to represent himself. That he declined to affirmatively assert his right to self-representation until the date of trial, coupled with all the other factors outlined in this opinion, leads us to concur with the trial court's conclusion that defendant's request was untimely. Further, to the extent it may be necessary under our Supreme Court's decision in *Hill*, we also conclude from the record evidence that "granting the request at that moment would have disrupted, unduly inconve-

nienced, and burdened the administration of the court's business." *Hill*, 485 Mich at 912. Consequently, the trial court's decision denying defendant's request for self-representation was well within the range of reasonable and principled outcomes and was not an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003); *Ahumada*, 222 Mich App at 614. Accordingly, defendant is not entitled to relief.

III. DESTRUCTION OF EVIDENCE

Next, defendant argues that he was denied due process by the destruction of evidence. This Court reviews a defendant's constitutional due-process claim de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). To warrant reversal on a claimed due-process violation involving the failure to preserve evidence, "a defendant must prove that the missing evidence *was exculpatory* or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007) (emphasis added). More specifically, as is relevant here, when the evidence is only "potentially useful," failure to preserve the evidence does not amount to a due-process violation unless bad faith can be shown. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). A "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Before trial began, defendant filed a motion to dismiss the case based on the failure to preserve the victim's shirt, which defendant argued contained samples of the alleged saliva. In response, the prosecution argued that the victim was wearing a short-sleeved shirt and that the saliva landed on his forearm.

Defendant then argued that the alleged saliva likely splattered onto the shirt. The trial court denied the motion because defendant's argument was speculative in nature and was based on what conceivably could have happened. At a subsequent motion hearing, defendant argued that the case should be dismissed based on the failure to preserve the saliva. Defendant argued that failing to preserve the saliva violated Michigan Department of Corrections policy and that the substance could not be tested because it was not preserved. The trial court denied the motion, stating that defendant was free to make the argument to the jury at trial. The trial court reasoned that "it was not reasonable to expect the officer to wait until a forensic team came to collect this sample, if it was even collectible, so to speak, particularly in light of the fact that there is evidence in the form of photographs."

Failing to preserve potentially useful evidence can amount to a due-process violation in certain situations. In *Youngblood*, 488 US at 57-58, the Court stated:

> The Due Process Clause of the Fourteenth Amendment . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.

The Court then held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id*. at 58. Thus, as noted earlier, to warrant reversal on a claimed due-process violation involving the failure to preserve evidence, "a defendant must prove that the missing evi-

dence was exculpatory or that law enforcement personnel acted in bad faith." *Hanks*, 276 Mich App at 95. A "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Johnson*, 197 Mich App at 365.

In this case, defendant failed to demonstrate that the evidence was exculpatory, as opposed to potentially exculpatory. The evidence would only be exculpatory if subject to tests that yielded favorable results. Defendant argues that the substance on the victim's arm was exculpatory because, if the substance had been preserved, testing could have ruled out defendant as a source or shown that the substance was water instead of saliva. While defendant testified that he did not spit at anyone and that water from the showerhead could have splattered off the floor and through the restraint slot, testimony from the corrections officers and police strongly supported that defendant spat on the victim. The victim testified that the substance on his arm was not water because he saw defendant spit on him. Hudson testified that the shower cell was a confined space, that defendant was the only inmate in the shower cell, and that he saw defendant spit on the victim. Hudson testified that the shower was off. Further, according to Nicewicz, the victim reacted and said that "he just got spat on." In addition, there was testimony that the saliva was "spit spray" and was "[n]ot a big wad," and, as the trial court alluded to, the sample may not have been able to be collected. For these reasons, defendant has shown only that the evidence was potentially exculpatory. *Id*. Therefore, defendant had to show bad faith with respect to the failure to preserve. *Hanks*, 276 Mich App at 95.

With respect to bad faith, there is no indication on the record that the victim washed his arm off in bad

faith. While defendant argues that the victim knowingly and intentionally destroyed the evidence and that not preserving evidence of misconduct violated the prison operating procedures, testimony was presented regarding what steps should be taken, in accordance with the operating procedures, to collect evidence in a case such as this one:

> We photograph it to maintain the evidence to show, in this case, in a courtroom what has happened and then we encourage the employees to clean quickly afterwards. Prisons have people with communicable diseases and there's a concern of getting it washed off as quickly as possible.

Further testimony revealed that the prison was not equipped to scrape saliva off one's arm and put it in a test tube for DNA purposes. The victim testified that he saw defendant spit on him, that he informed his supervisor, that he made a report of the misconduct, that he waited for his arm to be photographed, and that he washed his arm off with soap and water after the pictures were taken. The record simply does not support the assertion that the victim washed the saliva off his arm in bad faith. See *United States v Garza*, 435 F3d 73, 75 (CA 1, 2006) (explaining that "conscious and deliberate" actions were not enough to show bad faith and that "[e]ven if, as found by the district court, [the police officer's] actions were 'short-sighted and even negligent,' this does not satisfy the requirement of bad faith"). See also *Johnson*, 197 Mich App at 365 (explaining that "the routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal").

In sum, because defendant has not met his burden of establishing that "the evidence was exculpatory or that

the police acted in bad faith," *id*., defendant's due-process claim based on the destruction of evidence is without merit, *Hanks*, 276 Mich App at 95; *Johnson*, 197 Mich App at 365. Accordingly, defendant is not entitled to relief.

IV. RESENTENCING

Next, defendant argues that he is entitled to resentencing because his sentence was based on inaccurate guidelines and was unreasonable under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). "A sentence that departs from the applicable guidelines range [is] reviewed by an appellate court for reasonableness." *Id*. at 392. Recently, in *People v Steanhouse*, 313 Mich App 1, 44-48; 880 NW2d 297 (2015), this Court held that the reasonableness of a sentence is determined by using the "principle of proportionality" standard set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

In this case, defendant raised a scoring challenge to Offense Variable 19, MCL 777.49, in a motion for resentencing. At the hearing on the motion, the prosecution agreed with the scoring change, which changed defendant's applicable guidelines range to 12 to 48 months—making his minimum sentence of 50 months outside the applicable guidelines range. The trial court stated that it considered the new sentencing guidelines range but nonetheless determined that the sentence was reasonable. However, the trial court's ruling on the issue occurred before the *Steanhouse* decision was issued. Therefore, "the trial court was *unaware of, and not expressly bound by*, [*the*] *reasonableness standard rooted in the* Milbourn *principle of proportionality* at the time of sentencing." *Steanhouse*, 313 Mich App at 48 (emphasis added). See also *People v Shank*, 313

Mich App 221, 226; 881 NW2d 135 (2015) (explaining that "the trial court did not have the benefit of our Supreme Court's decision in *Lockridge* or *this Court's decision in* Steanhouse") (emphasis added).

V. STANDARD 4 BRIEF

Next, defendant, *in propria persona*, argues that the retroactive application of *Lockridge* violates the Ex Post Facto Clause, US Const, art I, § 10. However, defendant waived this issue. "[W]aiver is the *intentional* relinquishment or abandonment of a known right." *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012) (quotation marks and citation omitted). "A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right." *Id*. Specifically, "[a] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper" before the trial court. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id*. At the hearing on the motion for resentencing, defense counsel argued that the *Lockridge* decision was issued after her written motion and that *Lockridge* "made it so the guidelines are advisory but ordered that the Trial Courts consider the applicable guideline range in fashioning a sentence and then that sentence would be reviewed for reasonableness." Defense counsel further argued that, under *Lockridge*, defendant's sentence was unreasonable. Accordingly, by making this argument, defense counsel deemed the application of *Lockridge* to defendant's case proper at the trial court level. To allow defendant to assign error on appeal to the application of *Lockridge* would allow defendant to harbor this alleged error as an appellate

parachute. *Id*. Therefore, this issue is waived, and the alleged error is extinguished. *Vaughn*, 491 Mich at 663.

Moreover, even if defendant had not waived the issue, he has not demonstrated plain error for this unpreserved argument. *People v Carines*, 460 Mich 750, 761-765; 597 NW2d 130 (1999). "The *Ex Post Facto* Clause, by its own terms, does not apply to courts." *Rogers v Tennessee*, 532 US 451, 460; 121 S Ct 1693; 149 L Ed 2d 697 (2001). "[T]he Clause . . . is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Id*. at 456 (quotation marks and citation omitted). Defendant relies on cases that have found Ex Post Facto Clause violations when different versions of sentencing guidelines were applied. See, e.g., *Peugh v United States*, 569 US ___, ___; 133 S Ct 2072, 2082; 186 L Ed 2d 84 (2013) (explaining "that applying amended sentencing guidelines that increase a defendant's recommended sentence can violate the *Ex Post Facto* Clause"). However, these cases are distinguishable because an amended version of the sentencing guidelines was not applied to defendant's case. Defendant's case was pending on direct review when *Lockridge* was issued on July 29, 2015. Therefore, because defendant's case was pending on review, *Lockridge* applies retroactively. See *People v Lonsby*, 268 Mich App 375, 389; 707 NW2d 610 (2005) ("[I]t is well-established that a new rule for the conduct of criminal prosecutions that is grounded in the United States Constitution applies retroactively to all cases, state or federal, pending on direct review or not yet final."). See also *United States v Barton*, 455 F3d 649, 657 (CA 6, 2006) (explaining that the Court was "join[ing] *every other* circuit in holding that [retroactively applying]

Booker[2] does not violate ex post facto-type due process rights of defendants") (emphasis added). Defendant failed to establish plain error, *Carines*, 460 Mich at 763, and as a consequence, defendant is not entitled to relief.

Lastly, defendant argues that his due-process rights were violated because the prosecution failed to timely file its notice seeking to enhance defendant's sentence. The resolution of this issue involves the interpretation of a statute, which this Court reviews de novo. *People v Morales*, 240 Mich App 571, 575; 618 NW2d 10 (2000). MCL 769.13 governs the timing of when a prosecutor may seek to enhance a defendant's sentence under the habitual offender statutes and provides in pertinent part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

In this case, defendant did not waive his arraignment. Therefore, the applicable time period for measuring the 21-day period begins with the date of "defendant's *arraignment on the information* charging the underlying offense." MCL 769.13(1) (emphasis added). Contrary to defendant's argument on appeal, there is a distinction between an arraignment on the information and an arraignment on the warrant or complaint. Compare MCR 6.104 (arraignment on the warrant or complaint) with MCR 6.113 (arraignment

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[2] *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

on the indictment or information). See also *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013) (referring to the arraignment on the information as the "circuit court arraignment"). Defendant was arraigned on the information in circuit court on February 13, 2014. On that same day, the prosecution filed the first amended information, which contained a fourth-offense habitual offender notice. Therefore, the prosecution's notice came well within the 21-day period after defendant's arraignment on the information. MCL 769.13(1). Accordingly, defendant's due-process argument premised on the timing of the prosecution's notice fails.

Affirmed but remanded for further inquiry as to whether resentencing is required. We do not retain jurisdiction.

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

In re POPS

Docket No. 328818. Submitted April 12, 2016, at Lansing. Decided April 28, 2016. Approved for publication June 7, 2016, at 9:05 a.m.

The Department of Health and Human Services filed a petition in the Ingham Circuit Court, Family Division, to terminate respondent's parental rights to his child. The court obtained jurisdiction over the child after respondent pleaded no contest to fleeing from police for 14 blocks with the child in the vehicle. Police discovered marijuana and a scale in the vehicle, and respondent was briefly incarcerated pending charges. Petitioner placed the child with respondent's mother, who had been the child's caregiver since birth, but removed the child when it discovered she had a criminal record and could not obtain a license as a foster-care provider. Respondent agreed to plead guilty to resisting and obstructing an officer, for which he was sentenced to 18 months' probation. Respondent engaged in services while on probation but was sent to prison after his arrest for carrying a concealed weapon. The grandmother twice petitioned the court for a guardianship over the child, but the court denied both petitions. Petitioner eventually filed for termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j) because criminal activity was present at the beginning of the case and at the time of the filing of the petition, because respondent could not provide care or custody during his incarceration and was unable to provide an appropriate alternative placement, and because returning the child to respondent's care would harm the child. The court, Janelle A. Lawless, J., entered an order terminating respondent's parental rights. Respondent appealed.

The Court of Appeals *held*:

1. The trial court clearly erred by terminating respondent's parental rights on the basis of MCL 712A.19b(3)(c)(*i*) and (g), which both permit termination upon clear and convincing proof that the parent has not provided proper care and custody and will not be able to provide proper care and custody within a reasonable time. Although respondent was incarcerated, he was permitted to achieve proper care and custody through relative

placement, which he did by placing the child with his mother—the child's grandmother. Petitioner did not follow its own guidelines when it determined that the grandmother could not become a licensed foster-care provider because of her criminal record, which included misdemeanor aggravated assault, domestic violence, and retail fraud charges. Under the guidelines, placement is prohibited only for felony convictions, so the misdemeanors were insufficient. Petitioner's guidelines also restrict placement with a relative who committed a "good moral character offense," which includes fraud and assault convictions. But even then, the caseworker has discretion to place the child with the relative after evaluating whether there are safety issues with the relative and seeking approval for the placement. Here, the caseworker stated at the grandmother's guardianship hearing that she noted no safety concerns relating to the grandmother. Therefore, respondent might have been able to provide proper care and custody through placement with the child's grandmother. The trial court's remaining reasons for termination under MCL 712A.19b(3)(c)(*i*) and (g) were also clearly erroneous. The determination that respondent did not participate in services in a meaningful way when he had the opportunity was largely contradicted by the evidence. The only remaining rationale was that respondent committed another crime which resulted in his incarceration, but incarceration alone was not a sufficient reason for termination of parental rights.

2. The trial court clearly erred by terminating respondent's parental rights on the basis of MCL 712A.19b(3)(j), which permits termination if there is a reasonable likelihood, based on the parent's conduct or capacity, that the child will be harmed if returned to the parent's home. The trial court terminated respondent's rights solely because respondent was incarcerated and the child would "obviously" be harmed. The trial court implied that returning the child to respondent's care meant sending the child to live with him in prison. The proper determination was the likelihood of harm if the child was returned to respondent's home after his release from prison. There was no evidence that respondent ever harmed the child or was likely to harm the child. Respondent's criminal record alone was not sufficient to justify termination, and his failure to immediately pull over for a traffic stop under the circumstances that originally led to adjudication did not create an unreasonable risk of serious abuse or death that would justify termination.

Reversed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — RELATIVE PLACEMENT.

A child may be placed with a relative caregiver who has a criminal record if the conviction is not an automatic bar to licensure as a foster-care provider; if the offense constitutes a "good moral character offense" as defined in Rule 400.1152 of the Michigan Administrative Code, the caseworker has discretion to place the child with the relative after evaluating whether there are safety issues with the relative and seeking approval for the placement.

Stuart J. Dunnings, III, Prosecuting Attorney, *Joseph B. Finnerty*, Appellate Division Unit Chief, and *Kahla D. Crino*, Assistant Prosecuting Attorney, for petitioner.

Vivek S. Sankaran and Mallory Andrews (under MCR 8.120(D)(3)) for respondent.

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

PER CURIAM. Respondent-father (respondent) appeals as of right an order terminating his parental rights to his child, EP, under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), MCL 712A.19b(3)(g) (failure to provide proper care and custody), and MCL 712A.19b(3)(j) (reasonable likelihood of harm). For the reasons set forth in this opinion, we reverse.

I. FACTUAL BACKGROUND

The trial court obtained jurisdiction over EP after respondent pleaded no contest to an allegation by petitioner, the Department of Health and Human Services (DHHS), that he fled from police for a distance of 14 blocks while EP was in his vehicle. Police discovered marijuana and a scale in the vehicle, and respondent was briefly incarcerated pending charges. Petitioner

placed EP with respondent's mother, who had been EP's caregiver since birth. However, petitioner removed EP from the grandmother's home and placed him in foster care when it discovered that she had a criminal record and could not obtain a license as a foster-care provider. The prosecutor did not charge respondent for the traffic offense. Instead, respondent agreed to plead guilty to another offense, resisting and obstructing a police officer, and the court sentenced him to 18 months' probation. Respondent engaged in services provided by petitioner while on probation, but he was sent to prison after his arrest for carrying a concealed weapon. The grandmother twice petitioned the trial court for a guardianship over EP, but the court denied both petitions. Petitioner eventually filed for termination of respondent's parental rights, which the trial court granted. Respondent now appeals.

II. STANDARD OF REVIEW

Respondent argues that the trial court erred when it found that petitioner established multiple statutory grounds for termination by clear and convincing evidence. The trial court's decision that a ground for termination of parental rights has been proved by clear and convincing evidence is reviewed for clear error. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id*. at 296-297.

III. STATUTORY GROUNDS FOR TERMINATION

The trial court found that petitioner established three separate grounds for terminating respondent's

parental rights: MCL 712A.19b(3)(c)(*i*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j).

A. MCL 712A.19b(3)(c)(*i*) AND MCL 712A.19b(3)(g)

Under MCL 712A.19b(3)(c)(*i*), the trial court may terminate a parent's parental rights if the parent "was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and" it finds by clear and convincing evidence that the "conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." A trial court may also terminate a parent's parental rights if it finds by clear and convincing evidence that the parent, "without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g). We address both statutory grounds together.[1]

The trial court held that it was appropriate to terminate respondent's parental rights under MCL 712A.19b(3)(c)(*i*) because criminal activity was present at the beginning of the case and criminal activity was still a concern in light of respondent's arrest and imprisonment for carrying a concealed weapon. The court explained that there was no indication regarding when these conditions would be rectified because re-

[1] It is appropriate to address MCL 712A.19b(3)(c)(*i*) and (g) together because our Supreme Court in *In re Mason*, 486 Mich 142, 164-165; 782 NW2d 747 (2010), did so, stating, "each of these grounds requires clear and convincing proof that the parent has not provided proper care and custody and will not be able to provide proper care and custody within a reasonable time."

spondent would be incarcerated until at least April 2016, and it was unlikely that he could provide care for EP immediately after his release. The court also explained that, beyond his incarceration, respondent did not participate in services on a meaningful level when he had the opportunity and never attended therapy. The court held that termination was proper under MCL 712A.19b(3)(g) because respondent could not provide care or custody during incarceration, and he was unable to provide for an appropriate alternative placement.

With regard to these statutory grounds, respondent argues that he provided proper care and custody by placing EP with the grandmother, who had acted as EP's caregiver since birth. Respondent is correct that Michigan permits an incarcerated parent to achieve proper care and custody through placement with a relative. *In re Mason*, 486 Mich 142, 161 n 11; 782 NW2d 747 (2010). Our Supreme Court determined that when an incarcerated parent requests placement of his or her children with a relative, "[a]s long as the children are provided adequate care, state interference with such decisions is not warranted." *In re Sanders*, 495 Mich 394, 421; 852 NW2d 524 (2014).

Petitioner's guide for relative placement requires that relatives must become licensed foster-care providers. DHHS, *Children's Foster Care Manual: Relative Placement and Engagement* (September 1, 2014), p 12.[2] Petitioner's reason for removing EP from the grandmother's home was her inability to become a licensed foster-care provider because of her criminal history. The grandmother's criminal record included a misde-

[2] Available at <http://www.mfia.state.mi.us/OLMWEB/EX/FO/Public/FOM/722-03B.pdf> (accessed February 9, 2016) [https://perma.cc/J2HE-KNUS].

meanor aggravated assault charge in 2005 and a misdemeanor domestic violence charge in 2006. Her record also included convictions for operating with a suspended license in 2007, felony retail fraud in 2010, and misdemeanor retail fraud in 2011. Respondent contends that removal from the grandmother's home was erroneous because petitioner's policy states that relatives not interested in licensure can apply for a waiver. Petitioner's policy guidelines specifically state that all relative caregivers must become licensed and that waivers are only appropriate if the relative refuses to pursue licensure or the child is an American Indian. *Id*. at 14-15. In this case, the determination made by the caseworker was that the grandmother's criminal history made her ineligible for licensure, not that she refused to pursue licensure. Therefore, the waiver process cited by respondent was not applicable to the grandmother.

Nevertheless, respondent is correct that petitioner did not follow its own guidelines when it determined that the grandmother could not become a licensed foster-care provider because of her criminal record. A foster-home applicant must "[b]e of good moral character," Mich Admin Code, R 400.9201(b), but would be outright barred for a prior conviction only if it was for child abuse or neglect. Mich Admin Code, R 400.9205(3). Notably, the *Children's Foster Care Manual: Relative Placement and Engagement* prohibits placement with a relative caregiver only if there is a *felony* conviction for certain enumerated crimes, including spousal abuse or physical assault, battery, or a drug-related offense within the last five years. *Children's Foster Care Manual: Relative Placement and Engagement*, p 8. However, the grandmother had *misdemeanor* convictions for aggravated assault and domestic violence, not felony convictions. Accordingly,

petitioner's own guidelines did not outright bar EP's placement with his grandmother. Petitioner's guidelines potentially bar placement with a relative if the relative committed a "good moral character offense" listed in BCAL-Pub-673.[3] *Id*. at 8-9. Such offenses include convictions for fraud and assault, Mich Admin Code, R 400.1152, and the grandmother had convictions for misdemeanor aggravated assault and retail fraud. However, even if the potential relative caregiver has committed a good-moral-character offense, the caseworker has discretion to place the child with the relative, but must evaluate whether there are safety issues with the relative, and must seek approval for the placement.[4] Petitioner conducted a home study before removing EP, but we are unable to locate the

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[3] BCAL-Pub-673 is petitioner's publication listing the administrative rules governing the good-moral-character licensing requirements. DHHS, *Good Moral Character*, CWL-Pub-673. Available at <http:// <http://www.michigan.gov/documents/mdhhs/CWL-PUB-673_498802_7.pdf> (accessed March 3, 2016).

[4] More specifically, the policy manual states in pertinent part:

> **Good Moral Character Offenses** If a member of the household has a conviction listed in the BCAL-Pub-673, Good Moral Character, except for those identified above as Prohibited Due to Felony Conviction, caseworkers must evaluate this information to determine whether or not there are safety issues that must be addressed. The assessment must at a minimum include:
>
> • The length of time since the offense.
>
> • The relationship of the conviction to caring for children.
>
> • Any services provided to rectify the problems(s).
>
> • If services were provided, determine if the household member(s) completed and benefitted from the service(s).
>
> • How the offense may impact the safety of the child placed in the home and describe protective interventions currently in place.
>
> This documentation must describe and support the basis for the approval, in addition to the reasons the child is safe in the relative's home.

study in the record. Therefore, there is no indication on the record about whether petitioner considered any potential safety issues stemming from the grandmother's criminal history before removing him from her care. However, at the grandmother's guardianship hearing, the caseworker stated that she noted no safety concerns relating to the grandmother. Presumably, if the caseworker noted no safety concerns when doing the guardianship study, there would also have been no safety concerns earlier when petitioner removed EP from her home. Consequently, we conclude that petitioner improperly determined that the grandmother's criminal history barred her outright from licensure when petitioner had discretion to place EP with the grandmother after considering safety issues and seeking approval from within the DHHS.

Additionally, the trial court's remaining reasons for termination under MCL 712A.19b(3)(c)(*i*) and (g) were clearly erroneous. The trial court's determination that respondent did not participate in services in a meaningful way when he had the opportunity is largely contradicted by the evidence. The caseworker explained that respondent attended parenting classes at Cristo Rey and did not complete the course because she transferred him to a more hands-on supportive visitation program. She reported that he was "doing okay" in the visitation program, missed a few visits because of his probation, and did homework "for the most part." He could not complete the supportive visitation program because of his second incarceration. The caseworker testified that all drug screens were clean, with the exception of one positive screen for alcohol, which

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Director approval is required; see Director Approval, in this item. [*Children's Foster Care Manual: Relative Placement and Engagement*, pp 8-9.]

was excused by a doctor's note explaining that the positive test was due to taking Nyquil. She agreed that respondent missed 15 parenting visits, but she explained that most were due to his incarceration or probation issues. Respondent did not participate in the psychological evaluation, but this was because he was incarcerated, and he did not participate in counseling because he could not attend the scheduled intake after he returned to prison. Thus, respondent did participate in services meaningfully while he was not incarcerated. Given this record, we have a definite and firm conviction that the trial court was mistaken when it held that respondent did not participate in services on a "meaningful level" when he had the opportunity. After respondent returned to prison, he had to complete his GED before he could receive any other services. Accordingly, he was unable to make significant progress on his case service plan while incarcerated.

The only remaining rationale articulated by the trial court was that respondent committed another crime, which resulted in his incarceration a second time. However, incarceration alone is not a sufficient reason for termination of parental rights. *In re Mason*, 486 Mich at 146. If respondent provided proper care and custody through placement with the grandmother, incarceration was insufficient to terminate parental rights.

B. MCL 712A.19b(3)(j)

Under MCL 712A.19b(3)(j), a court may terminate parental rights if it finds by clear and convincing evidence that there "is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." On appeal, respondent argues

that the trial court impermissibly terminated parental rights solely because of his criminal history. Respondent was incarcerated at the time of the termination hearing, and the record reflects that he would not be released until either April or August 2016. The trial court terminated parental rights under this subsection solely because respondent was incarcerated, and EP would "obviously" be harmed if returned to respondent. Stated in this way, the court seemed to suggest that returning EP to respondent's care would mean sending the child to live with respondent in prison. However, it is proper to scrutinize the likelihood of harm if the child were returned to the parent's home *after* the parent's release from prison. See *In re Mason*, 486 Mich at 165 (holding that termination based on MCL 712A.19b(3)(j) was erroneous when there was no evidence that a parent would harm his children when released from prison). The trial court's brief statement about respondent's current incarceration does not address the likelihood that EP would be harmed based on respondent's "conduct or capacity." Further, petitioner did not present any evidence that respondent ever harmed his child or was likely to harm his child.

To the extent that the trial court's statement implies that respondent's criminal record placed EP in danger, such a finding is clearly erroneous. Our Supreme Court addressed the propriety of terminating parental rights based solely on a parent's criminal record:

> Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own

> children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children. MCL 712A.19a(2); MCL 722.638(1) and (2). [*In re Mason*, 486 Mich at 165.]

Respondent's criminal record includes resisting and obstructing a police officer and possession of a concealed weapon. Petitioner asserts that termination is proper because respondent admitted to fleeing from the police for 14 blocks while EP was in the vehicle. Although this action undoubtedly created a risk of harm, failing to immediately pull over for a traffic stop under these circumstances did not create an "unreasonable risk of serious abuse or death" that would justify termination. *Id*. Further, the trial court could not terminate parental rights based on respondent's criminal record alone because respondent did not commit any of the enumerated crimes listed in MCL 712A.19a(2) or MCL 722.638(1) and (2). For these reasons, we are left with a firm and definite conviction that the trial court clearly erred by determining that termination of parental rights was proper under MCL 712A.19b(3)(j).

Reversed.

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

AFT MICHIGAN v STATE OF MICHIGAN (ON REMAND)

Docket Nos. 303702, 303704, and 303706. Submitted July 23, 2015, at Lansing. Decided June 7, 2016, at 9:10 a.m. Leave to appeal granted ___ Mich ___.

In Docket No. 303702, AFT Michigan and numerous other labor organizations representing public school employees brought an action in the Court of Claims against the state of Michigan, asserting various constitutional challenges to MCL 38.1343e, as enacted by 2010 PA 75, as well as seeking to enjoin further withholding by the employers of 3% of the employees' wages and the remittance of that amount to the Michigan Public School Employees' Retirement System (MPSERS) as "employer contributions" to the trust that funds retiree healthcare benefits. In Docket No. 303704, Timothy L. Johnson and three other public school employees brought a similar action in the Court of Claims against MPSERS and others, seeking similar relief. In Docket No. 303706, Deborah McMillan and four other public school employees likewise brought a similar action in the Court of Claims against MPSERS and others, seeking similar relief. The court, Clinton Canady, III, J., ordered in all three cases that the withheld wages be placed in an interest-bearing account rather than in the MPSERS trust and ordered that the wages be maintained in that account until the legal challenge was resolved. The court then granted summary disposition in favor of the organizational plaintiffs in the first action and partial summary disposition in favor of plaintiffs and partial summary disposition in favor of defendants in both the second and third actions. The court held that the labor organizations had standing to challenge the statute, that the claims were ripe for review, and that the statute violated plaintiffs' rights under both the Takings Clauses and the Due Process Clauses of the federal and state Constitutions but did not violate the constitutional provisions barring the impairment of contracts by the state. The court also dismissed plaintiffs' common-law breach-of-contract claim. The state of Michigan appealed with regard to the first action (Docket No. 303702). MPSERS and some of the other defendants in the other two actions also appealed, and the plaintiffs in those actions cross-appealed (Docket Nos. 303704 and 303706). The Court of

Appeals, SHAPIRO, P.J., and BECKERING, J. (SAAD, J., concurring in part and dissenting in part), consolidated the appeals and held that the labor organizations had standing, that the claims were ripe for review, and that the statute was unconstitutional because it (1) impaired employment contracts between public school employees and employer school districts in violation of the Contracts Clauses of the state and federal Constitutions, Const 1963, art 1, § 10 and US Const, art I, § 10; (2) effected a taking without just compensation in violation of the Takings Clauses of the state and federal Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV; and (3) violated the guarantees of substantive due process in the state and federal Constitutions, Const 1963, art 1, § 17 and US Const, Am XIV, § 1. 297 Mich App 597 (2012) (*AFT Mich I*), vacated 498 Mich 851 (2015). Following the Court of Appeals' decision, the Legislature enacted 2012 PA 300, which amended MCL 38.1343e to add provisions that substantially altered the scope and effect of MCL 38.1343e; most notably, MCL 38.1343e, as amended by 2012 PA 300, permitted employees to opt out of the retiree healthcare system, which made employee contributions voluntary instead of mandatory, and it also provided a refund mechanism that allowed employees who paid in, but who did not ultimately qualify for benefits, to receive a refund on their contributions. AFT Michigan and other labor organizations then brought a separate action in the Court of Claims against the state of Michigan and others, similarly challenging the constitutionality of 2012 PA 300, and the court, Rosemarie E. Aquilina, J., upheld 2012 PA 300 against the constitutional challenges. The Court of Appeals, SAAD, P.J., and K. F. KELLY, J. (GLEICHER, J., concurring), affirmed, reasoning that the voluntary nature of the contributions and the refund mechanism in MCL 38.1343e, as amended by 2012 PA 300, served to remedy the constitutional defects that the Court of Appeals had identified in its 2012 decision pertaining to 2010 PA 75. *AFT Mich v Michigan*, 303 Mich App 651 (2014). The Supreme Court affirmed. *AFT Mich v Michigan*, 497 Mich 197 (2015) (*AFT Mich II*). Shortly thereafter, the Supreme Court vacated the Court of Appeals' 2012 decision in these cases and remanded them to the Court of Appeals for reconsideration in light of the enactment of 2012 PA 300 and the Supreme Court's decision in *AFT Mich II*. 498 Mich 851 (2015). The Supreme Court directed the Court of Appeals to consider which issues presented in these cases had been superseded by the enactment of 2012 PA 300 and the Supreme Court's decision in *AFT Mich II* and further directed the Court of Appeals to only address any outstanding issues that the

parties raised regarding 2010 PA 75 that were not superseded or otherwise rendered moot by that enactment and decision.

On remand, the Court of Appeals *held*:

1. An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy. Because the employees' withheld wages maintained in escrow will be dispersed to either the state or to the employees pending a final determination of this case, the Court's determination of the constitutional questions presented would have a practical legal effect, and the issues raised were not moot.

2. Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. Because the language of 2012 PA 300 neither contains a retroactivity provision nor makes any reference to the funds collected during the mandatory period (during the period that 2010 PA 75—but not 2012 PA 300—was in effect), the 2012 amendments could not be read as retroactive nor as governing the funds collected before the effective date of 2012 PA 300. The change from mandatory to voluntary contributions set forth in 2012 PA 300 did not retroactively render the reduction of wages during the mandatory period constitutional. The fundamental constitutional defect imposed by 2010 PA 75 during the mandatory period was not that mandatory contributions in and of themselves were unconstitutional, but rather that the mandated employee contributions were to a system in which the employee contributors had no vested rights. The conclusion in *AFT Mich I* that mandatory confiscation of employee wages as employer contributions to a system in which a right to benefits could never vest violated several constitutional guarantees was based on the Supreme Court's decision in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642 (2005), that retirement healthcare benefits did not constitute accrued financial benefits and so were not protected from reduction or elimination by Article 9, § 24 of the 1963 Constitution. Because the retirement healthcare benefits at issue in this case were not accrued financial benefits, the Legislature had the authority to reduce or eliminate those benefits at any time; therefore, the wages withheld during the mandatory period were taken without any legally enforceable guarantee that the contributors would receive the retirement health benefits provided to present retirees. Accordingly, the Supreme Court's decision in *AFT Mich II* did not provide a basis to alter the analysis in *AFT Mich I* concerning the constitution-

ality of the involuntary wage reductions during the mandatory period, and MCL 38.1343e, as enacted by 2010 PA 75, was unconstitutional as applied from its effective date through the effective date of the voluntary system created by 2012 PA 300.

3. The Contracts Clauses of the state and federal Constitutions, Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1, prohibit laws that impair obligations under contracts. In deciding whether an impairment of contract violates the Contracts Clause, a court must determine whether the particular impairment is necessary to the public good; in other words, it must be shown that the state did not (1) consider impairing the contracts on par with other policy alternatives, (2) impose a drastic impairment when an evident and more moderate course would serve its purpose equally well, or (3) act unreasonably in light of the surrounding circumstances. Heightened scrutiny applies when a governmental entity is party to the contract and benefits from the impairment. During the mandatory period, MCL 38.1343e, as enacted by 2010 PA 75, operated as a substantial impairment of the employment contracts between plaintiffs and the employing educational entities because plaintiffs agreed to provide their labor and expertise to the school districts for wages bargained for and set forth in contract, and the act required that the employers not pay the contracted-for wages but instead pay 3% less than the contracts provided. While courts have found statutes impairing contractual obligations to be reasonable and necessary when the impairment is the consequence of remedial legislation intended to correct systematic imbalances in the marketplace, this case did not involve corrections to the marketplace to assure free competition. Additionally, while modest, temporary impairments of government contracts may be imposed as a matter of last resort to address a fiscal emergency, such circumstances must be extraordinary and consideration must be given to the degree of the impairment in amount and in time; in this case, MCL 38.1343e, as enacted by 2010 PA 75, was not designed as a temporary measure, and defendants presented no evidence to the trial court that other means of undertaking long-term restructuring of retiree health benefit funding had been attempted before the adoption of 2010 PA 75. Accordingly, MCL 38.1343e, as enacted by 2010 PA 75, worked a severe, permanent, and immediate change in contractual relationships and violated the Contracts Clauses of the state and federal Constitutions from its effective date until the effective date of 2012 PA 300.

4. Under the Takings Clauses of the state and federal Constitutions, Const 1963, art 10, § 2 and US Const, Am V, the

government may not take private property for public use without providing just compensation to the owner. When the government does not merely impose an assessment or require payment of an amount of money without consideration but instead asserts ownership of a specific and identifiable "parcel" of money, such an action constitutes a "per se" violation of the Takings Clause. In this case, plaintiffs' salaries were specific and identifiable funds in which they unquestionably held a property interest, and the state took possession of 3% of plaintiffs' wages before allowing plaintiffs to take possession of their property. While *Adams v United States*, 391 F3d 1212, 1223 (CA Fed, 2004), held that an action to enforce payment of a statutory obligation for payment—unlike a contract for payment—does not establish a vested property right and thus does not implicate the Takings Clause, plaintiffs in this case had a contract-based property right in their own wages that implicated the Takings Clause. Accordingly, 2010 PA 75 violated the Takings Clauses of the state and federal Constitutions from its effective date until the effective date of 2012 PA 300.

5. The Due Process Clauses of the state and federal Constitutions, Const 1963, art 1, § 17 and US Const, Am XIV, § 1, forbid the state from depriving any person of life, liberty, or property without due process of law. In this case, payment of healthcare benefits owed by the government to a particular set of its retired employees was not analogous to the maintenance of a statewide workers' compensation risk-sharing system to assure market and economic stability for the private sector. The mechanism defined in MCL 38.1343e, as enacted by 2010 PA 75, was neither one involving general taxation for a general fund with specific uses of the monies later determined by the Legislature nor one imposing a fee for service to the payee, and the mechanism was not one that required individuals to fund benefits that they themselves had a vested right to receive. Defendants posited no evidence or even argument to suggest that the funding of the retirement benefits could not have been satisfied by measures that did not raise due-process concerns. Accordingly, 2010 PA 75 was unreasonable, arbitrary, and capricious and violated the Due Process Clauses of the state and federal Constitutions from its effective date until the effective date of 2012 PA 300.

Trial court orders granting summary disposition or partial summary disposition in favor of plaintiffs in each of the cases affirmed; case remanded to the trial court with the direction to return the subject funds, with interest, to the relevant employees.

SAAD, J., concurring in part and dissenting in part, concurred with the majority's conclusion that none of the issues before the Court of Appeals had been rendered moot by the Supreme Court's decision in *AFT Mich II*, but dissented from the majority's view that the mandatory contributions in MCL 38.1343e, as enacted by 2010 PA 75, violated the Contracts Clauses of the Michigan and United States Constitutions, US Const, art I, § 10 and Const 1963, art 1, § 10, the Takings Clauses of the Fifth Amendment and Const 1963, art 10, § 2, and the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17. Judge SAAD would have held that MCL 38.1343e did not violate the Contracts Clauses because, as a matter of law, MCL 38.1343e did not operate as a substantial impairment of a contractual relationship given that MCL 38.1343e neither altered a contract between the state itself and the public school employees nor altered the public school employees' contracts with some third party. The Supreme Court has ruled that the Legislature created and may revoke retiree healthcare benefits and that such benefits are neither a constitutionally protected contract right nor a vested right under the state Constitution. Under this ruling, plaintiffs had no contract with the state for retiree healthcare benefits and had no vested rights in retiree healthcare benefits; therefore, no contract had ever been impaired because no contract had ever existed, and plaintiffs' constitutional challenges under the Contracts Clauses should have failed. Additionally, the collective bargaining agreements between the public school employees and various school districts were not even touched, much less impaired, and did not address the retiree healthcare system, which is a benefit created by the state. The wage levels negotiated in collective bargaining agreements were not affected by the requirement under MCL 38.1343e that public school employees contribute money to the healthcare fund because the employers' obligation to pay the employees their contracted-for salaries was not altered. The fact that the state chose a paycheck deduction method as the particular mechanism to ensure that employees made the contribution did not convert a permissible legislatively mandated contribution into an unconstitutional impairment of contract. Judge SAAD also would have held that MCL 38.1343e did not effectuate a taking of private property for which the government must give just compensation. No caselaw holds that a taking occurs when the Legislature requires a public school employee to contribute money as a condition for receiving benefits in a state-created retirement healthcare program that was designed for the benefit of the employee. The majority's application of the

Takings Clauses to plaintiffs' claims was legally unsupportable because no constitutionally protected property interest was invaded by requiring a monetary contribution to a retiree healthcare plan. Additionally, any property interests in the wage levels contained in plaintiffs' respective collective bargaining agreements were not retroactively affected, and no extraction of interest generated in a specific fund of money occurred. Therefore, plaintiffs' constitutional challenges under the Takings Clauses should have failed. Finally, Judge SAAD would have reversed the trial court's grant of summary disposition to plaintiffs on the substantive due-process claims because plaintiffs were precluded from asserting generalized due-process claims when the Takings and Contracts Clauses provided explicit textual sources of constitutional protection regarding the type of governmental conduct at issue. Furthermore, plaintiffs' due-process claims were without merit. The Supreme Court articulated a rational basis for MCL 38.1343e when it upheld the constitutionality of 2012 PA 300 and concluded that the state had an unquestionably legitimate interest in implementing a fiscally responsible system by which to fund public school employees' healthcare. The fact that there may have been better or less intrusive ways to accomplish this funding did not transform MCL 38.1343e into an unconstitutional deprivation of substantive due process. Judge SAAD would have upheld MCL 38.1343e, as enacted by 2010 PA 75, as constitutional.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Patrick M. Fitzgerald*, Assistant Attorney General, for the state defendants.

Mark H. Cousens for AFT Michigan and others.

Miller Cohen, PLC (by *Bruce Miller*, *Keith D. Flynn*, and *Robert D. Fetter*), for Timothy Johnson, Janet Heslet, Ricky A. Mack, and Denise Zieja.

White, Schneider, Young & Chiodini, PC (by *James A. White*, *Kathleen C. Boyle*, and *Timothy J. Dlugos*), and *Michael M. Shoudy* for Deborah McMillan, Thomas Brenner, Theresa Dudley, Katherine Daniels, and Corey Cramb.

ON REMAND

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

SHAPIRO, P.J. On May 19, 2010, the Legislature enacted 2010 PA 75, significantly revising the Public School Employees Retirement Act (PERA), MCL 38.1301 *et seq*. In particular, Section 43e of 2010 PA 75 required all current public school employees to contribute 3% of their salaries to the Michigan Public School Employees' Retirement System (MPSERS).[1] These contributions, which were classified as "employer contributions" to a nonvesting retiree health benefit program, constituted a mandatory deduction from the employees' contracted-for compensation with their respective employers. 2010 PA 75, § 43e. Plaintiffs brought suit, challenging the constitutionality of 2010 PA 75. The trial court held that the statute violated plaintiffs' rights under both the Takings Clauses and the Due Process Clauses of the federal and state Constitutions, but held that it did not violate the constitutional provisions barring the impairment of contracts by the state.

The parties appealed in this Court. In *AFT Mich v Michigan*, 297 Mich App 597, 616, 621, 627; 825 NW2d 595 (2012) (*AFT Mich I*), vacated *AFT Mich v Michigan*, 498 Mich 851 (2015), we held that that 2010 PA 75 was unconstitutional because it (1) impaired employment contracts between public school employees and employer school districts in violation of the Contracts Clauses of the state and federal Constitutions, Const 1963, art 1, § 10 and US Const, art I, § 10; (2) effected

[1] The statute required any public school employee whose salary was less than $18,000 to contribute 1.5% for the fiscal year starting July 1, 2010. 2010 PA 75, § 43e. Beginning July 1, 2011, all employees were required to contribute the full 3%. *Id*.

a taking without just compensation in violation of the Takings Clauses of the state and federal Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV; and (3) violated the guarantees of substantive due process in the state and federal Constitutions, Const 1963, art 1, § 17 and US Const, Am XIV, § 1. On September 27, 2012, defendants sought leave to appeal in the Michigan Supreme Court, which took no action on the application for nearly two years. During that time, and in response to this Court's decision in *AFT Mich I*, the Legislature enacted 2012 PA 300, which further modified PERA. See *AFT Mich v Michigan*, 497 Mich 197, 205; 866 NW2d 782 (2015) (*AFT Mich II*). The 2012 act did not repeal MCL 38.1343e, but it added provisions substantially altering that section's scope and effect. First, it permitted employees hired before September 4, 2012, to opt out of the retiree healthcare system as of the first day of the pay period that would begin on or after February 1, 2013. MCL 38.1391a(5). Employees that opted out would, as of that date, no longer be subject to the challenged mandatory 3% reduction and would not receive any health insurance coverage premium from the retirement system. MCL 38.1391a(1) and (5). Second, the 2012 act significantly reduced benefits to those who elected to remain in the retiree healthcare system. See MCL 38.1391. Third, it provided for a separate retirement allowance for public school employees hired before September 4, 2012, who elected to pay contributions and remain in the system, but later failed to qualify for retiree healthcare benefits. MCL 38.1391a(8). In other words, it provided a refund mechanism that allowed employees who paid in, but did not ultimately qualify for benefits, to receive a refund on their contributions. Finally, the 2012 act eliminated retirement health benefits under the retire-

ment system for all new employees hired after September 4, 2012. MCL 38.1391a(1).

This Court upheld 2012 PA 300 against a constitutional challenge, reasoning that the voluntary nature of the contributions and the refund mechanism served to remedy the constitutional defects identified in *AFT Mich I*. *AFT Mich v Michigan*, 303 Mich App 651, 673, 676, 676-679; 846 NW2d 583 (2014). The Supreme Court affirmed. *AFT Mich II*, 497 Mich at 249-250.

Shortly after its affirmance in *AFT Mich II*, the Supreme Court vacated our opinion in *AFT Mich I* and remanded it to this Court

> for reconsideration in light of the enactment of 2012 PA 300 and this Court's decision in [*AFT Mich II*]. On remand, the Court of Appeals shall consider what issues presented in these cases have been superseded by the enactment of 2012 PA 300 and this Court's decision upholding that Act, and it shall only address any outstanding issues the parties may raise regarding 2010 PA 75 that were not superseded or otherwise rendered moot by that enactment and decision. [*AFT Mich*, 498 Mich 851 (2015).]

Per the Supreme Court's direction, we have considered whether the adoption of 2012 PA 300 or the Supreme Court's decision in *AFT II* renders moot any of the challenges to 2010 PA 75 or supersedes any of the constitutional analysis we employed in our earlier review of that act. We conclude that neither the legislative amendments nor the Supreme Court's decision supersedes or renders moot any of the issues raised in *AFT Mich I* as to the mandatory wage reductions made during the period 2010 PA 75—but not 2012 PA 300—was in effect (hereinafter "the mandatory wage reduction period" or "the mandatory period"). We also conclude that neither the passage of 2012 PA 300 nor the Supreme Court's decision in *AFT Mich II* requires that

we alter the analysis we employed in our now-vacated decision in *AFT Mich I* as to the constitutionality of 2010 PA 75 as it existed during the mandatory wage reduction period. The compulsory collection of 3% of employee wages during that period was unconstitutional. Accordingly, we remand this matter to the trial court with the direction to return the subject funds, with interest, to the relevant employees.

I. MOOTNESS

The enactment of 2012 PA 300 and our Supreme Court's decision in *AFT Mich II* upholding that act do not render moot the issues raised in the present cases.

> This Court generally does not address moot questions or declare legal principles that have no practical effect in a case. An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy. [*In re Pollack Trust*, 309 Mich App 125, 154; 867 NW2d 884 (2015) (quotation marks and citations omitted).]

It is undisputed that during the mandatory period, 3% of public school employees' contracted-for wages were withheld by their employers. Those wages, totaling more than $550 million, are being held in escrow pending a final determination in this case. The parties agree that if 2010 PA 75, as it applied during the mandatory period, is found to be constitutional, then the funds held in escrow will be provided to the state, but that if it is found to be unconstitutional, then the escrowed funds will be returned to the employees who earned them. Because determination of the constitutional questions before us will have a practical legal effect on the disposition of the escrowed funds, the issues raised in these cases are not moot.

We must also determine whether the enactment of 2012 PA 300 and the decision in *AFT II* require that we alter the analysis in our now-vacated opinion regarding the constitutionality of 2010 PA 75 as applied during the mandatory period. In our earlier opinion, we concluded that mandated confiscation of employee wages as employer contributions to a system in which a right to benefits could never vest[2] violated several constitutional guarantees. With the enactment of 2012 PA 300, however, all future contributions became voluntary, not mandatory. Unlike the sums withheld during the mandatory period, all the monies paid from employee wages into the retirement health system were thereafter paid voluntarily; no employee was or could be legally compelled to financially invest in a system in which the intended fruits were not "accrued financial benefits." See *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 658-659; 698 NW2d 350 (2005). The question before us now is whether the change from mandatory to voluntary contributions set forth in 2012 PA 300 retroactively rendered constitutional the reduction of wages during the mandatory period.

As with any question of statutory interpretation and application, we begin with the language of the statute. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628

[2] Our conclusion was driven by the decision of the Supreme Court in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 649, 658-659; 698 NW2d 350 (2005), that retirement healthcare benefits did not constitute "accrued financial benefits" and so were not protected from reduction or elimination by Article 9, § 24 of the 1963 Constitution, which provides that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." See also MCL 38.2733(6) ("This act shall not be construed to define or otherwise assure, deny, diminish, increase, or grant any right or privilege to retirement health care benefits . . . to any person . . . .").

(2007). The language of 2012 PA 300, as the state concedes, contains no retroactivity provision and makes no reference to the funds collected during the mandatory period. "Nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Thomason v Contour Fabricators, Inc*, 255 Mich App 121, 124-125; 662 NW2d 51 (2003). Accordingly, we may not read the 2012 amendments as retroactive nor as governing funds collected before the application of 2012 PA 300.

The state correctly points out that if the escrowed funds are turned over to the state, the funds would be subject to the refund mechanism of 2012 PA 300 for those employees who ultimately do not qualify for retirement healthcare benefits. Specifically, MCL 38.1391a(8) provides that the refunded sum shall be "equal to the contributions made by the member under section 43e"; therefore, it must include the sums collected under Section 43e from its inception, not merely after the modifications of 2012 PA 300. Therefore, it can be argued that so long as MCL 38.1391a(8) remains unaltered and in effect, those employees who do not opt out of the new system but do not ultimately qualify for benefits will not suffer a constitutional deprivation because they will receive back what they put in, including the sums withheld during the mandatory period. Putting aside the fact that the number of employees who will qualify for the refund is likely relatively few, this provision completely fails to address the fundamental constitutional defect imposed by 2010 PA 75 during the mandatory period. The problem was not that mandatory contributions are in and of themselves unconstitutional. The constitutional problem was, and is, that the mandated employee contributions were to a system *in which the employee contributors have no vested*

rights. Because retirement healthcare benefits are not "accrued financial benefits," the Legislature has the authority to reduce or eliminate those benefits—including the refund mechanism of MCL 38.1391a(8)—at any time. While there is no constitutional prohibition against inviting employees to voluntarily participate in an unvested system, the same is not true when participation is mandated by law. The wages withheld during the mandatory period were taken without any legally enforceable guarantee that the contributors would receive the retirement health benefits provided to present retirees. That has not changed. The sums withheld during the mandatory period were taken involuntarily, and the state still retains the right to reduce or eliminate retiree health benefits for those who were compelled to surrender their wages.[3]

AFT Mich II does not provide a basis to alter our analysis of the constitutionality of the involuntary wage reductions during the mandatory period.[4] Accordingly, we conclude that 2010 PA 75 was unconstitutional as it applied from its effective date through the transition date to the voluntary system created by 2012 PA 300.

II. CONTRACTS CLAUSE

During the mandatory period, Section 43e of 2010 PA 75 operated as a substantial impairment of the employment contracts between plaintiffs and the em-

[3] Indeed, 2012 PA 300 does not even contain a provision to refund the involuntarily withheld sums to those employees who chose not to participate in the retirement health system after the enactment of 2012 PA 300.

[4] In addition, in their supplemental briefs on remand, the parties have not referred us to any recent caselaw that would suggest we should alter our analysis.

ploying educational entities. The employment contracts provided for a particular amount of wages, and 2010 PA 75 required that the employers not pay the contracted-for wages, but instead pay 3% less than the contracts provided.[5] We note that this is not a broad economic or social regulation that impinges on certain contractual obligations by happenstance or as a collateral matter. Rather, the statute directly and purposefully required that certain employers not pay contracted-for wages. Such an action is unquestionably an impairment of contract by the state. "In the employment context, there likely is no right both more central to the contract's inducement and on the existence of which the parties more especially rely, than the right to compensation at the contractually specified level." *Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v Baltimore Mayor & City Council*, 6 F3d 1012, 1018 (CA 4, 1993). See also *Buffalo Teachers Federation v Tobe*, 464 F3d 362, 368 (CA 2, 2006) ("Contract provisions that set forth the levels at which union employees are to be compensated are the most important elements of a labor contract. The promise to pay a sum certain constitutes not only the primary inducement for employees to enter into a

[5] Defendants argue that there is no unconstitutional impairment of contract because (1) plaintiffs do not have a contract that is affected by 2010 PA 75 and (2) plaintiffs do not have a contractual right to be free from mandatory deductions for retiree healthcare or to continue in a particular retiree healthcare plan. These arguments are wholly without merit. Plaintiff-employees' employment contracts, which set forth specified wages, were unquestionably impaired by the mandatory and involuntary requirement in 2010 PA 75 that 3% of their wages be withheld and transformed into employer contributions to a retiree healthcare system without vested benefits. Moreover, plaintiffs have never claimed that they have a right to be free of mandatory deductions in general; they have only claimed a right to be free from unconstitutional mandatory deductions.

labor contract, but also the central provision upon which it can be said they reasonably rely.").

In *Baltimore Teachers*, the Fourth Circuit held that a temporary furlough plan under which employees lost just under 1% of their annual salary for one year constituted a substantial impairment of contract.[6] The present case involves a reduction three times as great and not merely for a single year. Plaintiffs have agreed to provide their labor and expertise to the school districts for wages bargained for and set forth in contract. For the state to mandate a 3% reduction in the contractually agreed-upon price of their labor is unquestionably an impairment of contract by the state.

That does not, however, resolve the constitutional question. In order to determine whether that impairment violates the Contracts Clause, we must determine whether the state has shown that it did not: "(1) 'consider impairing the . . . contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances[.]' " *Buffalo Teachers*, 464 F3d at 371, quoting *US Trust Co of New York v New Jersey*, 431 US 1, 30-31; 97 S Ct 1505; 52 L Ed 2d 92 (1977). Put more generally, we are to determine whether the particular impairment is "*necessary* to the public good . . . ." *In re Certified Question*, 447 Mich 765, 777; 527 NW2d 468 (1994) (emphasis added).

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[6] The *Baltimore Teachers* court noted that "because individuals plan their lives based upon their salaries, we would be reluctant to hold that any decrease in an annual salary beyond one that could fairly be termed *de minimis* could be considered insubstantial." *Baltimore Teachers*, 6 F3d at 1018 n 8.

In addressing these issues, we must consider that the employers in question are themselves governmental entities and that these entities benefited as a result of the challenged legislation given that they used the monies collected as "employer contributions" that they would have otherwise had to pay to the retiree healthcare benefits fund.[7] Because a governmental entity is party to the contract and benefits from the impairment, we are to employ heightened scrutiny in our review of the statute. *Buffalo Teachers*, 464 F3d at 370-371.

As a general rule, courts have found statutes impairing contractual obligations to be reasonable and necessary when the impairment is the consequence of remedial legislation intended to correct systemic imbalances in the marketplace. Such legislation may have positive or negative effects on particular economic actors and may in some cases result in altered contractual obligations without offending the Contracts Clause. For example, we rejected a Contracts Clause challenge in *Health Care Ass'n Workers Compensation Fund v Bureau of Worker's Compensation Dir*, 265 Mich App 236, 242; 694 NW2d 761 (2005), which involved a statute designed to unclog the marketplace for workers' compensation insurance by eliminating unduly anticompetitive contractual provisions that punished employers for changing insurers. Similarly, the United States Supreme Court held that correcting an imbalance between gas prices on the interstate and intrastate markets was a significant and legitimate state interest. *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 417; 103 S Ct 697; 74 L Ed 2d 569 (1983). The present case, however, does not involve corrections to the marketplace to assure free competition.

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[7] According to the record, the 3% wage reduction will cover nearly 40% of the overall *employer* contributions for retiree healthcare benefits.

We recognize that there are cases holding that a modest, temporary impairment of government contracts may be imposed as a matter of last resort to address a fiscal emergency. However, as the cases relied on by defendants show, such circumstances must be extraordinary, and the degree of the impairment in amount and in time is central to the question of whether the impairment passes constitutional muster. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co v Spannaus*, 438 US 234, 245; 98 S Ct 2716; 57 L Ed 2d 727 (1978). As in *Allied Structural*, the statute at issue in this case "worked a severe, permanent, and immediate change in [contractual] relationships." *Id*. at 250.

In *Baltimore Teachers*, 6 F3d at 1014, the city of Baltimore responded to sudden budget shortfalls caused by reductions in state aid of over $37 million during the last three months of 1991 by imposing involuntary furloughs for city employees. These furloughs were not conceived of as a long-term funding mechanism, but instead as a temporary response to a fiscal emergency. *Id*. at 1021. The furlough days resulted in Baltimore reducing annual salaries by less than 1% and only for a single year. Moreover, while the furloughs were involuntary, employees were provided with reduced hours that were equivalent to the reduction in their wages. The Fourth Circuit held that while the actions constituted an impairment of contract, they did not violate the Contracts Clause because the wage reduction was temporary, the amount of the resulting reduction in wages was no greater than necessary to meet the immediate budgetary shortfall, and the city had first taken other actions, including a significant cut in city services and laying off employees. *Id*. at 1020. In contrast, Section 43e of 2010 PA 75 reduced

public school employees' wages by an amount more than three times that which concerned the court in *Baltimore Teachers* and did not provide time off in exchange. Further, Section 43e was not designed as a temporary measure, and defendants presented no evidence to the trial court that other means of undertaking long-term restructuring of retiree health benefit funding had been attempted or even reviewed before 2010 PA 75 was adopted.[8]

In *Univ of Hawaii Prof Assembly v Cayetano*, 183 F3d 1096, 1102-1104 (CA 9, 1999), the United States Court of Appeals for the Ninth Circuit concluded that the state's action in delaying paydays by a few days, even without a reduction in the actual amount of pay, constituted a substantial impairment of contract because the timing of payment was part of the collective bargaining agreement. As in *Baltimore Teachers* and *Buffalo Teachers*, the *Univ of Hawaii* court noted the higher level of scrutiny applicable to legislative interference with governmental, as opposed to private, contracts and struck down the payday delays, noting that " 'although perhaps politically more difficult, numerous other alternatives exist which would more effectively and equitably raise revenues,' " such as additional budget restrictions, the repeal of tax credits, and the raising of taxes. *Id*. at 1107; see also *Donohue v Paterson*, 715 F Supp 2d 306 (ND NY, 2010).

Further, many courts have held that impairments of government employee contracts by the state that have indefinite application clearly violate the Contracts Clause. *Opinion of the Justices*, 364 Mass 847, 864; 303

[8] Indeed, it was only as a result of our decision to strike down 2010 PA 75 that the Legislature undertook its responsibility to consider alternative and constitutional funding mechanisms, such as the voluntary system implemented by 2012 PA 300.

NE2d 320 (1973) (striking down legislation increasing present employees' contributions to retiree benefits without an increase in the subject employees' own retirement benefits as "presumptively invalid" under the Contracts Clause); *Singer v City of Topeka*, 227 Kan 356, 369; 607 P2d 467 (1980) (holding that a statute mandating increase in public employees' contributions to their retirement plan without a commensurate increase in benefits "is an unconstitutional impairment of contract rights"); *Marvel v Dannemann*, 490 F Supp 170, 177 (D Del, 1980); *Hickey v Pittsburgh Pension Bd*, 378 Pa 300, 310-311; 106 A2d 233 (1954); *Allen v City of Long Beach*, 45 Cal 2d 128, 130-133; 287 P2d 765 (1955).

For these reasons, we conclude that 2010 PA 75, from its effective date until the completed transition to a voluntary system, violated US Const, art I, § 10 and Const 1963, art I, § 10.

III. TAKINGS CLAUSE

Under the Takings Clauses of the state and federal Constitutions, Const 1963, art 10, § 2 and US Const, Am V, "[t]he government may not take private property for public use without providing just compensation to the owner." *AFT Mich II*, 497 Mich at 216. The federal constitutional provision applies to the states through the Fourteenth Amendment, US Const, Am XIV. *Id*. at 217. Here, the plaintiff-employees' salaries are specific funds in which they unquestionably had a property interest. See *Sims v United States*, 359 US 108, 110; 79 S Ct 641; 3 L Ed 2d 667 (1959) (stating "it is quite clear, generally, that accrued salaries are property").

There is no doubt that during the relevant time frame, 3% of plaintiff-employees' wages were "taken" in the dictionary-definition sense of the word. The state

does not dispute that the school districts were taking possession of wages that, by contract, belonged to plaintiffs and were sending them to state-mandated funds as *employer* contributions. The question, however, is whether that action constituted a "taking" as it has been defined for purposes of the Fifth Amendment and its Michigan constitutional counterpart. We conclude that it did.

It is well settled that when the government directly seizes property in which a person has a property interest, a Fifth Amendment taking occurs, requiring the government to pay just compensation. However, takings cases regarding a direct seizure of property typically involve real property and the exercise of eminent domain. Takings jurisprudence also commonly deals with claims that governmental regulatory actions impose such limits on the use of property that the government's actions amount to a taking.

Defendants argue that the confiscation or seizure of money, as opposed to physical property, cannot constitute a taking. Defendants point out that several courts have held that the general imposition of a monetary assessment by the government does not raise Fifth Amendment concerns. See, e.g., *McCarthy v City of Cleveland*, 626 F3d 280 (CA 6, 2010). The law is, however, equally clear that when the government does not merely impose an assessment or require payment of an amount of money without consideration, but instead asserts ownership of a specific and identifiable "parcel" of money, it does implicate the Takings Clause. Indeed, the United States Supreme Court has termed such actions "per se" violations of the Takings Clause. *Brown v Legal Foundation of Washington*, 538 US 216, 235; 123 S Ct 1406; 155 L Ed 2d 376 (2003). In *Brown*, the Court held that when the government asserted a

right to control the interest on lawyer trust accounts, even where such amounts were *de minimis*, it constituted an unconstitutional taking. *Id*. We applied this principle in *Butler v Mich State Disbursement Unit*, 275 Mich App 309; 738 NW2d 269 (2007). In *Butler*, Judge SAAD, writing for the Court, found an unconstitutional taking of property when the state disbursement unit that collects and disburses child support payments was depositing interest on the amounts awaiting disbursement into the state treasury. *Id*. at 310-312. The amount in question was merely 83 cents, and it could certainly be argued that the state could reasonably assess such a sum to pay for the collection service that benefited the children and custodial parent. See *id*. at 311-312. However, because the money was part of a definable and distinct parcel of money in which the eventual recipient had a property interest, we held that it could not be taken without payment of just compensation. See *id*. at 313-314.[9]

In *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 156-158; 101 S Ct 446; 66 L Ed 2d 358 (1980), a Florida county court retained the interest from a fund in its custody intended for payment of Webb's creditors. The Supreme Court held that the Florida statute authorizing the retention of the interest "has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held . . . ." *Id*. at 164. Further, the interest could not be treated as a fee for the use of the court because another statute specifically provided for a court fee based on

[9] In *Brown*, the government was not required to pay compensation because the clients could not have earned any interest if they had deposited the funds on their own. *Brown*, 538 US at 239-240. Similarly, in *Butler*, no compensation was ordered because the government's administrative costs were greater than the plaintiff's accrued interest, and the plaintiff's net loss was therefore zero. *Butler*, 275 Mich App at 313.

the size of the fund deposited with the court. *Id*. "To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Id*.[10]

Defendants rely on two cases from the United States Court of Appeals for the Federal Circuit as support for their position, but neither case provides such support. In *Adams v United States*, 391 F3d 1212, 1214 (CA Fed, 2004), the federal government had concluded that certain federal law enforcement personnel were administrative employees and, therefore, were not entitled to overtime pay under the Fair Labor Standards Act (FLSA), 29 USC 201 *et seq*. The employees sued under the FLSA and also asserted that the government's failure to pay those sums constituted a taking. The *Adams* court held that an action to enforce pay-

[10] In *Eastern Enterprises v Apfel*, 524 US 498, 503-504; 118 S Ct 2131; 141 L Ed 2d 451 (1998), the plaintiff alleged that the Coal Industry Retiree Health Benefit Act, 26 USC 9701 *et seq*., violated the Takings Clause because it required the plaintiff to pay premiums into a fund to cover benefits for retirees the plaintiff had not employed. The Supreme Court found this to be unconstitutional. Four of the justices concluded that 26 USC 9701 *et seq*. violated the Takings Clause, *id*., while Justice Kennedy, in an opinion concurring in the judgment and dissenting in part, reached his conclusion under the Due Process Clause, *id*. at 539, 547. However, the concerns raised by Justice Kennedy regarding the applicability of the Takings Clause do not arise in the instant case. In his opinion, Justice Kennedy stated:

> The Coal Act does not appropriate, transfer, or encumber an estate in land . . . , a valuable interest in an intangible . . . , *or even a bank account or accrued interest*. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply *or the property it uses to do so*. [*Id*. at 540 (emphasis added).]

That is by no means the case here. Section 43e of 2010 PA 75 confiscated a specific fund, i.e., plaintiff-employees' paychecks, and removed 3% of the property before allowing them to take possession of their property.

ment of a statutory obligation for payment, unlike a *contract* for payment, does not establish a vested property right, without which a takings claim cannot arise. *Id*. at 1223. In *Adams*, the plaintiffs put the cart before the horse by arguing that failure to pay overtime constituted a taking before any right to that overtime was determined to exist. *Id*. at 1221-1222. This is not the case here because plaintiff-employees had a contract-based property right in their own wages.

Kitt v United States, 277 F3d 1330, 1336-1337 (CA Fed, 2002) is similarly inapposite because it involved only a general obligation to pay money under a disputed provision of the tax code. The government did not assert ownership of any particular property, and the court relied on that very point to reject the takings claim, noting that "[i]n some situations money itself may be the subject of a taking, for example, the government's seizure of currency or its levy upon a bank account. . . . In the present case, however, the government did not seize or take any property of the Kitts. All it did was to subject them to a particular tax to which they previously had not been subject. That government action did not constitute a taking of the amount of the tax they had to pay." *Id*. at 1337.

Accordingly, we hold that 2010 PA 75 violated the Takings Clauses of the state and federal Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV.

IV. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." Textually, only procedural due process is guaranteed by the Fourteenth Amendment;

> however, under the aegis of substantive due process, individual liberty interests likewise have been protected against certain government actions regardless of the fairness of the procedures used to implement them. The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power. [*People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998) (quotation marks and citations omitted).]

In other words, "[t]he essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an *arbitrary* exercise of power." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003).

Under 2012 PA 300, no employee is required to contribute to a retirement healthcare system. See MCL 38.1391a(1) through (4). Under the 2010 act, employees were required to do so. Under both acts, the employees have no vested right to retirement healthcare benefits. See *Studier*, 472 Mich at 658-659.[11] Under 2012 PA 300, any contributing employee subject to the 3% deduction in MCL 38.1343e is legally guaranteed compensation if he or she later does not qualify for the benefit, but that was not true under 2010 PA 75. See MCL 38.1391a(8). Despite the state's attempt to conflate the two acts, it is clear that one is consistent with substantive due process and the other is not.

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[11] In its supplemental brief, the state appears to suggest that it intends to now direct the use of the funds differently. However, these vague assurances in its brief are not binding on the state, do not have the force of law, and are wholly irrelevant to the constitutional question before us. The state does not refer us to any case holding that an unconstitutional statute should not be struck down because the state's brief offers a nonbinding, nonspecific assurance that it will try to minimize the unconstitutional effects of the statute. The issue before us is whether 2010 PA 75 was constitutional prior to the effective date of 2012 PA 30. If, as we conclude, it was not, then the collection of the subject funds was unlawful, and the funds must be returned.

Defendants argue that the present case is analogous to *Mich Mfr Ass'n v Workers' Disability Compensation Bureau Dir*, 134 Mich App 723, 726-727; 352 NW2d 712 (1984), in which this Court upheld a statute requiring all employers in the state to contribute to a fund to help defray the costs of workers' disability compensation for the logging industry. However, that case considered only whether the statute was enacted for a proper purpose and did not address whether it met the second prong of the constitutional test. *Id*. at 733-735. Moreover, the statute related to the broad policy objectives of the workers' compensation system that affect every worker and employer in the state. Workers' compensation legislation was adopted 100 years ago to create a system to share risks and to provide for the limited, but prompt, compensation of injured workers. In addition to obtaining general insurance or insuring themselves, all employers in the state may be required to contribute to specialized funds, such as the Second Injury Fund; the Silicosis, Dust Disease, and Logging Industry Compensation Fund; and the Self-Insurers' Security Fund. See MCL 418.551. These assessments are part of a statewide economic regulatory system, and contributions to the funding of that system are required of all employers in the state. The statute in *Mich Mfr* represented a small modification in an overall system of sharing risks intended to assure stability in the industrial marketplace.

The instant case is wholly different. Payment of healthcare benefits owed by the government to a particular set of its retired employees is not analogous to the maintenance of a statewide risk-sharing system to assure market and economic stability for the private sector. Rather, it is a question of various levels of government meeting their own fiscal obligations. Defendants posit no evidence or even argument to suggest

that the funding of these retirement benefits could not have been satisfied by measures that do not raise due-process concerns.[12] The mechanism defined in Section 43e of 2010 PA 75 was *neither* one involving general taxation for a general fund with specific uses of the monies later determined by the Legislature *nor* one imposing a fee for service to the payee. It was also not a mechanism that required individuals to fund benefits that they themselves had a vested right to receive. For these reasons, we conclude that 2010 PA 75 was unreasonable, arbitrary, and capricious and violated the state and federal Due Process Clauses, Const 1963, art 1, § 17 and US Const, Am XIV, § 1.

V. CONCLUSION

We conclude that 2010 PA 75, as it existed from its effective date until the effective date of 2012 PA 300, was unconstitutional because it violated (1) the Contracts Clauses of the state and federal Constitutions, Const 1963, art 1, § 10 and US Const, art I, § 10; (2) the Takings Clauses of the state and federal Constitutions, Const 1963, art 10, § 2 and US Const, Ams V and XIV; and (3) the guarantees of substantive due process in the state and federal Constitutions, Const 1963, art 1, § 17 and US Const, Am XIV, § 1. Accordingly, we affirm the trial court's orders granting summary disposition or partial summary disposition in favor of plaintiffs in each of the cases before us and remand the case to the trial court, which shall direct the return of the subject funds, with interest, to the relevant employees. We do not retain jurisdiction.

BECKERING, J., concurred with SHAPIRO, P.J.

[12] It is clear that such measures, however, exist. See 2012 PA 300 (curing the constitutional deficiencies in 2010 PA 75).

SAAD, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that none of the issues before us has been rendered moot by the Michigan Supreme Court's decision in *AFT Mich v Michigan*, 497 Mich 197; 866 NW2d 782 (2015). However, I respectfully disagree with the majority's view that § 43e of 2010 PA 75 is violative of the Contracts Clauses of the Michigan and United States Constitutions, US Const, art I, § 10 and Const 1963, art 1, § 10, the Takings Clauses of the Fifth Amendment and Const 1963, art 10, § 2, and the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17. Accordingly, just as I dissented from the majority's decision in *AFT Mich v Michigan*, 297 Mich App 597; 825 NW2d 595 (2012), vacated 498 Mich 851 (2015), I again dissent from the majority's decision here that the mandatory contributions at issue are unconstitutional.

I. NATURE OF THE CASE

In 1974 PA 244, the Michigan Legislature amended the Public School Employees Retirement Act, 1945 PA 136, to provide, on or after January 1, 1975, healthcare benefits for retired employees of the Michigan public schools. The act provided that the Michigan Public School Employees' Retirement System (MPSERS) would pay healthcare premiums for retired employees and their dependents under any group health plan authorized by the retirement commission. MCL 38.325b(1). In 1980, the Legislature enacted the Public School Employees Retirement Act of 1979, 1980 PA 300, MCL 38.1301 *et seq*., setting forth the healthcare coverage provision in MCL 38.1391(1). Pursuant to MCL 38.1341, public schools must contribute to MPSERS a percentage of the total amount of their payroll to

pay the cost of healthcare premiums for retirees and their dependents. In other words, Michigan taxpayers have, for years, paid for public school employees' retiree healthcare benefits.

Over the years, the number of retiree participants in the MPSERS program has grown significantly and, therefore, so has the expense to the taxpaying public, which knows little about this unseen, but enormous, cost to the public education system. Indeed, Phillip Stoddard, Director of the Office of Retirement Services of the Michigan Department of Technology, Management, and Budget, estimated that for the year beginning October 1, 2010, the cost of healthcare for retirees and their dependents would exceed $920,000,000. Thus, it now costs school districts (meaning taxpayers) almost a billion dollars each year for retiree healthcare alone. Faced with these unsustainable, increasing costs, the Legislature has passed various amendments to increase the copays and deductibles that retirees pay for their healthcare. These modifications that require retired public school employees to contribute to their healthcare costs have survived constitutional challenge from education workers. Indeed, our Supreme Court has ruled that the Legislature created and may revoke this taxpayer-funded benefit and that retiree healthcare benefits are not a constitutionally protected contract right, nor a vested right under the Michigan Constitution.

With the enactment of § 43e of 2010 PA 75, codified at MCL 38.1343e,[1] the Legislature required current public school employees to not only pay copays and deductibles upon retirement, but also pay dollars di-

[1] Of course, 2012 PA 300 later modified MCL 38.1343e, but my citation of MCL 38.1343e in this opinion will refer only to the version enacted by 2010 PA 75.

rectly into the program from which they will reap generous retiree healthcare benefits. Again, the public school employees object by claiming constitutional infirmities that, in truth, do not exist. I respectfully disagree with the majority's ruling because the challenged legislation is constitutional.

II. STANDARD OF REVIEW

This Court reviews constitutional issues de novo. *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009). This Court also reviews de novo a trial court's decision on a motion for summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

III. IMPAIRMENT OF CONTRACT

The majority's holding that MCL 38.1343e violates the Contracts Clauses is incorrect because, as a matter of law, MCL 38.1343e has not "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978). Indeed, MCL 38.1343e cannot possibly implicate these constitutional provisions because it does not affect, much less impair, any contract. Simply put, to constitute an impairment of contract, there must first be a contract that is impaired. Thus, for plaintiffs to state a claim, MCL 38.1343e must have altered either a contract between the state itself and the public school employees or the public school employees' contracts with some third party. MCL 38.1343e does neither. And, because no contract has been impaired, this claim must fail.

I begin with the established principle that legislative enactments are presumed to be constitutional

absent a clear showing to the contrary. *Mich Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 401; 522 NW2d 643 (1994). "The party challenging the constitutionality of legislation bears the burden of proof." *Id*. The majority holds that MCL 38.1343e violates the Contracts Clauses of the United States and Michigan Constitutions.

> This state's constitution, Const 1963, art 1, § 10, provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted," which is substantially identical to the federal constitution, US Const, art I, § 10, which provides that "[n]o state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." Our state constitutional provision is not interpreted more expansively than its federal counterpart. [*Attorney General v Mich Pub Serv Comm*, 249 Mich App 424, 434; 642 NW2d 691 (2002).]

The constitutional prohibition on the impairment of contracts is not absolute and must be accommodated to the state's inherent police power to safeguard the vital interests of the people. *Health Care Ass'n Workers Comp Fund v Bureau of Worker's Compensation Dir*, 265 Mich App 236, 240-241; 694 NW2d 761 (2005).

> A three-pronged test is used to analyze Contract Clause issues. The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. In other words, if the impairment of a contract is only minimal, there is no unconstitutional impairment of a contract. However, if the legislative impairment of a contract is severe, then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means

> adopted to implement the legislation are reasonably related to the public purpose. [*Id*. at 241 (citations omitted).]

In addition, the inquiry under the first prong regarding whether the state law substantially impairs a contractual relationship "has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

First, under the Michigan Supreme Court's ruling in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), the public school employees have no contract with the state for retiree healthcare benefits, nor do the public school employees have vested rights in retiree healthcare benefits. In *Studier*, the Court held that MCL 38.1391(1) does not create a contract with public school retirees for retiree healthcare benefits. The plaintiffs, six public school retirees, argued that increases in their prescription drug copayments and deductibles violated US Const, art I, § 10 and Const 1963, art 1, § 10, both of which prohibit a law that impairs an existing contractual obligation. *Studier*, 472 Mich at 647-648. The Supreme Court noted that, in general, "one legislature cannot bind the power of a successive legislature." *Id*. at 660. This principle can be limited where it is in tension with the constitutional prohibitions against the impairment of contracts. *Id*. at 660-661. However, "such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Id*. at 661. Thus, a strong presumption exists that statutes do not create contractual rights. *Id*. Absent a clear indication that the Legislature intended to bind itself contractually, a

law is presumed not to create contractual or vested rights. *Id*. To form a contract, the language of a statute must be plain and susceptible of no other reasonable construction than that the Legislature intended to bind itself. *Id*. at 662. Absent an expression of such an intent, "courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id*.

Applying these principles, the *Studier* Court concluded that the plaintiffs had "failed to overcome the strong presumption that the Legislature did not intend to surrender its legislative powers by entering into a contractual agreement to provide retirement health care benefits to public school employees." *Id*. at 663. "Nowhere in MCL 38.1391(1), or in the rest of the statute, did the Legislature provide for a written contract on behalf of the state of Michigan or even use terms typically associated with contractual relationships, such as 'contract,' 'covenant,' or 'vested rights.' " *Id*. at 663-664. Had the Legislature intended to surrender its power to amend the statute to remove or diminish the benefits provided, it would have done so explicitly. *Id*. at 665.

Therefore, *Studier* is directly controlling here, and no contracts entitling plaintiff-employees to receive retiree healthcare benefits exist. Accordingly, there are no contracts with the state that can be impaired.

Second, the collective bargaining agreements (CBAs) between the public school employees and various school districts are not even touched, much less impaired. Though the plaintiffs in Docket No. 303704 argue that their breach-of-contract count is based on CBAs with their local school districts entitling them to compensation at rates established in the agreements,

in their complaint, they did not allege that any CBAs existed or that such agreements formed the basis of the breach-of-contract count, and they did not attach any contracts to their complaint.[2] Further, the state is not a party to the CBAs and cannot be bound by them. *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002); *Baraga Co v State Tax Comm*, 466 Mich 264, 266; 645 NW2d 13 (2002).

In any case, obviously, the CBAs do not address the retiree healthcare system because this is a benefit created by the state. By virtue of MCL 38.1343e, the state required public school employees to contribute money to help defray the cost of retiree healthcare benefits. This statutory mandate is between the state and each worker, and this has nothing to do with any contract. Regardless of the wage levels negotiated in CBAs for principals, teachers, or noninstructional workers, those levels are not affected. If, for example, a school district has contracted with a teacher to pay him or her $80,000 a year, the state's mandate that the employee contribute 3% under MCL 38.1343e does not alter the school district's contractual obligation. Indeed, the state Legislature could change the mandate to 4% or 1%, and the school district would nevertheless be required by contract (CBA) to pay the teacher $80,000 a year. MCL 38.1343e simply sets forth a mechanism to ensure that each member of MPSERS makes this contribution by requiring school districts to

[2] Plaintiffs in Docket No. 303704 note that an employment contract necessarily exists for every employee who performs services in exchange for compensation regardless of whether there was a CBA and, thus, that the failure to plead the existence of CBAs was not fatal to plaintiffs' claims. However, plaintiffs did not merely fail to allege that any CBAs existed, they failed to allege that *any* employment contract for wages was impaired by the operation of MCL 38.1343e.

deduct the contribution from the member's pay and submit it to the retiree healthcare system. But the particular method is quite apart from the terms of any labor agreement, and indeed, the state could have enforced this mandate by a lump sum or periodic payments made directly by each member. That the state chose a paycheck deduction method simply does not convert a permissible legislatively mandated contribution into an unconstitutional impairment of contract. Clearly, this case concerns the state's demands or financial assessment upon each public school employee and has nothing to do with any contract between each employee and the state or a third party. Accordingly, this constitutional theory to challenge MCL 38.1343e should be rejected.[3]

IV. TAKINGS CLAUSES

I also dissent from the majority's holding that MCL 38.1343e effectuates a taking under the United States and Michigan Constitutions. Quite simply, MCL 38.1343e does not effectuate a taking of private property for which the government must give just compen-

[3] It is not clear to what extent the majority relies in its discussion in Parts II, III, or IV of its opinion on its assertion earlier in Part I that the mandatory deductions were unconstitutional not by virtue of their mandatory nature but because the "contributions were to a system *in which the employee contributors have no vested rights*." Nevertheless, the majority cites no authority for this novel proposition. If this were true, then many other legislative enactments would be deemed unconstitutional. Though many examples exist, one need look no further than the United States Medicare system, in which one must contribute through payroll deductions for healthcare for when the person eventually attains the age of 65. Thus, under the majority's view, Congress's choice to fund Medicare though payroll deductions would be unconstitutional because a contributing worker may never become vested in any Medicare benefits. But as already noted, I find no support in the law for this proposition.

sation. Further, no caselaw holds that a "taking" occurs when the Legislature requires a public school employee to contribute money as a condition for receiving benefits in a state-created retirement healthcare program that was designed for the benefit of the employee.

US Const, Am V provides that private property shall not "be taken for public use, without just compensation." This prohibition applies against the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 160; 101 S Ct 446; 66 L Ed 2d 358 (1980); *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576 n 3; 575 NW2d 531 (1998). Also, Michigan's Constitution provides that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. The Takings Clauses do not prohibit the taking of private property; rather, they place a condition on the exercise of that power. *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 314; 107 S Ct 2378; 96 L Ed 2d 250 (1987); *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010). "This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 US at 315.

Here, plaintiffs did not seek "just compensation" for the taking of property arising from an otherwise proper governmental interference. Rather, they alleged that MCL 38.1343e is unconstitutional as applied to them and sought a declaratory ruling to that effect. The trial court granted the requested relief,

ordering defendants to "cease and desist from enforcing or implementing MCL 38.1343e and from deducting 3% of members' compensation" in addition to requiring defendants to return, with interest, the contributions already deducted. This declaratory ruling invalidating the statute was not an award of just compensation for a taking effectuated by an otherwise proper governmental action. Therefore, the relief requested and granted in these cases is not that contemplated under the Takings Clauses, and the rulings should be reversed.

The majority's application of the Takings Clauses to plaintiffs' claims is legally unsupportable. Again, requiring a monetary contribution to a retiree healthcare plan does not trigger the clauses because no constitutionally protected property interest is invaded. The percentage deductions from plaintiff-employees' compensation are not physical appropriations of property. Money is fungible, and, quite simply, it is artificial to view the deductions as a taking of property requiring just compensation. *United States v Sperry Corp*, 493 US 52, 57-58, 62 n 9; 110 S Ct 387; 107 L Ed 2d 290 (1989). The payroll deductions are merely the Legislature's chosen means to effectuate the employees' obligation under MCL 38.1343e to contribute to their own retirement system in which, under existing law, MCL 38.1391, they will participate upon retirement.

I recognize that, in limited situations, a specific fund of money may be considered property for Takings Clause purposes, *Webb's Fabulous Pharmacies*, 449 US at 155-156, but no such fund exists here. Further, it is well established that a specific property right or interest must be at stake in order to find a regulatory taking. See *Eastern Enterprises v Apfel*, 524 US 498, 541-542, 544-546; 118 S Ct 2131; 141 L Ed 2d 451

(1998) (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy noted that although the statute at issue in that case imposed a financial burden, it did so without operating on or altering an identified property interest. *Id*. at 540.

> The [statute] does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. [*Id*.]

In *Eastern Enterprises*, Justice Kennedy would have held that the Takings Clause did not apply. *Id*. at 547-550. Furthermore, four other justices agreed with Justice Kennedy that the Takings Clause did not apply because the case involved "not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties." *Id*. at 554 (Breyer, J., dissenting). Justice Breyer noted that in *Webb's Fabulous Pharmacies*, the monetary interest at issue "arose out of the operation of a specific, separately identifiable fund of money. And the government took that interest for itself." *Id*. at 555.[4]

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[4] And a point the majority avoids is that, on the basis of the analysis expressed by the five justices in *Eastern Enterprises*, lower federal courts have repeatedly held that the imposition of an obligation to pay money does not constitute a taking of private property. See *Adams v United States*, 391 F3d 1212, 1225 (CA Fed, 2004) ("We decline to treat a statutory right to be paid money as a legally-recognized property interest, as we would real property, physical property, or intellectual property."); *Commonwealth Edison Co v United States*, 271 F3d 1327, 1340 (CA Fed, 2001) ("[W]hile a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment."); *Parella v Retirement Bd of Rhode Island Employ-*

The majority labors to find a taking by denominating money as property, despite contrary law. The majority reasons that increasing the dollars a retiree must pay is different from requiring current public school workers to contribute money to pay for current retirees who, incidentally, may have been coworkers yesterday and whom current workers may join tomorrow. Regardless, of course, this distinction has no relevance because it is a retiree healthcare system in which all may share and to which the Legislature has said all must contribute.

Again, MCL 38.1343e states a condition that, after the effective dates of the statute, public school employees must contribute money to a program the Legislature created for those employees upon retirement. Thus, any property interests in the wage levels contained in plaintiffs' respective CBAs were not *retroactively* affected. See *McCarthy v City of Cleveland*, 626 F3d 280, 286 (CA 6, 2010), and cases cited therein. Further, unlike in *Webb's Fabulous Pharmacies* and *Phillips v Washington Legal Foundation*, 524 US 156; 118 S Ct 1925; 141 L Ed 2d 174 (1998), no extraction of interest generated in a specific fund of money has occurred. The essence of plaintiffs' claim is that the state may not take future wages established by their CBAs. Though this is a fallacy because the state demands payment from each worker irrespective of

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ees' Retirement Sys, 173 F3d 46, 50 (CA 1, 1999). In *McCarthy v City of Cleveland*, 626 F3d 280, 286 (CA 6, 2010), the court held "that the Takings Clause 'is not an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest,' " quoting *Swisher Int'l, Inc v Schafer*, 550 F3d 1046, 1057 (CA 11, 2008). The *McCarthy* court noted that although some lower federal courts have followed the *Eastern Enterprises* plurality's takings analysis, those courts "have done so only where a specific private property interest is *retroactively* affected." *McCarthy*, 626 F3d at 285-286.

any negotiated wage levels, if there is a remedy, the proper remedy lies in contract, not takings, and a valid takings claim will lie only when the property rights exist independently of the claimants' so-called contracts with the government. *Niagara Mohawk Power Corp v United States*, 98 Fed Cl 313, 315 (2011); see also *Peick v Pension Benefit Guaranty Corp*, 724 F2d 1247, 1276 (CA 7, 1983); *Klamath Irrigation Dist v United States*, 67 Fed Cl 504, 534 (2005), mod on other grounds by 68 Fed Cl 119 (2005). Importantly, however, the fact that a contract theory may not yield a recovery or provide a full remedy in a given case " 'does not give life to a takings theory.' " *Niagara Mohawk*, 98 Fed Cl at 316, quoting *Home Savings of America, FSB v United States*, 51 Fed Cl 487, 495-496 (2002). In other words, that a Contracts Clause claim provides no relief does not resurrect an equally spurious takings claim.

V. SUBSTANTIVE DUE PROCESS

I also dissent from the majority's holding that the plaintiffs in Docket No. 303702 established that MCL 38.1343e is unconstitutional under the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17. Because the Takings and Contracts Clauses provide explicit textual sources of constitutional protection regarding the type of governmental conduct at issue (but provide no relief for the reasons already stated), plaintiffs are precluded from asserting generalized substantive due-process claims. That the majority holds otherwise is clearly contrary to our constitutional jurisprudence. *Sacramento Co v Lewis*, 523 US 833, 842; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). The clause should not be invoked "to do the work" of other constitutional provisions, even when they offer a plaintiff no relief. *Stop the Beach Renour-*

ishment, Inc v Fla Dep't of Environmental Protection, 560 US 702, 720-721; 130 S Ct 2592; 177 L Ed 2d 184 (2010) (plurality opinion by Scalia, J.). The plaintiffs in Docket Nos. 303704 and 303706 expressly alleged contract and takings claims. The complaint in Docket No. 303702 alleges only a substantive due-process claim, but the label placed on a claim is not dispositive. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Instead, "the gravamen of an action is determined by reading the complaint as a whole." *Id*. Because the underlying allegations are that MCL 38.1343e operates to extract a percentage of plaintiff-employees' compensation, the claims fall within the explicit sources of protection provided by the Takings or Contracts Clauses. Resort to the generalized notion of substantive due process is thus improper. *Cummins*, 283 Mich App at 704, citing *Lewis*, 523 US at 842.

Furthermore, a proper review under the applicable standards reveals that plaintiffs' claims are without merit. Both the Michigan and United States Constitutions prohibit the state from depriving any person of life, liberty, or property without due process of law. Specifically, the Michigan Constitution provides the following:

> No person shall be . . . deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed. [Const 1963, art 1, § 17.]

As our Supreme Court has noted, "the term 'due process' encompasses not only procedural protections, but also contains a 'substantive' component that protects individuals against 'the arbitrary exercise of

governmental power.' " *AFT Mich*, 497 Mich at 245, quoting *Bonner v City of Brighton*, 495 Mich 209, 223-224; 848 NW2d 380 (2014). When a law is challenged on substantive due-process grounds and the law does not infringe on any "fundamental rights," i.e., "the substantive liberties that are deemed 'implicit in the concept of ordered liberty,' " our review is that of rational basis. *AFT Mich*, 497 Mich at 245; see also *Conlin v Scio Twp*, 262 Mich App 379, 390; 686 NW2d 16 (2004). In other words, the plaintiff has to "prove that the challenged law is not 'reasonably related to a legitimate governmental interest.' " *AFT Mich*, 497 Mich at 245, quoting *Bonner*, 495 Mich at 227.

As illustrated by our Supreme Court, this is a very high burden:

> "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." *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id*. at 259-260. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. *Thoman v Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946)[, overruled on other grounds by *East Grand Rapids Sch Dist v Kent Co Tax Allocation Bd*, 415 Mich 381; 330 NW2d 7 (1982)]. Thus, to have the legislation stricken, the challenger would have to show that the legislation is based "solely on reasons totally unrelated to the pursuit of the State's goals," *Clements v Fashing*, 457 US 957, 963; 102 S Ct 2836; 73 L Ed 2d 508 (1982), or, in other words, the challenger must "negative every conceivable basis which might support" the legislation. *Lehn-*

hausen v Lake Shore Auto Parts Co, 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973). [*TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001).]

The majority remarkably asserts that MCL 38.1343e is "unreasonable, arbitrary, and capricious," and thereby not rationally related to a legitimate governmental interest.[5] Yet, our Supreme Court clearly articulated a rational basis for MCL 38.1343e when it upheld the constitutionality of 2012 PA 300:

> The state's purpose advanced by the challenged portions of 2012 PA 300—implementing a fiscally responsible system by which to fund public school employees' retiree healthcare—is unquestionably legitimate. It is entirely proper for the state to seek the continuation of an important retirement benefit for its public school employees while simultaneously balancing and limiting a strained public budget. The means used by the state—the retiree healthcare modifications made by 2012 PA 300—are also reasonably related to this purpose. It is altogether reasonable for the state to choose to maintain retiree healthcare benefits for all of its current public school retirees, and it is equally reasonable for the state to choose to maintain this program for current public school employees. Moreover, because the Legislature has deemed it fiscally untenable for the state to place the entire burden of providing these benefits on the taxpayer, it is also reasonable that the state would choose to have current public school employees assist in contributing to the costs of this program. If the state requires additional financial support to

[5] The majority also seems to shift the burden onto defendants when it states that "[d]efendants posit no evidence or even argument to suggest that the funding of these retirement benefits could not have been satisfied by measures that do not raise due-process concerns," but this misconstrues where the burden lies. Under rational-basis review, the burden is on the party challenging the law. See *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 319; 783 NW2d 695 (2010); *People v Idziak*, 484 Mich 549, 570; 773 NW2d 616 (2009); *TIG Ins Co*, 464 Mich at 557-558.

> maintain the public school employees' retiree healthcare system, which class of persons is more appropriate to assist in maintaining the fiscal integrity of this program than the participants themselves? We do not believe that the state or federal Constitutions require Michigan taxpayers to fund the entire cost of a retirement benefit for a discrete group of public employees. The state is not generally constrained from modifying its own employee benefits programs to accommodate its fiscal needs. [*AFT Mich*, 497 Mich at 247-248.]

Notably, from the Supreme Court's rationale, the voluntary or mandatory nature of the contributions is not relevant. Whether analyzed under 2012 PA 300 or 2010 PA 75, the state has an "unquestionably legitimate" interest in "implementing a fiscally responsible system by which to fund public school employees' retiree healthcare." *Id*. at 247. Further, under 2010 PA 75, every public school employee contributed to the system because every public school employee had the potential to obtain retiree healthcare benefits. Accordingly, it is entirely "reasonable that the state would choose to have current public school employees assist in contributing to the costs of [the] program." *Id*. at 248. Certainly, mandatory contributions to the retiree healthcare system are a "fiscally responsible system by which to fund public school employees' retiree healthcare." *Id*. at 247. Again, the fact that there may have been better or less intrusive ways to accomplish this does not somehow transform the law into an unconstitutional deprivation of substantive due process. See *TIG Ins Co*, 464 Mich at 557; *Crego*, 463 Mich at 260.

Accordingly, I would reverse the trial court's grant of summary disposition to plaintiffs on the substantive due-process claims.

VI. CONCLUSION

To discharge their solemn duty under the Constitution, courts must invalidate clearly unconstitutional legislation but must also defer to the Legislature when the public policy is one that may offend the litigants, but not the Constitution. Here, because (1) the challenged public policy does not even touch upon, much less impair, contracts, (2) no property is taken by the state in the sense contemplated by the Fifth Amendment, and (3) the Legislature had a rational basis for enacting 2010 PA 75, it would have been prudent and in keeping with our Court's limited charge under the Constitution to uphold this legislation as constitutional.[6]

[6] Additionally, assuming MCL 38.1343e is unconstitutional, I would not summarily order the specific remedy of returning the retained funds as the majority does, especially when the parties themselves have not briefed this particular issue. Instead, I would remand to allow the trial court to determine the proper measure of damages in light of the retiree healthcare components and the nature of the specific constitutional infirmity.

GALLAGHER v PERSHA

GALLAGHER v KAPER PROPERTIES, INC

Docket Nos. 325471 and 327840. Submitted April 7, 2016, at Detroit. Decided June 9, 2016, at 9:00 a.m.

Edward and Joan Gallagher brought an action in 2012 in the Oakland Circuit Court against Kaper Properties, Inc., and Kathleen Persha, alleging breach of contract against Kaper Properties, breach of fiduciary duty against Persha, and fraud and misrepresentation against both defendants. Plaintiffs also sought to pierce the corporate veil of Kaper Properties and hold Persha individually responsible for damages allegedly resulting from nonperformance by Kaper Properties and Persha under the terms of a purchase agreement involving the sale of plaintiffs' home to Kaper Properties. After plaintiffs' breach-of-fiduciary duty claim was dismissed with prejudice as time-barred under the statute of limitations, plaintiffs obtained a judgment against Kaper Properties, and the parties stipulated the dismissal of plaintiffs' remaining claims against Persha, without prejudice. In 2014, plaintiffs filed a complaint in the Oakland Circuit Court against Persha individually, claiming fraud and misrepresentation related to the purchase agreement as well as breach of fiduciary duty. Plaintiffs also sought to pierce the corporate veil of Kaper Properties to collect on the 2012 judgment. The court, Shalina D. Kumar, J., dismissed the breach-of-fiduciary-duty claim on the basis that the same claim had been dismissed with prejudice in the 2012 action. In addition, the court dismissed plaintiffs' fraud claim pursuant to MCR 2.116(C)(8), finding that there was no false statement of fact in the pleadings to support a claim of fraud. The court then dismissed the veil-piercing claim, concluding that the claim was not supported by a necessary underlying cause of action. Plaintiffs thereafter moved to reinstate the 2012 case against Persha only, seeking to reinstate the earlier lawsuit to pierce the corporate veil of Kaper Properties and hold Pershsa individually responsible for the 2012 judgment entered against Kaper Properties. The court denied plaintiffs' motion, explaining that because there was no independent cause of action for piercing a corporate veil without an underlying cause of action, it would not

entertain plaintiffs' motion to reinstate. In Docket No. 325471, plaintiffs appealed the court's orders related to the 2014 case. In Docket No. 327840, plaintiffs appealed the court's order related to their motion to reinstate the 2012 case against Persha and pierce the corporate veil of Kaper Properties. The Court of Appeals ordered the cases consolidated.

The Court of Appeals *held*:

1. Michigan law respects the corporate form, and its courts will usually recognize and enforce separate corporate entities. But when the requisite evidence establishes that the corporate form has been abused, the corporate form is pierced to allow creditors to seek payment of a corporate debt—like a judgment—from a responsible corporate shareholder. As a result, piercing a corporate veil is an equitable remedy used in limited circumstances, not a separate cause of action. A corporate entity's veil is pierced when the corporate form has been used to avoid legal obligations; the remedy is used to cure injustices that would otherwise not be redressed.

2. A judgment creditor may file a new action to seek to pierce the corporate veil of a judgment debtor to hold individual shareholders and directors liable individually for a judgment against the corporation. There is a difference between the cause of action needed to support a judgment and the separate and independent requirements for piercing the corporate veil. The veil of a corporate entity may be pierced and liability imposed on an individual shareholder or officer when a fact-finder concludes that the individual so misused the corporation that it was unable to pay on the outstanding judgment and an injustice would occur if the corporate form was not ignored; liability through piercing a corporate veil is not imposed because the shareholder or officer was necessarily liable under the cause of action that resulted in the judgment against the corporation. As a result, a creditor may secure a judgment against the actual corporate debtor first and then later bring a veil-piercing suit against the debtor when it is determined the debtor has no assets. Under MCR 2.114(E), a party may be sanctioned when he or she violates certification requirements for pleadings. Accordingly, a judgment creditor is not required to pursue a piercing remedy in the first lawsuit because the party may not have sufficient facts at that time to support that remedy; a plaintiff cannot assume at the time of filing a complaint that a corporate defendant will fail to pay a valid judgment entered at the end of a case and that the corporate form was abused to subvert justice.

3. In this case, the trial court erred by dismissing plaintiffs' 2014 action; plaintiffs were entitled to bring a new action against Persha to attempt to enforce the 2012 judgment against Kaper Properties by piercing its corporate veil. A separate, underlying cause of action was not necessary to support the equitable relief of piercing a corporate veil because a judgment already existed from the 2012 action that could be enforced. There was no need to address the merits of plaintiffs' veil-piercing claim because the motion was decided under MCR 2.116(C)(8) and the allegations were not addressed by the trial court.

4. Plaintiffs' challenge to the trial court order denying their request to reinstate the 2012 action was moot because the trial court's order in the 2014 case was reversed.

Docket No. 325471 reversed and remanded. Docket No. 327840 dismissed.

JUDGMENTS — CORPORATIONS — REMEDY — PIERCING THE CORPORATE VEIL — NOT A SEPARATE CAUSE OF ACTION.

An action to pierce a corporate veil is an equitable remedy used in limited circumstances, not a separate cause of action; a creditor may secure a judgment against a corporate debtor first and then later seek to pierce its corporate veil when it is determined the debtor has no assets; a judgment creditor is not required to pursue a piercing remedy in the first lawsuit because the party may not have sufficient facts at that time to support that remedy.

Docket No. 325471:

Demorest Law Firm, PLLC (by *Mark S. Demorest* and *Melissa Demorest LeDuc*), for Edward and Joan Gallagher.

Bankey Law, PLC (by *Jill A. Bankey*), for Kathy Persha.

Docket No. 327840:

Demorest Law Firm, PLLC (by *Mark S. Demorest* and *Melissa Demorest LeDuc*), for Edward and Joan Gallagher.

Bankey Law, PLC (by *Jill A. Bankey*), for Kaper Properties and Kathy Persha.

Before: MURRAY, P.J., and STEPHENS and RIORDAN, JJ.

MURRAY, P.J. In Docket No. 325471, plaintiffs, Edward Gallagher and Joan Gallagher, appeal as of right an order granting defendant Kathleen Persha's motion for summary disposition pursuant to MCR 2.116(C)(8), on the basis that plaintiffs had failed to state a claim for fraud, and concluding that plaintiffs' sole remaining claim of "piercing the corporate veil" was not viable without an underlying cause of action.

In Docket No. 327840, plaintiffs appeal by leave granted[1] an order denying their motion to reinstate a 2012 case against defendants, Kaper Properties, Inc., a Michigan real estate investment corporation ("Kaper"), and Persha, the president and sole shareholder of Kaper. We reverse the order in Docket No. 325471 and dismiss the appeal in Docket No. 327840 as moot.

I. FACTS AND PROCEDURAL HISTORY

This case arises from a purchase agreement through which Kaper purchased plaintiffs' home subject to two existing mortgages. Plaintiffs owed more money on the home than it was worth, and agreed to pay Kaper $37,000 to make up the difference between the agreed-upon purchase price and the balance on the mortgages. Kaper, in turn, agreed to pay off the two existing mortgages and release plaintiffs from their debt obligations by August 30, 2012, either through the sale of the home or the refinancing of the mortgages. By August 30, 2012, plaintiffs had transferred the home to Kaper by warranty deed and paid Kaper the $37,000 owed under the purchase agree-

[1] *Gallagher v Kaper Props, Inc*, unpublished order of the Court of Appeals, entered July 14, 2015 (Docket No. 327840).

ment. However, by that time the house had not been sold, Kaper had fallen behind on the mortgage payments, and neither of the existing mortgages had been satisfied as agreed.

A. THE 2012 CASE

Plaintiffs brought a two-count complaint on November 13, 2012, alleging breach of contract against Kaper, and breach of fiduciary duty against Persha. Defendants denied that Persha was ever a party to the purchase agreement, or that Kaper was obligated under the purchase agreement to pay off the existing mortgages by a certain date. After plaintiffs' breach of fiduciary duty claim was dismissed as time barred under the statute of limitations, plaintiffs filed an amended complaint, adding two additional claims against both defendants: one for fraud and misrepresentation and one titled "piercing the corporate veil." A case evaluation panel recommended an award of $290,000 to plaintiffs for the three remaining claims, against defendants jointly and severally. Plaintiffs and Kaper accepted the award, but Persha rejected it. After judgment against Kaper was entered in favor of plaintiffs in the amount of $283,110.88, the parties stipulated to dismissal of plaintiffs' remaining claims against Persha, without prejudice.

B. THE 2014 CASE

On July 25, 2014, plaintiffs filed a three-count complaint against Persha only, raising claims of (1) fraud and misrepresentation, (2) breach of fiduciary duty, and (3) piercing the corporate veil of Kaper based on the facts presented in the 2012 case. The trial court dismissed the breach of fiduciary duty claim based on the dismissal with prejudice of the

same claim in the 2012 case, and Persha filed a motion for summary disposition pursuant to MCR 2.116(C)(8) on the two remaining claims. Over plaintiffs' objection, the trial court granted defendant's motion, finding no false statement of fact in the pleadings to support a claim for fraud. The trial court dismissed the veil-piercing claim because it was no longer supported by an underlying cause of action. However, the trial court suggested that plaintiffs might be able to bring a veil-piercing claim based on a cause of action raised in the 2012 case:

> It's a dismissal with prejudice as to this action which is a separate cause of action that you cannot have, but I don't think it affects the original case; that if I reopen the original case, I reopen it, is it -- it's as if it was not closed, really, so this really doesn't -- even this will be without prejudice because you can't have a separate cause of action for piercing the corporate veil. If had of pled [sic], which -- and I don't remember the original complain [sic] -- if it was pled in the original case, and I reopen the original case, I mean I have to take a look at the pleadings and see. I don't know (indiscernible). This dismissal with prejudice is not necessarily gonna' [sic] affect that.

C. MOTION TO REINSTATE THE 2012 CASE

As a result of the trial court's comments in the 2014 case, plaintiffs filed a motion to reinstate the 2012 case against Persha only, asking the trial court to reopen the prior lawsuit to enable them to pierce Kaper's corporate veil and hold Persha individually responsible for Kaper's judgment. The trial court denied plaintiffs' motion, explaining that it would not entertain the veil-piercing claim without an underlying cause of action because, under Michigan law, "there is no independent cause of action for a claim for piercing the corporate veil."

II. ANALYSIS

A. DOCKET NO. 325471

As noted earlier, in Docket No. 325471 plaintiffs challenge the trial court's order granting Persha's motion for summary disposition in the 2014 case. According to plaintiffs, the trial court erred when it concluded that piercing the corporate veil cannot be brought as a separate cause of action. We agree with the general principle that piercing the corporate veil is an equitable remedy rather than a cause of action, but we conclude that the rule does not apply to this case. Accordingly, for the reasons explained below, we reverse the trial court's order granting defendant's motion for summary disposition and remand for further proceedings.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A party may move for summary disposition under MCR 2.116(C)(8) to challenge whether the opposing party has stated a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint based on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition under that court rule is appropriate only when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

As has been said many times before today, Michigan law respects the corporate form, and our courts will usually recognize and enforce separate corporate enti-

ties. See, e.g., *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650-651; 364 NW2d 670 (1985), and *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547; 537 NW2d 221 (1995) ("It is a well-recognized principle that separate corporate entities will be respected.").[2] But "usually" means not *always*, and when the requisite evidence establishes that the corporate form has been abused, the corporate form will be pierced so that creditors (and sometimes others) can seek payment of a corporate debt (like the judgment in this case) from a responsible corporate shareholder. See *Florence Cement Co v Vettraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011). Consequently, piercing the veil of a corporate entity is an equitable remedy sparingly invoked to cure certain injustices that would otherwise go unredressed in situations "where the corporate entity has been used to avoid legal obligations . . . ." *Wells*, 421 Mich at 651. It is therefore a remedy, and not a separate cause of action, something which the federal courts applying Michigan law have previously recognized. See *In re RCS Engineered Prod Co, Inc*, 102 F3d 223, 226 (CA 6, 1996), and *Aioi Seiki, Inc v JIT Automation, Inc*, 11 F Supp 2d 950, 953-954 (ED Mich, 1998).

But this case is not controlled by that principle, for what is at issue here is how a judgment-plaintiff procedurally pursues the piercing remedy once it is established that the corporate entity cannot pay the judgment, and there is some evidence or reason to believe that the corporate form has been abused to avoid legal obligations. We know that supplementary proceedings under MCR 2.621 and MCL 600.6104(5)

[2] The Supreme Court has recognized the many social and economic benefits resulting from respecting the corporate form. *Klager v Robert Meyer Co*, 415 Mich 402, 411 & n 5; 329 NW2d 721 (1982).

cannot be utilized, see *Green v Ziegelman*, 282 Mich App 292, 303-304; 767 NW2d 660 (2009) (*Green I*), but must the remedy be pleaded as part of the original case or forever be barred? Or can a new case be filed to enforce the outstanding judgment against responsible shareholders if the facts allow piercing of the corporate veil even if no separate cause of action has been pleaded? We now turn to that dispositive issue.

Plaintiffs do not challenge the trial court's order granting summary disposition in favor of Persha on their 2014 fraud and misrepresentation claim. Instead, plaintiffs argue only that, because they filed an action to pursue piercing the corporate veil of Kaper based upon the pre-existing judgment against it, the trial court's dismissal of their complaint was erroneous. Plaintiffs principally rely on *Green I* and *Green v Ziegelman*, 310 Mich App 436; 873 NW2d 794 (2015) (*Green II*), in support of their assertion that a plaintiff may pursue an action to pierce the corporate veil of a judgment debtor and reach a responsible individual.

In *Green I*, the circuit court allowed the plaintiff to initiate a supplemental proceeding, pursuant to MCR 2.621 and MCL 600.6104(5), in a closed case wherein the plaintiff had received a judgment against a corporate entity, "NZA." *Green I*, 282 Mich App at 293-294. The judgment had been entered against NZA only, though Norman Ziegelman, a shareholder of NZA, had been a party to the prior case. *Id*. at 296-297. During the discovery period of this supplemental proceeding, the plaintiff had an opportunity to depose Ziegelman and discovered evidence indicating Ziegelman's personal liability for the previously raised claims. *Id*. at 297. The circuit court granted the plaintiff's motion to pierce the corporate veil and hold Ziegelman liable for the previous judgment against NZA, citing MCL 600.6104 as author-

ity for its entry of a judgment against Ziegelman individually. *Id*. at 298-299. This Court reversed the circuit court's decision and vacated the judgment against Ziegelman, explaining:

> MCL 600.6104(5) begins with very broad language, allowing the court, at its "discretion," to make "any order" that "seems appropriate." But these actions must relate to "carrying out the full intent and purpose of these provisions to subject any nonexempt assets of any *judgment debtor* to the satisfaction of any judgment against the *judgment debtor*." *Id*. (emphasis added). Ziegelman was not a judgment debtor in regard to breach of the architectural agreement; the judgment debtor was solely NZA. The circuit court essentially used a proceeding *supplementary to judgment* to enter an additional judgment against a party not previously subject to a judgment on the claim at issue. MCR 2.621 and [MCL 600.6104] do not provide any authority for such a ruling in the context of piercing the corporate veil. [*Id*. at 303-304.]

Particularly important to this case, the *Green I* Court declined to answer "the questions whether plaintiffs are legally entitled to file a new and separate action against Ziegelman, outside [MCL 600.6104], under a corporate veil piercing theory and whether res judicata or the compulsory joinder rule, MCR 2.203, would bar such an action." *Id*. at 305. See also *Green II*, 310 Mich App at 438 (recognizing that the *Green I* Court did not decide whether an independent action could be filed to pierce the corporate veil). Consequently, the *Green I* Court did not answer the question presented in this case.[3]

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[3] Nor did *Aioi Seiki Inc*, 11 F Supp 2d at 953-954 (holding that because a piercing of the corporate veil action is not a new cause of action but merely a means of determining whether multiple entities exist as separate entities or were mere alter egos of each other, it is supplementary in nature to the original action and should be brought pursuant to FR Civ P 69(a)).

Interestingly, the parties in *Green I* were back before this Court six years later on an appeal from a judgment entered against Ziegelman after the trial court had pierced the corporate veil. In *Green II*, the plaintiffs filed a suit in 2010 against Ziegelman and Ziegelman Architects, seeking to pierce the corporate veil and hold Ziegelman responsible for the judgment entered against Ziegelman Architects after an arbitration, but the parties eventually stipulated to dismiss the case without prejudice. *Green II*, 310 Mich App at 438. But in 2012 the plaintiffs reinstated the case, again asking the trial court to disregard Ziegelman Architects' corporate existence and to hold Ziegelman liable for the judgment. *Id*. at 439. The plaintiffs also alleged that certain transfers of Ziegelman Architects monies violated two separate state laws, the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq*., and the Business Corporation Act, MCL 450.1101 *et seq*. *Id*. After a bench trial, the trial court found that the corporate form should be disregarded, that the actions of the defendants violated the two state laws, and entered a judgment finding the defendants jointly and severally liable for the prior judgment. *Id*. at 442-443.

On appeal, our Court addressed two issues: the applicability of res judicata and whether the evidence was sufficient to pierce the corporate veil. This Court resolved the res judicata issue against Ziegelman, concluding that the request to pierce the corporate veil could not have been made in the earlier lawsuit, *id*. at 445-446, and also upheld the trial court's legal and factual findings and its conclusion that the corporate veil for Ziegelman Architects should be pierced, *id*. at 465. And because of that resolution, this Court determined that it was unnecessary to decide whether the trial court erred in finding Ziegelman liable for violating the two separate statutes. *Id*. at 465-466. Conse-

quently, the *Green II* Court neither addressed nor decided whether a separate action can be filed seeking to pierce the corporate veil of a corporate entity in order to hold an individual corporate member personally liable for a judgment against the corporation.

Another case tangentially touching on this issue is *Belleville v Hanby*, 152 Mich App 548; 394 NW2d 412 (1986),[4] where the plaintiffs filed a lawsuit in 1980 against the corporate entity Shape-Up Shoppe Inc., which resulted in a judgment in excess of $20,000. Several years later, during a creditor's exam in a federal bankruptcy proceeding, the plaintiffs learned that there was a complete identity of interest between the corporate entity and its stockholders, including defendants Hanby and Stivers. *Id*. at 550. After that discovery, the plaintiffs filed a new action "through which they sought to impose the Shape-Up Shoppe's liability on the personal injury judgment upon defendants Hanby and Stivers." *Id*. The complaint contained two counts, one alleging that the defendants ignored the corporate formalities and thus merged the identities of the corporation and the individual defendants, while a second count alleged that the defendants failed to pay consideration for corporate stock and were therefore personally liable as creditors of the corporation. *Id*.

The issue presented to the trial court was whether the three-year statute of limitations to recover for personal injuries, MCL 600.5805(8), or the ten-year period of limitations for actions founded upon judg-

[4] *Belleville* is the only published case that was cited by both federal courts for the proposition that under Michigan law, piercing the corporate veil is a remedy and not a separate cause of action. See *In re RCS Engineered Prod Co Inc*, 102 F3d at 226, and *Aioi Seiki Inc*, 11 F Supp 2d at 953-954.

ments, MCL 600.5809(3), applied. *Id*. at 551. The Court concluded that the ten-year limitations period applied because the second suit was not one seeking recovery for a personal injury, as that had already occurred when the judgment was entered in the earlier case, but was instead one seeking to enforce the judgment against an individual:

> The lawsuit filed by the plaintiffs against defendants Hanby and Stivers was not one principally geared to establishing a right to recover for a personal injury. Rather, having already obtained a judgment against the corporation on their personal injury claim, plaintiffs sought, through the lawsuit at issue here, to establish that the judgment obtained against the corporation was also a judgment against the defendants in their individual capacities. The only issues presented in the cause of action are those concerned with piercing the corporate veil and establishing that defendants were the alter egos of the corporation . . . [t]hus, in its most basic sense, this was an action to establish an identity of interest between these defendants and the Shape-Up Shoppe. [*Id*. at 552-553.]

Consequently, the *Belleville* Court recognized the distinction between the initial rights asserted through a cause of action that lead to the original judgment against a corporate entity, and the subsequent action to enforce that judgment against an individual because of the lack of formal corporate identity. See also *Bodenhamer Bldg Corp v Architectural Research Corp*, 873 F2d 109, 112-113 (CA 6, 1989).

None of these prior decisions address the precise issue here, though they do provide some insight on the issue. But appellate courts in our sister states have addressed the issue, and as recognized by the *Green I* Court, one case, *Miner v Fashion Enterprises, Inc*, 342 Ill App 3d 405, 415; 276 Ill Dec 652; 794 NE2d 902 (2003), set forth the following principle:

> We do note that in *Miner*, [342 Ill App 3d] at 415, the Illinois Appellate Court ruled that "a judgment creditor may choose to file a new action to pierce the corporate veil of a judgment debtor in order to hold individual shareholders and directors liable for a judgment against the corporation." [*Green I*, 282 Mich App at 304-305.]

See also *Westmeyer v Flynn*, 382 Ill App 3d 952, 956; 321 Ill Dec 406; 889 NE2d 671 (2008) (recognizing holding in *Miner* that a judgment creditor can file a new action to seek to pierce the corporate veil of a judgment debtor and hold individual shareholders and directors liable).

The Kentucky Supreme Court has also opined on the issue. In *Inter-Tel Technologies, Inc v Linn Station Props LLC*, 360 SW3d 152 (Ky, 2012), the defendant Linn Station Properties had previously obtained a default judgment against Integrated Telecom Services, a wholly owned subsidiary of the plaintiff Inter-Tel Technologies. Linn Station then filed a new case seeking to enforce the Linn Station judgment against Inter-Tel by piercing the corporate veil, which the Kentucky Supreme Court held was an appropriate procedure:

> Beginning with the second point, there is nothing inappropriate about proceeding first to secure a judgment as to the actual debtor and, upon determining that the debtor has no assets and its corporate shield may be vulnerable, then bringing a piercing suit against those who actually control the corporation and have rendered it judgment-proof. *Sea–Land* is but one of many examples of piercing litigation that followed earlier debt collection litigation against the actual debtor. [*Sea-Land Servs, Inc v Pepper Source*, 941 F2d 519 (CA 7, 1991)]. *See also Bodenhamer Bldg Corp v Architectural Research Corp*, 873 F2d 109 (CA 6, 1989) (applying Michigan law); [*Wm Passalacqua Builders, Inc v Resnick Developers South, Inc*, 933 F2d 131 (CA 2, 1991); *Durrant v Quality First Mktg, Inc*, 127 Idaho 558; 903 P2d

> 147 (Idaho Ct App, 1995); *Davenport v Quinn*, 53 Conn App 282; 730 A2d 1184 (1999)]. . . . *See also Miner* [*v Fashion Enterprises, Inc*, 342 Ill App 3d 405; 276 Ill Dec 652; 794 NE2d 902, 911 (2003)] ("[J]udgment creditor could use supplementary proceedings to discover whether the judgment debtor corporation's individual shareholders and directors held assets of the corporation, or the judgment creditor could choose to file a new action to pierce the corporate veil in order to hold the individual shareholders and directors personally liable for the judgment of the corporation."). There is no valid basis for precluding a piercing action simply because the claim was not part of the original debt collection suit. In some cases, the creditor may know enough to proceed against all potentially liable parties but, in other instances, it may be appropriate to obtain the judgment first and only when it proves uncollectible then seek relief through veil-piercing litigation. [*Inter-Tel*, 360 SW3d at 168-169.]

Importantly, there were no unique statutes, court rules, or other laws relied upon by the courts in either Illinois, Kentucky, or the other states cited by the *Inter-Tel Technologies* court that specified a procedural mechanism to initiate piercing the corporate veil and that would differentiate the circumstances in those states from those at issue in Michigan.

In light of the foregoing, we hold that plaintiffs were entitled to bring a new action in an attempt to enforce the prior Kasper judgment against Persha. While we continue to recognize that piercing the corporate veil is merely a remedy to be applied in certain limited circumstances, the concern that there be a separate cause of action to support this type of equitable relief does not arise when, as in this case, there already exists a judgment based on one or more causes of action. See *Union Guardian Trust Co v Rood*, 308 Mich 168, 172; 13 NW2d 248 (1944) (recognizing that when a cause of action is reduced to a judgment, the cause of

action is merged into the judgment and thereafter only an action on the judgment exists). In other words, a party certainly needs to successfully pursue a cause of action before it can pursue a remedy, but "having already obtained a judgment against the corporation on their personal injury claim, plaintiffs sought, through the lawsuit at issue here, to establish that the judgment obtained against the corporation was also a judgment against the defendants in their individual capacities." *Belleville*, 152 Mich App at 553.

Courts from our sister states have similarly recognized the difference between the cause of action needed to support a judgment and the separate and independent requirements for piercing the corporate veil. In *Estate of Hurst v Moorehead I, LLC*, 228 NC App 571; 748 SE2d 568 (2013), for example, the plaintiff sued both a corporate and individual defendant (Bruce Blackmon), and the jury returned a verdict finding amongst other things that the corporate defendant had breached a promissory note. *Estate of Hurst*, 228 NC App at 574. Based on the jury verdict, the trial court concluded that Blackmon was the alter ego of the corporate entity and held both liable for the damages awarded in the judgment. *Id*. Blackmon moved for judgment notwithstanding the verdict, arguing that he could not be held liable for the damages because the jury did not find liability against him on the promissory note, nor did it find he had committed fraud or unfair trade practices, as its findings on those were only against the corporate entity. *Id*. at 574-575. The trial court denied the motion, and the court of appeals affirmed, holding that the findings by the jury on the breach of contract and fraud claims were not necessary to support piercing the corporate veil, which looked to different concerns and contained different elements:

> First, while a finding that an individual member of a limited liability company personally engaged in certain conduct, such as fraud or misrepresentation, is necessary to support the imposition of individual liability against that member under N.C. Gen.Stat. § 57C–3–30(a), a finding of actual fraud against an individual member is not required to support the imposition of alter ego liability under the instrumentality rule. Rather, the requisite element for piercing the corporate veil under the instrumentality rule requires a finding that the individual member used his control over the entity "to commit fraud *or wrong*, to perpetrate the violation of a statutory or other positive legal duty, *or a dishonest and unjust act in contravention of* [*the*] *plaintiffs' legal rights*[.]" [*Glenn v Wagner*, 313 NC 450, 455; 329 SE2d 326, 330 (1985)] (emphasis added) (internal quotation marks and citation omitted). A showing of actual fraud, in its legal sense, is not a necessary element for the court to pierce the corporate veil. Therefore, the jury's findings addressing fraud are immaterial to their findings addressing breach of contract and piercing the corporate veil.
>
> Similarly, an award of actual damages for claims of fraud and/or unfair and deceptive trade practices is likewise inconsequential to imposing alter ego liability under the instrumentality rule for a breach of contract claim. The requisite element for piercing the corporate veil under the instrumentality rule requires a finding that the individual member's control over the entity and breach of duty "must proximately cause the injury or unjust loss complained of." *Id*. (internal quotation marks and citation omitted). The jury awarded plaintiffs $4.9 million in actual damages on their breach of contract claim. The fact that the jury awarded only nominal damages to plaintiffs on their claims for fraud and unfair and deceptive trade practices has no bearing on the trial court's ability to pierce the corporate veil and hold Blackmon liable for the breach of contract damages awarded by the jury against Moorehead I. [*Estate of Hurst*, 228 NC App at 579-580.]

Likewise, in *Acadia Partners, LP v Tompkins*, 759 So 2d 732, 740 (Fla Dist Ct App, 2000), the Florida appeals

court ruled that verdicts that (1) found no liability against the individual defendant, but (2) pierced the corporate veil of the corporate defendant and held the individual liable for the damages awarded against the corporate entity were not inconsistent since "there was no impediment to a finding of liability on the corporate veil claim even where no liability was assessed on the other claims."

These cases make sense, as they are consistent with the theory of liability created through piercing the corporate veil. A corporate veil is pierced and liability imposed upon an individual shareholder or officer not because the shareholder or officer was necessarily liable under the cause of action resulting in the judgment against the corporation. See *Green II*, 310 Mich App at 451-452 (rejecting an argument that the trial court could not pierce the corporate veil in the absence of finding that the individual caused the entity to commit the particular wrong at issue). Instead, liability is imposed because the fact-finder has concluded that the individual so misused the corporation that it was unable to pay on the outstanding judgment and an injustice would occur if the corporate form was not ignored. *Id*. at 452-454. The *Green II* Court concluded as much when reviewing Michigan Supreme Court precedent on the issue:

> Because the evidence in [*People ex rel Attorney General v Mich Bell Tel Co*, 246 Mich 198, 204; 224 NW 438 (1929)] showed that American Telephone and Telegraph operated Michigan Bell as a mere instrumentality and did so "to avoid full investigation and control by the public utilities commission of the State to the injury of the public," the Court disregarded the separate existence of Michigan Bell and voided the contract between Michigan Bell and American Telephone and Telegraph. *Id*. at 204-205. *It was unnecessary to show that the owners used the entity*

> *directly to commit a fraud or other wrong; it was sufficient to show that the continued recognition of the entity's separate existence under the circumstances would amount to a wrong or be contrary to public policy*. [*Green II*, 310 Mich App at 452 (emphasis altered).]

As a result, when a judgment already exists against a corporate entity, an additional cause of action is not needed to impose liability against a shareholder or officer if a court finds the necessary facts to pierce the corporate veil.

Other than to state that a separate cause of action is required to pursue the remedy of piercing the corporate veil, and we have rejected that argument, defendants have pointed to no law that prohibits plaintiffs from filing this second suit against Persha and seeking to pierce Kasper's corporate veil. Certainly Persha was not off-limits to a new lawsuit, as the first case against her was dismissed without prejudice. See *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 509-510; 686 NW2d 770 (2004), overruled in part on other grounds by *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4 (2012). And as we noted earlier, actions to enforce judgments are specifically permitted by the common law. See *Netting Co v Touscany*, 247 Mich 279, 282; 225 NW 556 (1929) (recognizing a common-law action to recover on a personal judgment), and *Union Guardian Trust Co*, 308 Mich at 172. Judgment creditors like plaintiffs should also not be *required* to pursue a piercing remedy in the first lawsuit or face losing that remedy, as a party should first have facts to support any claim or remedy before pursuing it. See MCR 2.114(E) and *Inter-Tel*, 360 SW3d at 169 n 11. A plaintiff cannot presume at the time of filing that (1) a corporate entity will fail to pay a valid judgment entered at the end of a case and (2) that the corporate form was being abused to subvert justice, and therefore

plead piercing the corporate veil as a remedy no matter the set of facts (again, see MCR 2.114(E)), as oftentimes the improprieties that lead to pursuing a piercing remedy do not come to light during the initial lawsuit. See *Belleville*, 152 Mich App at 550. We therefore hold that the trial court erred by dismissing the 2014 case, and we remand for further proceedings.

Although plaintiffs discuss the merits of their veil-piercing claim at length in their appeal brief, because the trial court's order was based on plaintiffs' failure to state a legally cognizable claim, MCR 2.116(C)(8), it did not reach plaintiffs' argument on its merits. Because appellate review is limited to issues that the lower court actually decided, *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005), we choose not to review the merits of the argument. On remand, the trial court will have the opportunity to consider the merits of plaintiffs' arguments.

B. DOCKET NO. 327840

In Docket No. 327840, plaintiffs challenge the trial court's order denying their motion to reinstate the 2012 case against Persha. Plaintiffs argue that, because they "properly requested the circuit court to pierce the corporate veil of Kaper and hold Persha liable" on the previous judgment, the trial court erred when it denied their request. However, because plaintiffs will now be allowed to pursue the piercing remedy in the 2014 case, they have obtained full relief and we need not address the issues raised in this appeal.

In Docket No. 325471, we reverse the trial court's order and remand for further proceedings. We dismiss the appeal in Docket No. 327840 as moot. We do not retain jurisdiction.

Neither party may tax costs, an issue of first impression being involved. MCR 7.219(A).

STEPHENS and RIORDAN, JJ., concurred with MURRAY, P.J.

PEOPLE v SHAW

Docket No. 313786. Submitted February 10, 2016, at Detroit. Decided June 14, 2016, at 9:00 a.m. Leave to appeal denied 500 Mich 941.

Barry D. Shaw was convicted following a jury trial in the Ingham Circuit Court of nine counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b; he was acquitted of one additional count of CSC-I. The court, Joyce Draganchuk, J., sentenced defendant to 15 to 40 years' imprisonment on one count and to 18 years and 9 months to 40 years' imprisonment on the other eight counts. Defendant filed a motion for new trial on the ground of ineffective assistance of counsel. After a 10-day hearing, the trial court denied the motion for new trial. Defendant appealed his convictions and the denial of his motion for new trial.

The Court of Appeals *held*:

1. Defendant received ineffective assistance of counsel when his attorney failed to object to hearsay testimony offered by five different witnesses, each of whom recounted statements made to them by the complainant, which served to bolster her credibility. Three of the witnesses were members of the complainant's family. Their statements were clearly hearsay, and defense counsel conceded that he had no strategic reason for failing to object. Therefore, his performance fell below an objective standard of reasonableness. The other two witnesses were Dr. Stephen Guertin, a pediatrician and expert witness on child sexual abuse, and Lansing Police Department Detective Elizabeth Reust. The statements to Guertin were not admissible under MRE 803(4), which permits the admission of statements made for the purpose of medical treatment if they were reasonably necessary for diagnosis and treatment and there was a self-motivation for truthfulness to receive proper medical care, because the complainant was referred to Guertin in conjunction with the police investigation and had seen a different physician in the last seven years who was not called as a witness. Reust's testimony was filled with statements about how she confirmed background facts reported to her by the complainant and corroborated facts in the complaints. There was no reason for trial counsel to have reasonably concluded that he could obtain a tactical advantage by allowing the

inadmissible hearsay to uncover inconsistencies in the complainant's testimony. The trial was essentially a credibility contest, and these errors all essentially confirmed the complainant's story. Given the frequency, force, and extent of the hearsay testimony, there was a reasonable probability that the outcome of the trial would have been different but for these errors.

2. Defendant was also denied effective assistance of counsel because defense counsel failed to discover and present testimony that the complainant was sexually active with a boyfriend that she had lived with for some time beginning when she was 19 years old. Evidence that the complainant and the boyfriend engaged in consensual vaginal and anal sex would have explained Guertin's testimony about the extensive hymenal changes and chronic anal fissure. Without this testimony, the jury was left to conclude that those injuries must have resulted from defendant having abused the complainant when she was a child. The trial court erroneously concluded that the testimony would have been excluded by the rape-shield law, MCL 750.520j. Rather, the testimony could have come in as evidence of an alternative explanation for the hymenal changes and the source of the chronic anal fissure, and defense counsel's failure to ask the boyfriend about the issues fell below an objective standard of reasonableness. In light of the significance of the testimony, there was a reasonable probability that the result of the trial would have been different had the testimony been admitted.

3. The trial court erred when it admitted, over objection, hearsay testimony from Officer Kasha Osborn. The complainant's brother was asked on direct examination whether he recalled a fight between his mother and defendant that occurred when he was 12 or 13 years old. He denied memory of the incident and stated that he did not remember telling the police about it. Over defense objection, Osborn testified that the brother told her about an incident that occurred at that family's house. The brother's testimony had little, if any, probative value. The brother did not witness any of the abuse, nor did the prosecution suggest that he did. The elicited denial was simply a mechanism for introducing substantive evidence under the guise of rebutting the denial; therefore, the impeachment should have been disallowed. Although under other circumstances this may have been harmless error, given the extent of other improperly admitted evidence heard by the jury, it was difficult to single out a particular error and conclude it was harmless.

Reversed and remanded for a new trial.

GLEICHER, P.J., concurring, raised the question whether Guertin, who was board-certified in pediatrics and pediatric critical care, was qualified under MRE 702 to render expert opinions based on his examination of an adult, sexually active woman, and suggested that the trial court would need to consider this question on retrial.

JANSEN, J., dissenting, disagreed with the majority's substitution of its judgment for that of the trial court in determining that there had been ineffective assistance of counsel. The failure to object to the hearsay statements was a matter of trial strategy that was beneficial to defendant because it opened the door for additional testimony that the complainant was not credible or truthful. In addition, the testimony was cumulative; therefore, the result of the trial was unlikely to be different but for the admission of the cumulative testimony. Regarding Guertin's testimony, it was admissible under MRE 803(4) because the complainant expressed concern that, as the result of years of abuse, she could not have children; therefore, the statements were both for medical evaluation and forensic investigation. To the extent the challenged statements were inadmissible, trial counsel admitted that he allowed Guertin's and Reust's statements in because he intended to use them to impeach the complainant. That counsel failed to address all the inconsistencies did not render the strategy unsound, and its lack of success did not give rise to ineffective assistance of counsel. The failure to present the testimony of the complainant's boyfriend was also not ineffective assistance of counsel because the evidence presented established that the complainant had engaged in consensual sexual intercourse as an adult, rendering the boyfriend's testimony unnecessary and unduly prejudicial. Moreover, with regard to consensual anal intercourse, the boyfriend's testimony would have harmed defendant's case because it would have explained why an injury that allegedly occurred years previously had not healed. Finally, the majority conceded that the impeachment evidence may have constituted harmless error if there were no additional errors, and there were none. Judge JANSEN would have affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, and *Joseph B. Finnerty*, Appellate Division Chief, for the people.

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

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

SHAPIRO, J. In August 2011, when the complainant was 23 years old, she reported to the Lansing Police Department that defendant, her stepfather, had sexually molested her on multiple occasions between the ages of 8 and 16. Following a jury trial, defendant was convicted of nine counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and acquitted of an additional count of CSC-I. Defendant filed a motion for new trial on the ground of ineffective assistance of counsel. After a 10-day *Ginther*[1] hearing, the trial court denied the motion for new trial. Defendant now appeals his conviction and the denial of his motion for new trial. We conclude that defendant did not receive effective assistance of counsel at trial and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Accordingly, we reverse and remand for a new trial.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that defense counsel was ineffective for a number of reasons. Because a *Ginther* hearing was held, the issue is preserved. See *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). A defendant's ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When reviewing an ineffective assistance of counsel claim, this Court reviews for clear error the

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

trial court's findings of fact and reviews de novo questions of law. *Id*. The trial court's findings are clearly erroneous if this Court is definitely and firmly convinced that the trial court made a mistake. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654-655; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. FAILURE TO OBJECT TO HEARSAY

Defendant argues that his counsel's performance fell below reasonable professional norms because, among other reasons, his attorney failed to object to hearsay testimony offered by five different witnesses, each of whom recounted statements made by the complainant in which she told them that defendant had sexually abused her years earlier. Defendant further argues that this hearsay testimony was of particular significance because it served to bolster the complainant's credibility in a case that turned on credibility.

MRE 801 defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." Unless an exception exists, hearsay is inadmissible. MRE 802. "In a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant, hearsay evidence may tip the scales against the defendant, which means that the error is more harmful." *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010).

Three of the challenged witnesses were members of the complainant's family, one was Dr. Stephen Guertin, a pediatrician, who was admitted as an expert in child sexual abuse, and the last was Lansing Police Detective Elizabeth Reust. We address each in turn.

1. STATEMENTS TO FAMILY MEMBERS

The prosecution called three relatives of complainant—two cousins and her sister. Her cousin Elizabeth testified that, while at their grandmother's house, while upset and crying, the complainant told her that defendant had sexually touched her. Her cousin Laura testified that, in 2011 or 2012, while on a family canoe outing, the complainant, crying and intoxicated, told her that defendant had abused her when she was younger and specifically recounted one incident. The complainant's sister, Brooke, testified that later in the canoe trip, she, the complainant, and Laura took a walk together. During the walk, Laura told Brooke that the complainant had said to her that defendant had been "molesting her ever since she was little." Brooke testified that the complainant then began to cry and recounted a specific incident in which defendant raped her in the living room while the rest of the family was out in the yard. The prosecution concedes, and we agree, that no exception to the hearsay rule applies to any of these statements, so admitting

testimony recounting them was plain error, and the failure to object constituted ineffective assistance of counsel. Given that the statements were clearly hearsay, and defense counsel conceded he had no strategic reasons for failing to object, we conclude that defense counsel's performance fell below an objective standard of reasonableness. *Frazier*, 478 Mich at 243.

2. TESTIMONY OF DR. GUERTIN

Dr. Guertin conducted a forensic physical examination of the complainant seven years after the last alleged instance of abuse. Without objection, he recounted in detail the complainant's statements to him about the abuse. On appeal, defendant argues that the statements were inadmissible hearsay and that counsel should have objected. The prosecution responds that such an objection would have been futile because the statements were admissible pursuant to MRE 803(4) because they were made for the purposes of medical treatment or diagnosis.

"Statements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care." *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011). The "rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). An injury need not be readily apparent. *Mahone*, 294 Mich App at 215. Moreover, "[p]articularly in cases of sexual assault, in which

the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." *Id*.

We agree with defendant that MRE 803(4) does not apply under the circumstances presented here. First, the examination by Guertin did not occur until seven years after the last alleged instance of abuse, thereby minimizing the likelihood that the complainant required treatment. Second, the complainant did not seek out Guertin for gynecological services. Rather, she was specifically referred to Guertin by the police in conjunction with the police investigation into the allegations of abuse by defendant.[2] And during the seven years since the last alleged incident of abuse, she had seen a different physician, who was not called as a witness, for gynecological care. Under these facts, the complainant's statements to Guertin were not admissible because they were not statements for the purposes of medical treatment. See *People v Kosters*, 175 Mich App 748, 751; 438 NW2d 651 (1989) (holding that a nurse's testimony about the victim's statements was inadmissible because the statements were not reasonably necessary to medical diagnosis and treatment). The prosecution argues, on the basis of defense counsel's testimony at the *Ginther* hearing, that allowing the admission of hearsay statements by Guertin was strategic because defense counsel hoped to point out variations of fact in the complainant's statements. However, a review of Guertin's report, which was

[2] Indeed, Guertin's written report was directed to the prosecutor, not to the complainant as his patient or to any other physician.

available to counsel before trial, readily reveals the absence of any significant inconsistencies; certainly none that could justify allowing a medical professional to offer extensive and highly damaging hearsay testimony. Accordingly, defense counsel's performance fell below an objective standard of reasonableness when he failed to object to Guertin's hearsay testimony. *Frazier*, 478 Mich at 243.

3. TESTIMONY OF DETECTIVE REUST

The primary investigating officer was Detective Reust. Her testimony also contained numerous hearsay statements for which no exceptions were applicable. First, she, like other witnesses, recounted the out-of-court statements made to her by the complainant, including detailed descriptions of the alleged abuse. And in an example of hearsay within hearsay, i.e., double hearsay, she testified to the statements of Guertin that described in detail the complainant's statements to him.

Reust also testified extensively about how she confirmed numerous background facts that the complainant reported to her. She recounted statements made by the complainant regarding other events and then testified that, before filing the charges, she was able to confirm the veracity of those statements by comparing them to out-of-court statements made to her by others, by reference to various out-of-court documents, or both. She testified that, by doing so, she "corroborated" what the complainant had said. In other words, Reust concluded that the complainant was credible and so advised the jury. For the same reasons discussed in reference to the testimony of Guertin, we hold that there was no basis for defense counsel to have reasonably concluded that he could obtain a tactical advantage by allowing

the inadmissible hearsay testimony in order to ferret out inconsistencies.[3] Accordingly, defense counsel's performance fell below an objective standard of reasonableness when he did not object to the hearsay testimony from Reust. *Frazier*, 478 Mich at 243.

4. EFFECT ON TRIAL

Having concluded that defense counsel's performance fell below an objective standard of reasonableness with regard to the hearsay statements by the complainant's family members, by Guertin, and by Reust, we turn now to whether, but for those errors, there is a reasonable probability that the outcome of the trial would have been different.

Given the time that had passed since the alleged abuse stopped, the lack of any witnesses to the charged crimes, and the lack of any significant circumstantial proofs, this case turned largely on the complainant's credibility. Because defense counsel did not object to the hearsay statements, the jury heard the complainant's version of events more than five times. And in the case of Guertin and Reust, the hearsay was offered with what amounted to an official stamp of approval. In closing argument, the prosecutor reminded the jury that the testimony of the complainant's reports was consistent with the testimony the complainant gave during trial. And Reust's testimony that she corroborated a large number of incidental details related to her by the complainant by consulting out-of-court sources was clearly intended to bolster the complainant's credibility through references to hearsay.

[3] The inconsistencies addressed by defense counsel in closing argument were very minor, such as where the complainant said defendant worked and whether, in a particular incident more than 10 years earlier, she recalled defendant was wearing traditional underwear or thong-style underwear.

Moreover, Guertin testified that, based on the complainant's medical history, he believed her allegations. He also stated that, based on the complainant's medical history, i.e., her hearsay statements, he believed that his physical findings were consistent with someone who had suffered child sexual abuse. His belief based on hearsay was critical because the medical findings themselves were ambiguous at best.[4] He testified that the hymenal "injuries" he observed upon examination of the complainant could be caused by consensual penile-vaginal intercourse and that such injuries could be seen in up to 80% of teenagers who had recurrent consensual intercourse.[5] Further, he testified that the complainant's chronic anal fissure could have been caused by consensual intercourse or by diarrhea or constipation. The minimal probative value of the physical findings supports our conclusion regarding the significant prejudicial effect of the hearsay in this case.

Given the frequency, extent, and force of the hearsay testimony, we conclude that, had defense counsel objected to its admission, there is a reasonable probability that the outcome of this case would have been different. Accordingly, defendant has satisfied both prongs of the *Strickland* test.

B. FAILURE TO PRESENT EVIDENCE OF AN ALTERNATIVE SOURCE OF INJURY

Defendant also argues that he was denied effective assistance of counsel by defense counsel's failure to

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[4] It is unclear on what basis Guertin, a pediatrician, could offer testimony regarding what hymenal changes would be expected in a sexually active adult woman.

[5] As noted later in this opinion, it was undisputed that before Guertin's examination, the complainant had been sexually active with her boyfriend.

discover and present testimony that the complainant was sexually active with a boyfriend with whom she had lived for some time beginning when she was 19 years old. Specifically, defendant argues that defense counsel failed to investigate and present testimony that the complainant and the boyfriend engaged in consensual vaginal and anal sex. Defendant argues that this testimony would have explained why Guertin found extensive hymenal changes and the chronic anal fissure. Without this testimony, the jury was left to conclude that those injuries must have resulted from defendant having abused the complainant when she was a child.[6]

At the *Ginther* hearing, appellate counsel called the boyfriend as a witness to testify that while a couple, he and the complainant had engaged in consensual vaginal and anal sex.[7] Defense counsel testified that although he called the boyfriend as a witness at trial, he did not ask questions about the complainant's sexual activity with him because he believed it to be barred by the rape-shield law. The trial court agreed, ruling that defense counsel's failure to present this testimony was not of consequence because it would have been barred by the rape-shield law. Both counsel and the court were mistaken.

The rape-shield law, MCL 750.520j(1), provides:

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[6] The failure to reasonably investigate can constitute ineffective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 52-53; 826 NW2d 136 (2012).

[7] That the boyfriend would have so testified was stated as an offer of proof by appellate counsel at the *Ginther* hearing because the trial court would not permit the boyfriend to testify at the *Ginther* hearing regarding any sexual activities with the complainant. The court stated that such testimony, even as an offer of proof, is barred by the rape-shield statute. The trial court's refusal to allow the testimony for purposes of the *Ginther* hearing was erroneous because such testimony is permitted as an offer of proof if the applicability of the rape-shield statute is at issue. See *People v Hackett*, 421 Mich 338, 350; 365 NW2d 120 (1984).

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

The rape-shield law does not prohibit defense counsel from introducing "specific instances of sexual activity . . . to show the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged provided the inflammatory or prejudicial nature of the rebuttal evidence does not outweigh its probative value." *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978); see also *People v Haley*, 153 Mich App 400, 405-406; 395 NW2d 60 (1986) (holding that "once the prosecution introduced medical evidence to establish penetration, evidence of alternative sources of penetration became highly relevant to material issues in dispute"). Accordingly, evidence of an alternative explanation for the hymenal changes and source for the chronic anal fissure would have been admissible under the exception to the rape-shield statute, and defense counsel's failure to ask the boyfriend about these issues fell below an objective standard of reasonableness.

It is difficult to determine, with confidence, whether the boyfriend's testimony on these matters would have had a significant effect on the trial given that he was not permitted to offer the testimony at the *Ginther*

hearing, and so there is an inadequate record. However, assuming what appellate counsel proffered was accurate, the testimony would likely have been very significant given that, without it, there was no likely explanation, other than defendant's guilt, to explain the extensive hymenal changes and the chronic anal fissure. Guertin essentially testified that the hymenal changes were consistent with those of either a sexually active adult woman or an abused child. The fact that the complainant was sexually active and living with her boyfriend at age 19, well before Guertin's examination, was therefore highly relevant. The same is true regarding the proffered testimony about consensual anal sex because the complainant testified that she had not had anal sex other than defendant's forcible penetration. Given that unchallenged testimony, it is difficult to see why the jury would have questioned the prosecution's closing argument that that "the physical findings absolutely match with what [the complainant] says happened to her . . . . That's not a coincidence. That's because it actually happened."[8]

We conclude that trial counsel's failure to present this testimony at trial constituted ineffective assistance and that there is a reasonable probability that the result of the trial would have been different had the testimony been admitted.[9]

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[8] The prosecution argues that defense counsel's failure to present the boyfriend's testimony was harmless because Guertin stated that the complainant "had adult consensual sex" and the complainant testified that she had sexual relations with the boyfriend she was dating at the time of trial. These two brief references, however, were unlikely to provide the jury a basis to conclude that the complainant was in a sexually active relationship before Guertin's examination. Moreover, they demonstrate the prosecution's recognition that the rape-shield statute did not apply.

[9] Given our resolution of defendant's arguments pertaining to the failure to object to hearsay and the failure to investigate and present evidence regarding an alternative source for the extensive hymenal

II. IMPEACHMENT TESTIMONY

Defendant also argues that the trial court erred when it admitted, over objection, hearsay testimony from Officer Kasha Osborn. We agree. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). We review unpreserved issues for plain error affecting defendant's substantial rights. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

The complainant's brother, who was interviewed by the police, was asked on direct examination whether he recalled a fight between his mother and defendant that occurred when he was 12 or 13; he denied memory of the incident and stated that he did not remember telling the police about it. Over a defense objection, Osborn testified that the brother told her about an incident that had occurred at the family's house when he was 12 or 13. She testified that the brother told her that defendant came downstairs in a state of partial undress acting very angry toward the complainant and saying she was "in trouble." Osborn also recounted that the brother told her that in the same incident, defendant became "heated" and grabbed the complainant's mother by the neck and threatened to kill her.

The brother's testimony had little, if any, probative value. It amounted to background evidence regarding the layout of the house, the nature of household disciplinary methods, school and bus schedules, his football practice, the existence of a swimming pool, the name of a neighbor, confirmation that defendant had a Speedo, and the fact that he learned about the allega-

changes and the chronic anal fissure, it is unnecessary to address defendant's remaining allegations of ineffective assistance of counsel.

tions of abuse after a canoeing trip. The brother did not witness any of the abuse, nor did the prosecution suggest that he did. At the same time, the brother did not provide exculpatory testimony, nor did the defense suggest that he did. A review of the brother's testimony leaves little doubt that the prosecution's purpose in calling him as a witness was to have him describe the incident later described by Osborn.

Immediately after the brother's testimony denying both the incident and the statement to the police, Osborn was called to testify, and as described earlier, she recounted the story that the brother allegedly told her. Defense counsel objected on the ground of hearsay. On appeal, defendant argues that admission of Osborn's testimony also violated MRE 404(b) and MRE 403.

The trial court held that the statement was not hearsay because it was a prior inconsistent statement by the brother that was being offered for impeachment purposes. "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). However, "[t]he purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *Id*. "Testimony of 'the impeaching witness presenting extrinsic proof should state the time, place, circumstances of the statement and the subject matter of the statement but not its content.' " *Id*. at 257 n 20, quoting 28 Graham, Federal Practice & Procedure (interim ed), § 6583, pp 191-192.

In *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994), the Supreme Court held that there are limitations on the use of extrinsic evidence of a

witness's prior inconsistent statements. In that case, the witness testified that he had never made any statements that implicated the defendant in sexually abusing the victim. *Id*. at 689. The prosecutor then had the investigating officer testify that the witness had told him that the defendant had once stated that he had " 'screwed a young girl' " and would be in trouble if caught. *Id*. at 690. The Court reasoned:

> The substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. MRE 801.
>
> While the prosecutor could have presented defendant's alleged admission by way of the nephew's statement, he could not have delivered it by way of the officer's testimony because the statement would be impermissible hearsay. *Likewise, a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial*. Here, the prosecutor used the elicited denial as a means of introducing a highly prejudicial "admission" that otherwise would have been inadmissible hearsay. The testimony of [the officer] was that [the witness] said that [the defendant] said that he had sex with a young girl. This would have been clearly inadmissible without [the witness's] denial. It is less reliable in the face of the denial. Absent any remaining testimony from the witness for which his credibility was relevant to this case, the impeachment should have been disallowed. [*Id*. at 692-693 (citations omitted; emphasis added).]

In *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997), this Court summarized the rule in *Stanaway*, stating, "A prosecutor cannot use a statement that directly tends to inculpate the defendant under

the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." Further, "impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Id*. at 683.

There is nothing to suggest that the *content* of the brother's alleged statement to Osborn was needed to impeach his testimony that he did not make such a statement. Moreover, there was no other testimony from him that made his credibility relevant to the case. As in *Stanaway*, the prosecutor improperly used "an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial," and so "[a]bsent any remaining testimony from the witness for which his credibility was relevant to this case, the impeachment should have been disallowed." *Stanaway*, 446 Mich at 693.

The effect of this improperly admitted hearsay was heightened by the fact that the trial court failed to instruct the jury that Osborn's testimony was for impeachment purposes only. In both *Stanaway* and *Jenkins*, our Supreme Court reversed convictions in which improper hearsay was admitted on the grounds of impeachment despite the fact that the juries had received proper cautionary instructions. *Id*. at 690-692, 695; *Jenkins*, 450 Mich at 263. In *Jenkins*, the Court stated:

> We must be mindful of the fact that prior unsworn statements of a witness are mere hearsay and are, as such, generally inadmissible as affirmative proof. The introduction of such testimony even where limited to

> impeachment, necessarily increases the possibility that a defendant may be convicted on the basis of unsworn evidence, for despite proper instructions to the jury, it is often difficult for them to distinguish between impeachment and substantive evidence. [*Id*. at 261-262 (quotation marks and citation omitted).]

In *Stanaway*, the trial court gave two such curative instructions: one immediately after the statement was admitted and the other during the final jury instructions. *Stanaway*, 446 Mich at 690-692. In the instant case, the jury was essentially permitted to consider the hearsay testimony as substantive evidence. The failure to give such a limiting instruction was plain error, and defense counsel's failure to request it was below the standard of effective representation.

The trial court also failed to provide a prior-bad-acts limiting instruction despite the potential for prejudice in testimony that described defendant grabbing the complainant's mother by the neck and threatening to kill her. This testimony did not provide evidence of "motive, opportunity, intent, preparation, scheme, plan or system" about the charged crime, nor was there any other basis for admission under MRE 404(b). It was, however, classic "bad man" evidence that suggested defendant had a character for violence. As the Supreme Court instructed in *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994): "The evidence must be relevant to an issue other than propensity under Rule 404(b), to 'protect[] against the introduction of extrinsic act evidence when that evidence is offered *solely* to prove character.' " (citation omitted; alteration in original). "To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's

character or relevant to his propensity to act in conformance with his character." *People v Jackson*, 498 Mich 246, 259; 869 NW2d 253 (2015) (quotation marks and citation omitted). The failure to give such a limiting instruction was plain error, and defense counsel's failure to request it was below the standard of effective representation.[10]

It can be fairly argued that in the context of an otherwise proper trial, the erroneous admission of this particular testimony might very well have been harmless error. However, given the extent to which the jury heard other improperly admitted evidence, it is difficult to single out a particular error and conclude that it was harmless.

III. CONCLUSION

During this trial, defense counsel failed to object to the improper admission of multiple hearsay statements in which the complainant was the declarant. As conceded by the prosecution on appeal, the hearsay offered by three family members did not fall within any hearsay exception. The testimony of the police officer similarly contained inadmissible hearsay statements made by the complainant as well as double hearsay regarding what the complainant told Guertin. Further, Guertin's own testimony about the declarant's state-

[10] Defendant argues that one of his CSC-I convictions was supported by insufficient evidence because the complainant did not testify how old she was during the incident. However, when viewed in context, it is clear that the prosecutor's questions about the complainant's age in the seventh grade were setting the time frame for the subsequent questions about the time the complainant was allegedly abused after being grounded. Accordingly, because there is sufficient evidence to support defendant's conviction, we need not vacate defendant's conviction on this basis, see *People v Mitchell*, 301 Mich App 282, 294; 835 NW2d 615 (2013), and on retrial the prosecutor can bring this charge again.

ments was hearsay and did not fall within the exception in MRE 803(4). Finally, the officer's testimony providing corroboration of the complainant's credibility through reliance on often unidentified out-of-court statements and out-of-court documents was hearsay. In addition to failing to object to the hearsay, defense counsel also failed to discover, present, or both the admissible evidence of alternative sources of the complainant's injuries. The quantity of improperly admitted testimony was so extensive, and its content so significant, that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different.

We also conclude that the trial court abused its discretion when it allowed a police officer to testify over objection to the content of a statement the complainant's brother allegedly made to the police. The testimony introduced substantive evidence under the guise of rebutting the brother's denial. Further, the content of the statement violated MRE 404(b) and MRE 403.

Reversed and remanded for a new trial. We do not retain jurisdiction.

GLEICHER, P.J., concurred with SHAPIRO, J.

GLEICHER, P.J. (*concurring*). I fully concur with the majority opinion. I write separately to broach an issue likely to arise during the new trial and not addressed by the parties.

Dr. Stephen Guertin testified as an expert witness for the prosecution based on his examination of the 23-year-old complainant. As the majority opinion states, Dr. Guertin "recounted in detail the complainant's statements to him about the [sexual] abuse." Dr. Guertin also performed gynecological and rectal ex-

aminations. At the trial he advanced two expert opinions: that the appearance of the complainant's hymen was more consistent with "child sexual assault" than with "consensual penile-vaginal intercourse" and that her chronic anal fissure "clearly could be from unconsensual sodomy."

In my view, the record does not establish Dr. Guertin's qualification under MRE 702 to render either opinion. Dr. Guertin testified that he is board certified in pediatrics and pediatric critical care. He detailed his extensive experience in examining children referred to him for evaluation of possible child abuse. But he provided no testimony whatsoever concerning his experience, education, or training in adult gynecology or rectal examination and diagnosis in adult women, if any. Whether the appearance of the complainant's hymen was entirely consistent with consensual adult sexual activity or suggested sexual abuse during childhood formed a critical issue in this case. An expert's view on this subject is certainly relevant, but under MRE 702 must also qualify as reliable. "The Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony . . . rests on a reliable foundation . . . ." *People v Kowalski*, 492 Mich 106, 149; 821 NW2d 14 (2012), quoting *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 597; 113 S Ct 2786; 125 L Ed 2d 496 (1993) (brackets omitted).

The breadth and depth of Dr. Guertin's experience in performing pelvic examinations on adult, sexually active women should figure prominently in a new trial evaluation of his qualifications to testify as an expert on this subject. Similarly, Dr. Guertin's training, education, and experience in evaluating the rectum of an adult woman who has engaged in consensual anal sex

must be considered before he is permitted to offer expert opinions in this regard. Because the testimony of the complainant's boyfriend regarding the nature and extent of his sexual relations with the complainant will be admitted on retrial, the extent of Dr. Guertin's experience in examining sexually active adult women constitutes information integral to the court's performance of its gatekeeping function.

JANSEN, J. (*dissenting*). I respectfully dissent from the majority opinion reversing defendant's convictions and remanding for a new trial. I would affirm defendant's convictions because I believe that this Court should not substitute its judgment for that of the trial court, which made specific findings in an opinion following a *Ginther*[1] hearing and rejected defendant's alleged claims of error.

The majority discusses several bases for reversal, including (1) ineffective assistance of counsel for failure to object to hearsay testimony, (2) ineffective assistance of counsel for failure to present evidence of an alternative source of the victim's injuries, and (3) the admission of improper impeachment testimony. I disagree that any of the alleged errors in this case warrant reversal.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The majority concludes that trial counsel rendered ineffective assistance when he (1) failed to object to hearsay statements by members of the victim's family, Dr. Stephen Guertin, and Lansing Police Detective Elizabeth Reust and (2) failed to present evidence of an alternative source of the victim's injuries. I disagree

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

that trial counsel's conduct rises to the level of ineffective assistance of counsel.

> A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Russell*, 297 Mich App 707, 715-716; 825 NW2d 623 (2012) (citation and quotation marks omitted).]

This Court will not evaluate defense counsel's conduct with the benefit of hindsight. *Id*. at 716.

A. FAILURE TO OBJECT TO HEARSAY STATEMENTS

The majority takes issue with defense counsel's failure to object to certain hearsay statements made at trial. MRE 802 prohibits admission of hearsay except as provided by the Michigan Rules of Evidence. See MRE 802. MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

The majority first concludes that trial counsel rendered ineffective assistance when he failed to object to testimony of the victim's family members regarding the fact that the victim told them that defendant had sexually abused her. I agree that the statements constituted hearsay. However, as the trial court noted in its opinion and order denying defendant's motion for a

new trial, it became clear during the trial that Brooke, the victim's sister, no longer believed the victim's claims. She testified that her relationship with the victim is strained. Furthermore, she explained that she does not have a problem letting defendant stay with her children, who were five years old and seven years old at the time of trial. Trial counsel explained during the *Ginther* hearing that he anticipated that Elizabeth and Laura, the victim's cousins, would provide neutral testimony that they heard about the assault. Therefore, I fail to see how there was a reasonable likelihood that, but for defense counsel's conduct, the result of the proceeding would have been different. Instead, it appears that the failure to object to the hearsay statements was to defendant's benefit because it opened the door for additional testimony regarding the fact that the victim was not credible, which supported defendant's theory at trial that the victim was not truthful. This testimony from the victim's own family member was extremely beneficial to defendant at trial and not otherwise admissible. Furthermore, as the trial court noted, the testimony of the witnesses was cumulative to the victim's testimony regarding the incidents, and I do not believe that there is a reasonable probability that, but for the admission of the cumulative testimony, the result of the trial would have been different. For these reasons, I do not believe that defense counsel's failure to object to the hearsay statements constituted ineffective assistance of counsel, and in fact, when viewed overall, the admission of the testimony was exceedingly beneficial to defendant.

The majority also concludes that Dr. Guertin's testimony regarding the victim's statement that defendant sexually molested her and her description of the details of the sexual activity constituted inadmissible hearsay.

The majority further holds that trial counsel's failure to object rose to the level of ineffective assistance of counsel. I agree with the majority that, to the extent that the victim sought out Dr. Guertin in relation to a police investigation of the abuse rather than for the purpose of medical treatment in relation to the abuse, her statements would not constitute statements for the purpose of medical treatment under MRE 803(4). However, Dr. Guertin also testified that the victim expressed her concern that, as a result of the years of abuse, she could not have children. Because the victim's statements were both for medical evaluation and forensic investigation on her criminal allegations, I conclude that the statements were admissible under MRE 803(4) because they can be construed as having a dual basis for admission. However, even assuming that the statements did constitute inadmissible hearsay, I believe that trial counsel's failure to object to the hearsay statements constituted reasonable trial strategy. Defense counsel explained that he permitted Dr. Guertin to testify regarding the hearsay statements because he planned to use them later in the trial to impeach the victim. Defense counsel did not end up revealing every inconsistency at trial. I do not believe that the fact that defense counsel failed to address all the inconsistencies in the testimony renders his trial strategy unsound. Additionally, the fact that defense counsel's strategy was ultimately unsuccessful does not give rise to ineffective assistance of counsel. Therefore, I conclude that defendant fails to overcome the strong presumption that defense counsel's failure to object to Dr. Guertin's testimony constituted sound trial strategy.

Lastly, the majority concludes that Detective Reust's testimony recounting the victim's out-of-court statements regarding the abuse and other events constituted inadmissible hearsay and the failure to object to admis-

sion of the testimony rose to the level of ineffective assistance. Detective Reust testified at trial that the victim informed her that defendant molested her, and she described the details of what the victim told her had occurred. Detective Reust testified that she was able to obtain some background facts from the victim for her investigation. During the *Ginther* hearing, defense counsel explained that he permitted Detective Reust to testify without objection in order to connect the crimes with the charges, and he believed that Detective Reust was the best witness to discuss the time frame for the incidents. He also believed that he could use Detective Reust's testimony to point out inconsistencies in the victim's story. As with Dr. Guertin, defense counsel did not ultimately bring to light every inconsistency between the victim's testimony and her prior statements because he wished to avoid bringing up bad facts and did not want to permit the victim to clear up the inconsistencies in her testimony. However, I do not believe that this renders defense counsel's trial strategy unsound. Furthermore, as noted in the trial court's opinion and order, "Most if not all of the 'corroborated facts' were innocuous and were testified to by other witnesses, including Yvonne Shaw, Michael Bailey, Brooke Lewis, and Betty Elliot." Therefore, there is not a reasonable probability that, but for defense counsel's failure to object, the result of the trial would have been different. Accordingly, I do not believe that defense counsel's conduct constituted ineffective assistance of counsel because his failure to object was a sound trial strategy.

B. FAILURE TO PRESENT TESTIMONY

The majority next concludes that defense counsel rendered ineffective assistance when counsel failed to

present the testimony of the victim's former boyfriend regarding the fact that the victim and the former boyfriend had engaged in consensual vaginal and anal sexual intercourse. I agree with the trial court that defense counsel did not render ineffective assistance by failing to present evidence that the victim engaged in consensual sexual intercourse in the years following the alleged sexual abuse, but before Dr. Guertin examined her. I disagree with the majority's conclusion that there was no likely explanation for the damage to the victim's vagina and anus other than the sexual assault. Defense counsel explained during the *Ginther* hearing that he did not question the former boyfriend regarding the victim's sexual activity because he believed that the line of questioning was barred by the rape-shield law and because he believed that the testimony was unimportant in light of the fact that the victim testified that she had engaged in consensual sexual intercourse. Defense counsel then used the evidence in the record to make an argument that the vaginal and anal injuries observed by Dr. Guertin did not stem from injuries inflicted by defendant. As noted by the trial court, Dr. Guertin testified that it was possible that the injuries to the victim's vagina occurred through adult consensual sex, and Dr. Guertin further testified that the victim had engaged in adult consensual sex. There was also testimony that the victim began using birth control at the age of 17 and that the former boyfriend lived with the victim during their relationship. Defense counsel argued during his closing argument that the vaginal injuries were most likely due to adult consensual sex. I agree with the trial court that it was unnecessary for the victim's former boyfriend to testify that he had consensual sexual intercourse with the victim given that the testimony in the case established that the victim had

engaged in consensual sexual intercourse as an adult. I disagree with the majority's conclusion that Dr. Guertin's testimony that the victim had adult consensual sex was insufficient for the jury to conclude that the victim had a sexual relationship before the medical examination. Therefore, as noted by the trial court, allowing the former boyfriend to testify that he had vaginal intercourse with the victim would be "unnecessary, unduly prejudicial, and unlawful," and the probative value of the testimony would have been outweighed by its prejudicial effect. See MRE 403.

With regard to anal sexual intercourse, Dr. Guertin testified that more recent anal sexual intercourse would explain how an injury that occurred during a sexual assault years before trial would still be present at the time of the medical examination. Dr. Guertin also testified that the injury he observed on the victim's anus could still be present if the victim passed large stool, although this was less likely. Dr. Guertin was unable to state when the anal injury occurred. Therefore, testimony that the victim engaged in consensual anal sexual intercourse with her former boyfriend would have actually *harmed* defendant's case since it would have explained why an injury that occurred years before when defendant allegedly engaged in anal sexual intercourse with the victim would not have healed before the examination. The testimony would have bolstered the victim's claim that defendant engaged in anal sexual intercourse with her. Furthermore, defense counsel properly pursued the theory that the chronic anal fissure that Dr. Guertin saw on the victim came from a large volume of stool, diarrhea, constipation, or other anal sexual activity. I believe that defense counsel's strategy properly addressed the issue, and I do not believe that defense counsel's

failure to call the victim's former boyfriend as a witness constituted ineffective assistance of counsel.

II. IMPEACHMENT TESTIMONY

The majority concludes that the trial court erred when it admitted the testimony of Lansing Police Officer Kasha Osborn regarding a statement that the victim's brother made to her. I believe that, to the extent that the trial court erred by admitting Officer Osborn's testimony regarding the statement of the victim's brother, the error was harmless. As the majority notes, the brother's testimony had little probative value and related only to background evidence. Even assuming that the prosecution improperly used the brother's denial of the statement to introduce substantive evidence, I do not see how the testimony had any bearing on the central issue in this case regarding whether defendant sexually assaulted the victim. The testimony involved an incident that occurred years earlier in which defendant informed the victim that she was in trouble and grabbed the neck of the victim's mother while threatening to kill her. Considering that there was ample testimony at trial that defendant sexually assaulted the victim, I do not believe that the admission of Officer Osborn's testimony regarding an unrelated incident that occurred years before trial had any effect on the outcome of trial. The majority concedes that the admission of the testimony may have constituted harmless error if there were no additional errors in this case. Because I conclude that there were no additional errors in this case that prejudiced defendant, I conclude that, to the extent that there was an error, the error was harmless.

The very experienced trial court judge issued a very complete and well-thought-out 40-page opinion after

the *Ginther* hearing addressing each of defendant's allegations of error and rejecting them. For the reasons discussed earlier, I believe that the trial court correctly denied defendant's motion for a new trial. Accordingly, I would affirm.

MORELLI v CITY OF MADISON HEIGHTS

Docket No. 326621. Submitted June 7, 2016, at Detroit. Decided June 14, 2016, at 9:05 a.m.

Kimberly Morelli brought a negligence action in the Oakland Circuit Court against the city of Madison Heights and Donald East for injuries she sustained from a fall when she stepped in a hole on the grassy berm between the road and sidewalk in front of East's house while attempting to avoid an obstacle across the sidewalk. The fall occurred in August 2012. East testified that the hole developed over time from a 2006 ash tree removal performed by the city; the stump had originally been cut even with the ground but had decomposed over time. East mowed the grass on the berm and around the hole, but he did not attempt to correct the hole. East moved for summary disposition, asserting that he did not have possession or control over the berm area on which Morelli fell. The court, Shalina D. Kumar, J., held that a question of fact existed regarding whether East had possession and control over the berm, precluding summary disposition. East filed a delayed application for leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

The trial court erred by concluding that there was a question of fact because whether a duty exists is a question of law. In this case, East did not legally owe Morelli a duty because he did not have possession and control over the berm. According to the city's ordinances, the city maintained a public right-of-way easement over the entire area for public use as a highway, street, alley, or other public place. The owner of a public right-of-way easement has the duty to maintain the safety of the easement. And although certain city ordinances required East to maintain the grass in the berm area, which he did, those actions did not give him possession and control of the area sufficient to create a duty. East also was not liable for negligently altering the state of the right-of-way because his mowing left the hazard alone and did not make the hole any different than it already was.

Reversed and remanded for summary disposition in favor of East.

Larry A. Smith and *The Lobb Law Firm* (by *Joseph R. Lobb*, *Jeremy M. Knox*, and *David A. Parker*) for Kimberly Morelli.

Mary T. Nemeth, PC (by *Mary T. Nemeth*), and *Hom, Killeen, Arene, Hoehn & Bachrach* (by *Robert L. Gariepy*) for Donald East.

Before: JANSEN, P.J., and O'CONNELL and RIORDAN, JJ.

PER CURIAM. Defendant Donald East appeals as on leave granted the trial court's order denying his motion for summary disposition under MCR 2.116(C)(10) on claims by plaintiff, Kimberly Morelli, that she was injured after she stepped into a hole on East's property. The trial court ruled that there was a genuine issue of material fact regarding whether East had possession and control over the area where Morelli was injured. We reverse and remand for entry of summary disposition.

I. FACTUAL BACKGROUND

Morelli was out for a walk on the evening of August 7, 2012. During her walk, Morelli crossed the street to avoid an obstacle across the sidewalk. As she was attempting to get back up onto the opposite sidewalk in front of East's house, her foot went into a hole on the grassy berm between the road and sidewalk. Morelli fell and suffered injuries.

East testified at his deposition that the city of Madison Heights had removed an ash tree from the berm area at some point in 2006. At that time, Madison Heights cut the stump to ground level, but it had decomposed over time and left a hole. East mowed the

grass on the berm and around the hole, but he did not attempt to correct the hole.

Madison Heights maintains a public right-of-way easement over "[t]he entire area owned or dedicated by the city or other governmental agency or entity for public use as a highway, street, alley or other public place." Madison Heights Ordinances, §§ 23-26 and 23-27. The "berm area" is "that portion of the public right-of-way lying between the sidewalk and the edge of the street excluding driveway aprons." Madison Heights Ordinances, § 23-55.

Madison Heights also prohibits owners or occupants from permitting "any growth of weeds, grass or other vegetation of a greater height than six inches on average" from growing "on such parcel of land or upon any sidewalk abutting the same, or upon that portion of any street . . . adjacent to the same between the property line and the curb or traveled portion of such street . . . ." Madison Heights Ordinances, § 27-17. Madison Heights requires the adjacent property owner to cut down all weeds and grass and prohibits the owner from maintaining hazards that prevent the removal of weeds. Madison Heights Ordinances, §§ 27-18 and 27-19. However, Madison Heights has delegated to their department of public works "complete charge and control over the planting, cutting, trimming and removal of trees and other growth upon all public highways . . . ." Madison Heights Ordinances, § 27-35.

Morelli filed her complaint against East and Madison Heights in July 2013. East filed for summary disposition in November 2014, asserting that he did not have possession or control over the berm area on which Morelli fell. The trial court determined that a question of fact existed regarding whether East had possession and control over the berm.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). A party is entitled to summary disposition 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 party may maintain a negligence action, including a premises liability action, only if the defendant had a duty to conform to a particular standard of conduct. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a duty exists in a premises liability case is a question of law. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). This Court reviews de novo questions of law. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 595; 614 NW2d 88 (2000).

III. ANALYSIS

East contends that the trial court erred when it determined that there was a question of fact regarding whether he owed Morelli a legal duty. We agree because the existence of a duty is generally a question of law, and in this case, East did not legally owe Morelli a duty because he did not have possession and control over the berm.

A plaintiff may only recover from a defendant for injuries caused by conditions of the land if the defendant had legal possession and control of the premises. *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994). "[P]remises liability is conditioned upon the

presence of both possession and control over the land because the person in possession is in a position of control and normally best able to prevent any harm to others." *Anderson v Wiegand*, 223 Mich App 549, 555; 567 NW2d 452 (1997).

In *Morrow*, this Court considered whether city of Wayne ordinances placed a duty on a landowner to safely maintain a driveway approach. *Morrow*, 203 Mich App at 326. The plaintiff slipped and fell on an icy driveway approach while attempting to help the defendant's children onto a school bus. *Id*. The defendant moved for a directed verdict on the issue of duty. *Id*. The defendant argued that even though an ordinance placed a duty to maintain the driveway approach on the defendant, he was not liable for injuries because a public right-of-way easement rendered the city liable for injuries. *Id*. The trial court held the issue in abeyance, and the jury ultimately found the defendant negligent. *Id*. at 326-327.

This Court considered whether the defendant was entitled to a directed verdict on the issue of duty as a matter of law because the ice was located within the public right-of-way. *Id*. at 327. We recognized that ordinances provided that the city maintained an easement for driveway approaches and sidewalks but also delegated responsibility to clear snow from driveway approaches to the adjacent landowner. *Id*. at 329. We concluded that the defendant did not have possession or control of the driveway approach. *Id*. at 328-330. We reasoned that the public right-of-way easement placed the duty to safely maintain the easement on the public body:

> The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights. However, it is the owner of an

> easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties. [*Id*. at 329-330 (quotation marks and citations omitted).]

The adjacent owner's retained residual rights were not possessory in nature and were not sufficient to establish a duty. *Id*. at 330. That the owner routinely maintained the driveway approach did not change the nature of his duty. *Id*.

We consider *Morrow* analogous to this case. In this case, an ordinance provides that the berm area in which Morelli fell is part of a public right-of-way. Although Madison Heights delegates responsibility to maintain the grass on the berm, Madison Heights retains an easement over the public right-of-way. Accordingly, it was Madison Heights—the owner of the easement—who had the duty to maintain the public right-of-way in a safe condition. As in *Morrow*, that East regularly mowed the grass as required by a second ordinance did not render him liable for Morelli's injuries.

We conclude that the trial court erred when it determined that questions of fact existed regarding whether East owed Morelli a duty. The existence of duty is a question of law, and as a matter of law, East did not owe Morelli a duty to fill in the hole in the berm.

In the alternative, Morelli contends that East should be held liable for negligently altering the state of the right-of-way. We disagree.

A defendant has no duty to alter a hazardous condition in a public right-of-way, but once the defendant makes an attempt, the defendant must do so with proper care. *Kinsey v Lake Odessa Machine Prods*, 368 Mich 666, 670; 118 NW2d 950 (1962). "The sidewalk,

after the attempt to repair, must be more dangerous than before, or the new hazard must be different from the old, else the defendant is not liable." *Id*. at 669-670 (quotation marks and citations omitted). In this case, the condition was a hole in the berm. However, East did not attempt to alter the hole, but instead simply let it be. Any mowing he did around the hole did not make the hazard itself different. Accordingly, we reject Morelli's alternative argument.

We reverse and remand for entry of summary disposition in favor of East. We do not retain jurisdiction. As the prevailing party, East may tax costs. MCR 7.219(A).

JANSEN, P.J., and O'CONNELL and RIORDAN, JJ., concurred.

AGUIRRE v STATE OF MICHIGAN

Docket No. 327022. Submitted June 7, 2016, at Lansing. Decided June 14, 2016, at 9:10 a.m. Leave to appeal denied 500 Mich 946.

Robert Aguirre and five other members of the Parole and Commutation Board brought an action in the Court of Claims against the Department of Corrections and the state of Michigan, seeking damages for breach of contract and promissory estoppel, when their positions were eliminated by Governor Rick Snyder's entry of Executive Reorganization Order (ERO) No. 2011-3, effective April 15, 2011, which abolished the 15-member Parole and Commutation Board established under ERO 2009-3, effective April 19, 2009; created a new 10-member Parole Board; and granted the power to appoint Parole Board members to the director of the Department of Corrections, who did not appoint any Parole and Commutation Board members to the new Parole Board. Plaintiffs alleged that their employment contracts were breached when their employment was terminated without just cause. The Court of Claims, Clinton Canady III, J., denied defendants' motion for summary disposition and granted summary disposition in favor of plaintiffs. The Court of Appeals, METER, P.J., and WHITBECK and RIORDAN, JJ., reversed and remanded for further proceedings, holding that even if the members had a contract with the state, ERO 2011-3 abolished the members' positions, the abolishment did not constitute a breach of contract, and the abolishment was permissible. *Aguirre v Dep't of Corrections*, 307 Mich App 315 (2014). However, the panel declined to address whether the reorganization of the Parole Board violated the Contracts Clause of the Michigan Constitution, Const 1963, art 1, § 10, because the issue had not been decided by the trial court. On remand, the Court of Claims, PAT M. DONOFRIO, J., granted summary disposition to the state under MCR 2.116(C)(8) and concluded that an amendment of plaintiffs' complaint would have been futile. Plaintiffs appealed.

The Court of Appeals *held*:

1. Courts use a three-pronged balancing test to determine whether a state law substantially impairs an existing contract. The first prong is whether the state law actually substantially

impaired a contractual relationship, which requires consideration of three factors: (1) whether there was a contractual relationship, (2) whether a change in the law impaired that relationship, and (3) whether the impairment was substantial. If the court finds a substantial impairment, then the second and third prongs of the balancing test are considered. The second prong is whether the legislative disruption of contract expectancies is necessary to the public good, and the third prong is whether the means chosen by the Legislature to address the public need are reasonable.

2. The appointment to public office does not create a contractual right to hold that office, and any holder of public office necessarily accepts the position with the knowledge that he or she may be removed as provided by law. An express contract interfering with the power to abolish an office in the manner provided by law would be void as against public policy. Because an officer has no vested property right to an office, the protections of the Contracts Clause do not apply, and when an office is abolished or an officer lawfully removed, the officer is not entitled to payment for future services that would have been rendered but for the elimination of the office.

3. Under Const 1963, art 5, § 2, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he or she considers necessary for efficient administration.

4. The trial court properly granted summary disposition to defendants. Plaintiffs did not have and could not have a contract that entitled them to serve a set term of years on the Parole and Commutation Board in contravention of the governor's plenary authority to abolish offices within the executive branch. The members accepted their appointments subject to the contingency that their positions could lawfully be abolished in the future, even during the term of their appointments. The members were charged with knowledge of the limitations of the governor's authority. There being no vested contractual rights to the continued existence of the Parole and Commutation Board, or to hold a position of the board for a set period in contravention of the governor's reorganization power, there could be no impairment of contract by ERO 2011-3.

Affirmed.

CONSTITUTIONAL LAW — CONTRACTS CLAUSE — GOVERNOR'S REMOVAL OF STATE OFFICERS.

The state and federal Contracts Clauses, US Const, art I, § 10; Const 1963, art 1, § 10, are not violated when the governor, as

> part of a reorganization, eliminates positions from a board of the executive branch because officers accept their appointments subject to the contingency that their positions can lawfully be abolished in the future, even during the term of their appointments.

Deborah Gordon Law (by *Sarah S. Prescott*) for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jeanmarie Miller*, Assistant Attorney General, for defendants.

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

PER CURIAM. Following a remand from this Court, plaintiffs, Robert Aguirre, Laurin Thomas, John Sullivan, James Atterberry, Sr., Ted Hammon, and Artina Hardman (collectively, the members), appeal as of right the trial court's order denying their motion for summary disposition, denying their motion to amend their complaint, and granting summary disposition in favor of defendants, the Department of Corrections (the Department) and the state of Michigan (collectively, the State). Because the members have failed to state a viable claim of a constitutional Contracts Clause violation and an amendment to add such a claim would be futile, we affirm.

I. FACTS

The basic facts giving rise to this dispute were succinctly set forth in this Court's previous opinion as follows:

> In 1992, the Michigan Legislature established "a parole board consisting of 10 members" within the Department. In 2009, Governor Jennifer Granholm reorganized the

Department, abolished the parole board, and created the 15-member Parole and Commutation Board.

The members were members of the Parole and Commutation Board. The members each received a letter of appointment from the Governor's office. Hardman's term was from April 19, 2009, to November 20, 2012, Sullivan, Aguirre, and Hammon's terms were from December 1, 2009, to November 30, 2013, and Thomas and Atterberry's terms were from December 1, 2010, to November 30, 2014.

* * *

In 2011, by [Executive Reorganization Order (ERO)] 2011-3, Governor Rick Snyder abolished the Parole and Commutation Board and created a new Parole Board. ERO 2011-3 provided in § III(A) that the new Parole Board "shall consist of 10 members appointed by the Director of the Department of Corrections." Section II(A) of ERO 2011-3 transferred to the new Parole Board

> [a]ll of the authority, powers, duties, functions, responsibilities, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds of the Michigan Parole and Commutation Board[.]

Section V(B) provided that

> [a]ll rules, orders, contracts, and agreements relating to the transfers under this Order lawfully adopted prior to the effective date of this Order shall continue to be effective until revised, amended, repealed, or rescinded.

ERO 2011-3 granted the director of the Department of Corrections the power to appoint Parole Board members. The director did not appoint any of the members to serve as members on the new Parole Board. [*Aguirre v Dep't of Corrections*, 307 Mich App 315, 317-318; 859 NW2d 267 (2014) (citations omitted; some alterations in original).]

II. PROCEDURAL HISTORY

On January 5, 2012, the members filed suit against the State, alleging a breach of contract and a claim of promissory estoppel. Both parties moved for summary disposition. The trial court granted the members' motion for summary disposition and denied the State's motion for summary disposition. As summarized in this Court's previous opinion:

> The trial court concluded that the members' letters of appointment continued to be effective after ERO 2011-3. The trial court also concluded that ERO 2011-3 transferred the members' contracts from the Parole and Commutation Board to the Parole Board. The trial court agreed that the Governor had authority to eliminate the members' positions, but concluded that their contracts remained valid and the termination breached their contracts. [*Id*. at 319.]

The State appealed, and this Court reversed and remanded for further proceedings. In doing so, this Court made two main holdings relevant to the dispute now before us. First, assuming for the sake of argument that the members had a contract with the State, this Court determined that ERO 2011-3 abolished the members' positions, and that this abolishment did not constitute a breach of contract.[1] *Id*. at 323-325, 327.

[1] On appeal, the members assert that this Court's previous opinion did not resolve all their arguments pertaining to their breach of contract claim. In particular, the members maintain that this Court addressed the claim in terms of the members' argument that their contracts transferred to the new parole board and that those transferred contracts were then breached by their subsequent termination. The members argue that we did not decide whether the reorganization was itself a breach of contract. We do not read our previous decision so narrowly. We plainly rejected their breach of contract claim, *Aguirre*, 307 Mich App at 323-325, 327, and the law of the case forecloses further consideration of this question, see *Duncan v Michigan*, 300 Mich App 176, 188; 832 NW2d 761 (2013). In any event, as discussed later in the context of the

Second, this Court considered the members' constitutional challenges and determined that the abolishment of the members' positions was permissible. *Id*. at 322. Specifically, we rejected claims that eliminating positions violated the good-cause termination provisions found in Const 1963, art 5, § 10, and, instead, characterized Governor Snyder's actions as the reorganization of an executive department and the elimination of positions under the governor's plenary control over the organization of the executive branch under Const 1963, art 5, § 2. See *id*. at 317, 321, 325-326.

While largely resolving the parties' dispute, this Court noted that the members had asserted, as an alternative ground for affirmance, that the reorganization of the Parole Board violated the Contracts Clause of the Michigan Constitution, Const 1963, art 1, § 10. However, we declined to address this issue on appeal because it had not been decided by the trial court and we reasoned that "[o]ur analysis of this issue would benefit from a decision of the trial court and full argument." *Id*. at 326. Consequently, while reversing the trial court's grant of summary disposition to the members and its denial of summary disposition to the State, we left open the question whether ERO 2011-3 violated the Contracts Clause of the Michigan Constitution, and we remanded for further proceedings consistent with our opinion.

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members' Contracts Clause argument, the members do not have a contractual right to hold their positions for the appointed term in contravention of the governor's constitutional reorganization authority. Applying the same reasoning, the governor's reorganization of the Department could not have resulted in a breach of contract if the alleged contractual right to hold the positions did not exist in the first place. See *AFT Mich v Michigan*, 497 Mich 197, 210 n 2; 866 NW2d 782 (2015).

On remand, the trial court granted summary disposition to the State "as to all issues in the Complaint except that preserved [in] the Court of Appeals on the issue of **Unconstitutional Impairment of Contract**."[2] The parties then filed cross-motions for summary disposition in relation to the Contracts Clause issue, and the members filed a motion to amend their complaint to add a claim that ERO 2011-3 violated the Contracts Clauses of the Michigan Constitution and the United States Constitution, US Const, art I, § 10. Because this count was not contained in the members' original complaint, the trial court concluded that the State was entitled to summary disposition under MCR 2.116(C)(8). However, the court also considered whether the members should be allowed to amend their complaint under MCR 2.116(I)(5), and the court determined that such amendment would be futile. The court offered several reasons for this conclusion, most notably explaining that the governor's constitutional power to reorganize the executive branch in the future was an implicit term of any contract that the members might

[2] On appeal, the members note that, when granting summary disposition, the trial court did not expressly address their promissory estoppel claim, and they maintain that the grant of summary disposition for this claim should be reversed. This argument is without merit. Given this Court's previous decision, the only question open on remand was the Contracts Clause issue, and therefore, consistently with this Court's directives, the trial court properly granted summary disposition "as to all issues in the Complaint" except the Contracts Clause issue. See *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005) ("[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."). In any event, it is clear that the members' promissory estoppel claim is without merit. Among other elements, promissory estoppel requires a promise that produced reliance, and "the reliance on it must be reasonable." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008). In light of the governor's known plenary authority to reorganize the Department as discussed in more detail later, any reliance on assurances of continued employment could not be considered reasonable.

have with the State. Reasoning that the members must have contracted "with reference to this fundamental law," the court concluded that, under *Harsha v Detroit*, 261 Mich 586, 595; 246 NW 849 (1933), their contract could not have been impaired by Governor Snyder's exercise of his constitutional authority and, therefore, the members' Contracts Clause argument was without merit. Consequently, the trial court denied the members' motion to amend their complaint, denied the members' motion for summary disposition, and granted the State's motion for summary disposition. The members now appeal in this Court as of right.

III. STANDARD OF REVIEW

We review de novo a trial court's grant or denial of summary disposition. *Detroit Edison Co v Stenman*, 311 Mich App 367, 377; 875 NW2d 767 (2015). Constitutional questions are reviewed de novo. *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 649; 698 NW2d 350 (2005). Likewise, whether a contract exists is a question of law to be reviewed de novo. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). When a contract is found to exist, "questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Finally, a trial court's decision on a motion to amend a complaint is reviewed for an abuse of discretion. *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 216; 859 NW2d 238 (2014).

IV. ANALYSIS

On appeal, the members begin their argument with the assertion that they have fully enforceable contractual rights in their Parole and Commutation Board

offices for the term of years set forth in their letters of appointment.[3] Given these purported contractual rights, the members contend that Governor Snyder's elimination of their positions under ERO 2011-3 constituted an unconstitutional impairment of the members' contracts in violation of the Michigan and United States Constitutions. Notably, in making these arguments, the members in no way dispute the legality of ERO 2011-3 insofar as it represented an exercise of the governor's plenary authority to reorganize the executive branch under Const 1963, art 5, § 2. Instead, the members characterize the issue as whether the State is liable for monetary damages when the governor exercises this constitutional authority to eliminate executive positions, thereby purportedly impairing the members' contractual right to their positions—and their related employment benefits—for the period defined in their letters of appointment. For the reasons stated later in this opinion, we hold that this argument is without merit.

A. THE CONTRACTS CLAUSE

"Both the Michigan and United States Constitutions prohibit laws that impair obligations under con-

[3] The members suggest that the State has conclusively conceded that the members have enforceable contracts and that the trial court's determination, during a 2013 hearing, that the members had contracts is somehow "binding." The members are mistaken. The existence of a contract is a question of law that we review de novo, *Kloian*, 273 Mich App at 452, and the parties' agreements about the law are not binding on this Court, *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). This Court did not decide this question during the previous appeal and, instead, remanded for "full argument" on the Contracts Clause issue. We note also that the State has denied the existence of a contract and briefed the matter, on remand and on appeal, in relation to the members' Contracts Clause claim. In short, there has been no binding determination of this issue, and we consider it properly before us at this time.

tracts."[4] *AFT Mich v Michigan*, 497 Mich 197, 232-233; 866 NW2d 782 (2015). "These clauses provide that vested rights acquired under a contract may not be destroyed by subsequent state legislation."[5] *Seitz v Probate Judges Retirement Sys*, 189 Mich App 445, 455; 474 NW2d 125 (1991). "However, the Contract[s] Clause prohibition on state laws impairing the obligations of contract is not absolute." *Health Care Ass'n Workers Compensation Fund v Bureau of Worker's Compensation Dir*, 265 Mich App 236, 240; 694 NW2d 761 (2005) "Rather, the prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Id*. at 240-241 (quotation marks and citations omitted).

Consequently, when examining whether a state law substantially impairs an existing contract, courts apply a three-pronged balancing test, "with the first prong being a determination 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *In re Certified Question*, 447 Mich 765, 777; 527 NW2d 468 (1994) (citation omitted). See also *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 21; 367 NW2d 1 (1985). Under this first prong of the analysis, "[w]hether a change in

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[4] US Const, art I, § 10 states, in part, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." Similarly, Const 1963, art 1, § 10 states, "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." These provisions have typically been interpreted to provide coextensive protections against the impairment of a contractual relationship. *AFT Mich*, 497 Mich at 233.

[5] Although the present case involves an executive order, we note that an executive order under Const 1963, art 5, § 2 "has the status of enacted legislation," *Health Care Ass'n Workers Compensation Fund v Bureau of Worker's Compensation Dir*, 265 Mich App 236, 250; 694 NW2d 761 (2005) (quotation marks and citation omitted), and we will treat it as such for purposes of analyzing the members' Contracts Clause claims.

state law has resulted in 'a substantial impairment of a contractual relationship' itself requires consideration of three factors: '[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial.' " *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 408; 878 NW2d 891 (2015) (citation omitted). For purposes of this analysis, " 'an impairment takes on constitutional dimensions only when it interferes with reasonably expected contractual benefits.' " *Id*. at 413-414, quoting *Borman, LLC v 18718 Borman, LLC*, 777 F3d 816, 826 (CA 6, 2015). If it is determined that the state law resulted in a substantial impairment of a contractual relationship, courts must then examine the second and third prongs as follows: by determining whether "the legislative disruption of contract expectancies [is] necessary to the public good" and whether "the means chosen by the Legislature to address the public need are reasonable." *In re Certified Question*, 447 Mich at 777.

The protection offered by the Contracts Clause can be applied to prevent the impairment of the state's own contractual obligations. See *US Trust Co of New York v New Jersey*, 431 US 1, 23; 97 S Ct 1505; 52 L Ed 2d 92 (1977). That is, by contract, the Legislature may contractually bind successive Legislatures to agreements. *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). However, "such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Id*. Among these protections of sovereignty is the " 'reserved power' doctrine, which held that certain substantive powers of sovereignty could not be contracted away." *United States v Winstar Corp*, 518 US 839, 874;

116 S Ct 2432; 135 L Ed 2d 964 (1996). In other words, when analyzing a Contracts Clause claim in the context of a contract with the state, there must be "a determination of the State's power to create irrevocable contract rights in the first place." *US Trust Co of New York*, 431 US at 23. Additionally, the distinct "unmistakability doctrine" provides that, when governmental powers may be contracted away, such surrender will not be presumed or inferred, but must be "expressed in terms too plain to be mistaken." *Windstar Corp*, 518 US at 875 (quotation marks and citation omitted).

B. CONTRACTUAL RIGHTS TO PUBLIC OFFICE

In Michigan, appointment to public office does not create a contractual right to hold that office; any holder of public office necessarily accepts the position with the knowledge that he or she may be removed as provided by law, and an express contract interfering with the power to abolish an office in the manner provided by law would be void as against public policy.[6] In particular, well over 100 years ago, our

[6] At the outset we note that, in our judgment, the members' positions on the Parole and Commutation Board were of such importance, dignity, and independence as to be properly characterized as public offices rather than mere employment. See *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999) (enumerating the distinguishing features of a public office); *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 585 n 22; 566 NW2d 208 (1997) (same). First, the positions were created incident to the governor's authority under Const 1963, art 5, § 2, which, in the absence of legislative veto, has the same status as enacted legislation. *Straus v Governor*, 459 Mich 526, 534; 592 NW2d 53 (1999). See also MCL 16.134; MCL 791.304. Second, as members of the Parole and Commutation Board, the members exercised sovereign power while engaged in the discretionary discharge of their duties. See generally *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003). Third, the powers and duties exercised by

Supreme Court acknowledged that "[n]othing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public." *Attorney General v Jochim*, 99 Mich 358, 368; 58 NW 611 (1894). See also *Molinaro v Driver*, 364 Mich 341, 350; 111 NW2d 50 (1961); *Robbins v Wayne Co Bd of Auditors*, 357 Mich 663, 667; 99 NW2d 591 (1959). "A public office cannot be called 'property,' " and it does not provide the officer with a vested right to hold his or her office until the expiration of the term. *Jochim*, 99 Mich at 367. Rather, "[a]n office is a special trust or charge created by competent authority." *Solomon v Highland Park Civil Serv Comm*, 64 Mich App 433, 438; 236 NW2d 94 (1975) (quotation marks and citation omitted).

> Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the State, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it. [*Jochim*, 99 Mich at 367.]

Accordingly, "except as it may be restrained by the Constitution, the Legislature has the same inherent authority to modify or abolish that it has to create; and it will exercise it with the like considerations in

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the members are set forth by statute as conferred by executive order. See MCL 791.304; ERO 2009-3. Fourth, while the Parole and Commutation Board is an entity within the Department, ERO 2009-3, *In re Parole of Bivings*, 242 Mich App 363, 372; 619 NW2d 163 (2000), these offices were created and placed within the Department as provided by law. Cf. *Coutu*, 459 Mich at 355. Fifth, the positions were not created as temporary positions. Finally, the members were required to take an oath of office. See *id*. at 356. In short, the members held public offices and "are subject to all applicable law pertaining to public officials." *Council of Organizations & Others for Ed About Parochiaid, Inc*, 455 Mich at 585.

view." *Id*. at 368. Indeed, absent a constitutional prohibition, an office may be lawfully abolished "within the terms for which the incumbents were elected or appointed." *MacDonald v DeWaele*, 263 Mich 233, 235; 248 NW 605 (1933).

Because an officer has no vested property right to the office, the constitutional protections of the Contracts Clause do not apply, and when an office is abolished or an officer lawfully removed, he or she is not entitled to payment for future services which would have been rendered but for the elimination of the office. See *Butler v Pennsylvania*, 51 US 402, 416-417; 13 L Ed 472 (1851).

> The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is [a] matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; *but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense*. The establishment of such a principle would arrest necessarily every thing like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. [*Id*. at 416 (emphasis added).]

Given the reality that public offices may be abolished as provided by law, an individual who accepts a public office takes that position "subject to the contingency that it may be abolished lawfully." *Sprister v Sturgis*, 242 Mich 68, 72; 218 NW 96 (1928). See also *Jochim*, 99 Mich at 368, 370 ("One of the constitutional conditions upon which the respondent took his office was that he would be subject to removal by the Governor . . . ."). Moreover, when the power of appointment or removal is provided for by law, the future exercise of this governmental power of appointment or removal typically cannot be bargained away by contract. See, e.g., *Hazel Park v Potter*, 169 Mich App 714, 720; 426 NW2d 789 (1988).[7] A contract to limit a future governing body's lawful power of removal or appointment of a public officer is considered void as a matter of public policy. See, e.g., *id*. at 722 (holding that a written employment contract with a city manager was void because it deprived incoming city counsel of power to select and appoint a city manager as provided in the city charter). And a party conducting business with the state is charged with understanding the extent of any limitations on the appointing official's authority to bind the state. See *Roxborough v Mich Unemployment Com-*

[7] See also *US Trust Co of New York*, 431 US at 22 ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.") (quotation marks and citation omitted); *Detroit v Div 26 of Amalgamated Ass'n of Street, Electric R & Motor Coach Employees of America*, 332 Mich 237, 252; 51 NW2d 228 (1952) ("To the extent that terms and conditions of public employment are governed by statute or charter, they are not subject to modification by contract . . . .") (quotation marks and citation omitted); *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 702; 513 NW2d 230 (1994) (finding that a public employee could not have entered into a contract for a longer period of employment than that permissible by statute).

pensation Comm, 309 Mich 505, 511; 15 NW2d 724 (1944).

C. GOVERNOR'S POWER TO REORGANIZE THE EXECUTIVE BRANCH

As we discussed in our previous opinion in this case, under Const 1963, art 5, § 2, "the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration." The governor's power under Const 1963, art 5, § 2, "is nearly plenary" and "is limited only by constitutional provisions that would inhibit the Legislature itself." *Straus*, 459 Mich at 534. "The Framers of the Michigan Constitution desired to give the Governor 'real control over the executive branch,' " including the power to appoint officials, *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 144; 807 NW2d 866 (2011) (citation omitted), and to abolish positions, *Aguirre*, 307 Mich App at 326-327; *Morris v Governor (On Remand)*, 214 Mich App 604, 609; 543 NW2d 363 (1995). "The constitution, then, specifically recognizes that, where the Governor feels compelled to make certain changes within the executive branch, he has authority, through the executive order procedure, in effect, to enact laws to carry out those changes." *House Speaker v Governor*, 443 Mich 560, 579; 506 NW2d 190 (1993).

D. APPLICATION

In view of the foregoing, in this case, the members' Contracts Clause claim is without merit because they do not have, and cannot have, a contract that entitles them to serve a set term of years on the Parole and Commutation Board in contravention of the governor's plenary authority to abolish offices within the execu-

tive branch.[8] That is, when the members accepted their appointments to the Parole and Commutation Board, they necessarily did so subject to the contingency that their positions could be lawfully abolished in the future, even during the term of their appointments. *MacDonald*, 263 Mich at 235; *Sprister*, 242 Mich at 72; *Jochim*, 99 Mich at 368, 370. The governor has nearly plenary authority under Const 1963, art 5, § 2 with regard to the reorganization of the executive branch, and Governor Granholm was without authority to contractually surrender or impede a future governor's constitutional authority to reorganize the Department by guaranteeing the members a set term of appointment in contravention of a future governor's reorganization power. Cf. *Hazel Park*, 169 Mich App at 720. See also *Mich Farm Bureau*, 292 Mich App at 144 ("For our constitutional framework to operate as it was intended, each newly elected governor must possess the power and ability to manage the bureaucracy, to supervise the administrative agencies, and to influence those agencies' rulemaking decisions through his or her appointments and directives."). When conducting business with the state, the members were charged with knowledge of such limitations on Governor Gra-

[8] On appeal, the members cite *Bracco v Mich Technological Univ*, 231 Mich App 578, 588; 588 NW2d 467 (1998), for the proposition that public employees may form contractual employment relationships with public employers. We do not hold otherwise, and we do not suggest that the members were not contractually entitled to compensation and benefits relating to the time that they held their positions. See *Butler*, 51 US at 416-417; *Fisk v Jefferson Police Jury*, 116 US 131, 134; 6 S Ct 329; 29 L Ed 587 (1885). Instead, applying long-established caselaw, we hold only that a public officer may not form a contract to hold an office for a set term of appointment when the term of appointment would interfere with the exercise of the governor's plenary reorganizational authority over the executive branch under Const 1963, art 5, § 2. See *Butler*, 51 US at 416-417; *MacDonald*, 263 Mich at 235; *Sprister*, 242 Mich at 72; *Jochim*, 99 Mich at 368, 370. See also *Hazel Park*, 169 Mich App at 720.

nholm's authority. See *Roxborough*, 309 Mich at 511. In other words, as the trial court aptly recognized, the members dealing with the State must have contracted "with reference" to the governor's fundamental power of reorganization. Cf. *Harsha*, 261 Mich at 595.

It follows that the members do not have vested rights to hold their positions on the Parole and Commutation Board for their full term of appointment in contravention of the governor's plenary authority to abolish the positions as provided by law. See *Butler*, 51 US at 416-417; *Jochim*, 99 Mich at 367. There being no vested contractual right to the continued existence of the Parole and Commutation Board, or to hold a position on the board for a set period of time in contravention of the governor's reorganization power, there can be no impairment of a contract by ERO 2011-3. See *Butler*, 51 US at 416-417; *Harsha*, 261 Mich at 595; *Gillette*, 312 Mich App at 408, 414. Consequently, the trial court properly granted the State's motion for summary disposition, denied the members' motion for summary disposition, and denied the members' motion to amend their complaint as any amendment would be futile.

Affirmed.

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

JOHNSTON v STERLING MORTGAGE & INVESTMENT COMPANY

STERLING MORTGAGE & INVESTMENT COMPANY v JOHNSTON

Docket Nos. 324855 and 325238. Submitted March 8, 2016, at Detroit. Decided March 15, 2016. Approved for publication June 14, 2016, at 9:15 a.m. Leave to appeal denied 500 Mich 898.

In Docket No. 325238, Sterling Mortgage & Investment Company and Citi Investments LLC filed a summary-proceeding action in the 52-1 District Court to obtain possession of foreclosed property that had been owned by Ronald E. Johnston and Rosemarie P. Johnston because the Johnstons still resided in the home and had not redeemed the property before the expiration of the redemption period. The Johnstons filed an answer and jury demand, alleging that Sterling and Citi Investments had unlawfully refused to participate in and allow the redemption of the property. William R. Connolly moved to intervene in the action, alleging that he had an interest in the property because he had entered into a purchase agreement with the Johnstons during the redemption period. The court, Robert Bondy, J., granted judgment in favor of Sterling and Citi Investments and denied Connolly's motion to intervene. The Johnstons and Connolly appealed in the Oakland Circuit Court, and the appeals were consolidated. The Oakland Circuit Court, Daniel P. O'Brien, J., affirmed. The Johnstons and Connolly appealed by leave granted.

In Docket No. 324855, the Johnstons and Connolly filed a petition to quiet title to the property and a complaint for damages against Sterling, Citi Investments LLC, Citi Investment LLC, and Emre Uralli in the Oakland Circuit Court while the circuit court appeal in Docket No. 325238 was still pending. The complaint alleged six counts and indicated that while the Johnstons and Connolly had previously attempted to raise issues of frustration of redemption efforts, the district court judge avoided the litigation of those issues. Sterling, Citi Investments LLC, Citi Investment LLC, and Uralli moved for summary disposition, arguing that the action was barred by the doctrine of res judicata. The court, Daniel P. O'Brien, J., granted the motion for summary disposition. The Johnstons and Connolly appealed. The Court of Appeals consolidated the appeals in Docket Nos. 325238 and 324855.

The Court of Appeals *held*:

1. MCL 600.3240(1) provides, in relevant part, that a purchaser's deed under MCL 600.3232 is void if the mortgagor or any person that has a recorded interest in the property redeems the entire premises sold by paying the amount required within the applicable time limit to the purchaser or the purchaser's personal representatives or assigns, or to the register of deeds (ROD) in whose office the deed is deposited for the benefit of the purchaser. In this case, the Johnstons alleged that they were ready, willing, and able to tender payment for the purpose of redeeming the foreclosed property and would have done so but for appellees' purposeful failure to provide them with the full redemption amount and wiring information despite numerous requests for such information, thereby frustrating the Johnstons' efforts to pay. MCL 600.3240(1) specifically provides that the Johnstons had to pay the amount required to appellees or to the ROD; however, the Johnstons acknowledged that there had been no payment or delivery of funds. The Johnstons' argument that payment was not required when a proper "tender" had been made failed because nowhere in MCL 600.3240 is the term "tender" used. The term "tender" as used in MCL 600.3248, the statute that the Johnstons cited in support of this argument, focuses on a party's civil liability for refusing tender or payment, but it is MCL 600.3240 that specifically sets forth the process to be used in redeeming foreclosed property. The Johnstons also cited caselaw that used the term "tender" in situations involving the frustration of redemption efforts, but this caselaw predated MCL 600.3240 and therefore did not involve the statutory right to redemption in MCL 600.3240; the caselaw had used the terms "pay" and "tender" interchangeably because there had been no need to distinguish between the terms at the time. Even assuming that the Johnstons had the requisite money assembled and placed in the hands of people tasked to deliver it and that offers of payment had been communicated, the redemption funds were not "paid" as required by MCL 600.3240(1). Furthermore, the Johnstons' argument that they had been frustrated in their efforts to pay also failed because MCL 600.3240(1) specifically provides that payment may be made to the ROD. Therefore, the Johnstons could have simply submitted payment to the ROD, a fact that the Johnstons acknowledged when analyzing the legislative history of MCL 600.3240 in response to appellees' allegation that the Johnstons contacted the wrong individual for the purpose of making the payment. The Johnstons' argument that it was acceptable to make payment through Uralli, a representative of Citi Investment LLC, instead of through the designated contact

person listed on the Affidavit of Purchaser imposed an affirmative duty on appellees when none existed.

2. MCL 600.3240(14) provides, in relevant part, that the ROD, at the request of a person entitled to redeem the property, shall determine the amount necessary for redemption and that the ROD is not liable for damages proximately caused by an incorrect determination of an amount necessary for redemption. A plain reading of MCL 600.3240(14) did not support the Johnstons' claim that appellees had the right to reject a payoff to the ROD; instead, MCL 600.3240(14) simply insulated the ROD from liability for any incorrect calculation.

3. Because Connolly's rights were derivative of the Johnstons' rights and because the Johnstons' substantive arguments failed, the circuit court did not err by denying Connolly's motion to intervene.

4. MCR 2.116(C)(7) provides that summary disposition is appropriate if a claim is barred by a prior judgment. Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. Similarly, collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. The summary proceeding at issue here involved the same parties (or their privies) as the quiet title action, the summary proceeding was decided on its merits, and the Johnstons raised the same argument—that appellees frustrated their attempts to redeem the property—in both; therefore, res judicata and collateral estoppel precluded the Johnstons from bringing the quiet title action.

5. MCL 600.5714(1)(g) provides, in relevant part, that a person entitled to possession of premises may recover possession by summary proceedings when a person continues in possession of premises sold by virtue of a mortgage after the time limited by law for redemption of the premises. MCL 600.5750 states that the remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable, or statutory; a judgment for possession under MCL 600.5701 *et seq*. does not merge or bar any other claim for relief; the plaintiff obtaining a judgment for possession of any premises under MCL 600.5701 *et seq*. is entitled to a civil action against the defendant for damages

from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be. The Johnstons' argument that they were not required to litigate all issues relating to title because the district court proceeding was merely a holdover proceeding that did not bar future actions failed because MCL 600.5750 merely provides that possession is not a landlord's only remedy. Nothing in MCL 600.5750 stands for the proposition that, having litigated in the district court the issue regarding who has the right to the premises, the question can be relitigated de novo in a subsequent suit.

6. MCL 600.2932(1) provides that any person, whether he or she is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not. MCL 600.8302(3) provides that, in an action under MCL 600.5701 *et seq*., the district court may hear and determine an equitable claim relating to or arising under MCL 600.3101 *et seq*. (foreclosure), MCL 600.3301 *et seq*. (partition), or MCL 600.3801 *et seq*. (nuisance) or involving a right, interest, obligation, or title in land. MCL 600.8302(3) further provides that the district court may issue and enforce a judgment or order necessary to effectuate the court's equitable jurisdiction as provided in this subsection. A difference exists between want of jurisdiction and errors in exercising jurisdiction: once jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside, the judgment is valid and binding for all purposes and cannot be collaterally attacked. The Johnstons' argument that only the circuit court had jurisdiction to decide the issue of title pursuant to MCL 600.2932(1) failed because district courts in Michigan have equitable jurisdiction and authority concurrent with that of the circuit court with respect to equitable claims arising under MCL 600.5701 *et seq.*, which concerns proceedings to recover possession of premises. Several recent unpublished decisions of the Court of Appeals contained appellate postures very similar to the case at bar and likewise provided that res judicata barred claims that contested foreclosure on the same grounds asserted in a prior action. The Johnstons' claim that appellees frustrated their attempt to redeem the property was decided in the district court; therefore, the

circuit court properly determined that the quiet title action was barred by the doctrine of res judicata.

Circuit court order granting appellees summary disposition in the quiet title action and denying Connolly's motion to intervene affirmed; circuit court order affirming the district court's judgment that granted appellees possession of the property in a summary proceeding affirmed.

1. REVISED JUDICATURE ACT — FORECLOSURE OF MORTGAGES BY ADVERTISEMENT — REDEMPTION — WORDS AND PHRASES — "PAYING."

MCL 600.3240(1) provides that a purchaser's deed under MCL 600.3232 is void if the mortgagor or any person that has a recorded interest in the property redeems the entire premises sold by paying the amount required within the applicable time limit to the purchaser or the purchaser's personal representatives or assigns, or to the register of deeds (ROD) in whose office the deed is deposited for the benefit of the purchaser; MCL 600.3240(1) specifically requires payment of the required amount; the fact that a person attempting to redeem the property is ready, willing, and able to tender the payment and has communicated offers of payment is not enough to satisfy the requirement in MCL 600.3240(1) that the redemption funds be paid.

2. REVISED JUDICATURE ACT — SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES — COLLATERAL ESTOPPEL.

MCL 600.5750 states that the remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable, or statutory; a judgment for possession under MCL 600.5701 *et seq*. does not merge or bar any other claim for relief; the plaintiff obtaining a judgment for possession of any premises under MCL 600.5701 *et seq*. is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be; nothing in MCL 600.5750 stands for the proposition that, having litigated in the district court the issue regarding who has the right to the premises, the question can be relitigated de novo in a subsequent suit.

3. COURTS — DISTRICT COURTS — EQUITABLE POWERS — JURISDICTION — CLAIMS ARISING UNDER MCL 600.5701 *ET SEQ*.

MCL 600.2932(1) provides that any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest

> claimed by the plaintiff, whether the defendant is in possession of the land or not; MCL 600.8302(3) provides that, in an action under MCL 600.5701 *et seq*., the district court may hear and determine an equitable claim relating to or arising under MCL 600.3101 *et seq*. (foreclosure), MCL 600.3301 *et seq*. (partition), or MCL 600.3801 *et seq*. (nuisance) or involving a right, interest, obligation, or title in land; MCL 600.8302(3) further provides that the district court may issue and enforce a judgment or order necessary to effectuate the court's equitable jurisdiction as provided in this subsection; district courts in Michigan have equitable jurisdiction and authority concurrent with that of the circuit court with respect to equitable claims arising under MCL 600.5701 *et seq*., which concerns proceedings to recover possession of premises.

Mark Bucchi and *Edward A. Mahl* for Ronald E. Johnston, Rosemarie P. Johnston, and William R. Connolly.

Allyn Smith Law Group, PC (by *Eden J. Allyn*), for Sterling Mortgage & Investment Company, Citi Investments LLC, Citi Investment LLC, and Emre Uralli.

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

PER CURIAM. In Docket No. 324855, plaintiffs-appellants, Ronald E. Johnston, Rosemarie P. Johnston, and William R. Connolly (collectively, Appellants), appeal as of right an order granting defendants-appellees, Sterling Mortgage & Investment Company, Citi Investments LLC, Citi Investment LLC, and Emre Uralli (collectively, Appellees), summary disposition in Appellants' quiet title action and denying Connolly's motion to intervene.

In Docket No. 325238, Appellants appeal by leave granted[1] an order of the circuit court that affirmed the

[1] *Sterling Mtg & Investment Co v Johnston*, unpublished order of the Court of Appeals, entered June 5, 2015 (Docket No. 325238).

district court's judgment granting Appellees possession of the property in a summary proceeding.[2]

Finding no errors warranting reversal, we affirm both orders.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case involves the foreclosure and attempted redemption of 22333 Taft Road in Northville, Michigan. Ronald and Rosemarie Johnston (the Johnstons) owned the home but were unable to pay the mortgages thereon and ultimately defaulted in 2013. The home was sold at sheriff's sale on November 5, 2013. Sterling Mortgage & Investment Company (Sterling) and Citi Investments LLC (Citi) were the purchasers at the sheriff's sale; neither were the Johnstons' mortgagees.

After purchasing the property at sheriff's sale, Sterling filed an Affidavit of Purchaser, declaring that the amount to redeem the property was $322,542.83 at an interest rate of 3.125% per annum and a per diem of $28.58. The redeeming party was warned that the amount could change in the event that Sterling paid additional amounts for items such as taxes and insurance. The Affidavit of Purchaser further provided:

> 6. Redemption figures are subject to final verification upon receipt of funds. Sterling Mortgage & Investment Co. reserves the right to adjust these figures, and refuse any funds that are not sufficient to pay the full amount, for any reason, including but not limited to: an error in calculation of the payoff amount, failure to account for additional unrecorded fees disbursed, or previously submitted dishonored funds. Additional disbursements made between the date of the payoff statement and the receipt of

[2] Citi Investment LLC and Uralli are not parties to the proceedings in Docket No. 325238. Therefore, when referring to Docket No. 325238, the term "Appellees" does not include these parties.

> funds may also affect the final figures. Any redemption made without a written, current computation provided by Sterling Mortgage & Investment Co. will be subject to audit and potential subsequent rejection of funds.
>
> 7. Sterling Mortgage & Investment Co., is the designee responsible to assist an appropriate person redeeming the Property, in computing the exact amount required to redeem the Property, and receive redemption funds. If you choose to utilize this assistance, contact C. Switzer at Sterling Mortgage & Investment Co, 31333 W. 13 Mile Rd., Farmington Hills, MI. Pursuant to statute, a fee of Two Hundred Fifty Dollars ($250.00) will be charged to use the assistance of Sterling Mortgage & Investment Co.
>
> 8. REDEMPTION FUNDS MUST BE REMITTED WITHIN THE REDEMPTION PERIOD, BY CASHIER'S CHECK ONLY. TO ORDER A REDEMPTION COMPUTATION CALL: Sterling Mortgage & Investment Co., 31333 W. 13 Mile Rd, Farmington Hills, MI 48334, 248-539-3029.
>
> 9. Attention: REGISTER OF DEEDS: DO NOT accept redemption funds without a written, current redemption computation from Sterling Mortgage & Investment Co. Acceptance of funds without a Sterling Mortgage & Investment Co. computation will subject that redemption to an audit and potential subsequent rejection of the redemption funds.

On February 10, 2014, and upon the Johnstons' request, Sterling provided a letter setting forth the exact amount needed to redeem the property, which was $333,786.85. The letter was signed by "Kellie Carl."

The Johnstons e-mailed Kellie on April 28, 2014, asking for a "revised payoff for the last day of redemption." In response, Kellie wrote: "We require a $250.00 statement fee upfront to process a pay off a second time. Once payment of $250.00 is received in our office we will re-calculate the pay off for you through the date you request."

Instead of paying the fee, the Johnstons asked the Oakland County Register of Deeds (ROD) to prepare a statement setting forth the amount to redeem the property. On April 28, 2014, the ROD prepared a statement utilizing the final day of redemption (May 5, 2014), which was 182 days from the sheriff's sale. The ROD used the sheriff's deed amount ($322,542.83) and added the 3.125% interest rate ($5,025.92), the amount of insurance paid ($3,782.25), and the interest of insurance ($58.94) for a total redemption amount of $331,409.94. The statement included the provision: "PAYMENT MUST BE CERTIFIED CHECK OR CASHIER'S CHECK AND MADE PAYABLE TO: OAKLAND COUNTY REGISTER OF DEEDS."

On April 30, 2014, during the six-month redemption period, the Johnstons entered into a Purchase Agreement with William R. Connolly (Connolly). The Johnstons agreed to sell the property to Connolly for $341,409.94. To that end, Connolly deposited $350,000 into an account with the Johnstons' attorney, E. Dale Wilson. Wilson, in turn, enlisted First American Title Insurance Company (First American) to facilitate the closing and wired funds to be held in escrow by First American. Pat Flinchum was First American's Commercial Closing Officer. However, the purchase never took place because the Johnstons never redeemed the property.

On May 8, 2014, Wilson filed an Affidavit of Interest on Connolly's behalf, setting forth what was to become the crux of the issue in this case—the inability of the Johnstons to redeem the property:

> 6. On several occasions on May 1, 2014, May 2, 2014, and May 5, 2014, both the Affiant [Wilson] and Pat Flinchum, Commercial Closing Officer of First American . . . contacted the representative of Citi Investment

LLC, that being Emri [sic] Uralli, requesting the full redemption amount and a Quit Claim Deed for the Property to clear title.

7. On Thursday, May 1, 2014, Ms. Pat Flinchum of First American Title Insurance Company had a telephone conversation with Emri [sic] Uralli, who stated that he would provide such information on either May 2, 2014 or not later than Monday, May 5, 2014, to allow for the successful redemption of the Property.

8. On Friday, May 2, 2014 at 11:28 am, the Affiant emailed to Emri [sic] Uralli the fully prepared Redemption Certificate and Quit Claim Deed under which the Seller would redeem the Property at closing via payment to Citi Investment LLC by Ms. Pat Flinchum of First American . . . utilizing closing proceeds provided by the Purchaser in connection with his purposed acquisition of the Property.

9. Affiant followed up both via telephone calls and emails on May 5, 2014 requesting such information from Citi Investment LLC to allow Purchaser to complete its acquisition of the Property.

10. On May 5, 2014, prior to the expiration of the Redemption Period, Purchaser and Seller completed and executed all required documentation and Purchaser, via a wire transfer, provided Ms. Pat Flinchum of First American . . . with all closing proceeds and required documentation such that the Purchaser and Seller were ready, willing and able to close the transaction, subject only to receipt of the Redemption Certificate and Quit Claim Deed from Citi Investment LLC.

11. Citi Investment LLC's failure to provide such information is the sole reason that the Property was not able to be redeemed by Seller and sold to Purchaser, and as such, Citi Investment LLC should not be allowed to profit from its failure to provide information it is required to provide to allow the Seller its statutory right of redemption of the Property.

While the Affidavit of Purchaser had specifically designated *Sterling* as the entity to contact regarding payoff information and in particular "C. Switzer," Flinchum, in a separate affidavit, averred that she directed her inquiries "to Emre Uralli, who I knew from prior dealings to be the member of Plaintiffs/Appellees." Nevertheless, Uralli failed to respond to a number of e-mails from Flinchum and Wilson. On May 5, 2014, at 10:23 a.m., Flinchum faxed "Kelli" at Sterling the following:

> **We are going to payoff this loan today. Can you please email be [sic] the payoff amount and the wiring instructions asap?**
>
> **I had spoken with Emre from Citi on Thursday and he indicated that we would have the payoff this morning but it has not been received as of yet[.]**

Uralli never responded to the inquiries, so the money was never wired. In her affidavit, Flinchum laid the blame squarely on Sterling and Citi:

> 5. . . . I can confirm that, on May 5, 2014, I, the Johnstons and Mr. Connolly were ready, willing and able to complete the sale of the subject premises, and transmit funds to Plaintiffs/Appellees in whatever amount was needed to redeem the subject premises. What we required from Plaintiffs/Appellees were (a) a payoff letter setting the exact amount required to redeem, and (b) wiring instructions so the funds could be deposited in Plaintiffs/Appellees' account, instantly, via wire transfer. I can also confirm that, on and before May 5, 2014, Mr. Wilson and I made Plaintiffs/Appellees aware of the foregoing, via the written communications attached hereto and telephone calls as referenced in Mr. Wilson's [Affidavit of Interest]. I have no doubt that, Plaintiffs/Appellees were aware of the preparations that had been made for closing and redemption, that we stood at the ready to complete the transactions on May 5, 2014, and that, had they responded and supplied the above

noted payoff amount and wiring instructions, they would have received the payoff funds, on May 5, 2014. That was my task.

6. Although Plaintiffs/Appellees promised to cooperate in the redemption process during the work week ending May 2, 2014, neither I, and, to the best of my knowledge, anyone else acting on behalf of the Johnstons and Mr. Connolly, ever received a payoff amount or wiring instructions from Plaintiffs/Appellees. At no time did anyone advise me that Plaintiffs/Appellees objected to a wire transfer, or to receiving the redemption funds from First American. In particular, I never received [the May 5, 2014 fax from Sterling indicating that the redemption amount was $335,780.23], and never saw it until I was emailed a copy of it by Mr. Bucchi, on/about May 29, 2014. I note, too, that [the fax did] not contain wiring instructions. As such, we had no way to transmit the redemption funds, since we lacked both the proper redemption amount and wiring instructions. Given the pay-off amount reflected on [the fax], however, we certainly had sufficient funds on deposit to satisfy the redemption requirements.

A. THE SUMMARY PROCEEDING (OAKLAND CIRCUIT COURT CASE No. 2014-141116-AV)

The redemption period expired on May 5, 2014. Because the Johnstons still resided in the home and had not redeemed the property, Sterling filed a summary proceeding action in district court on May 14, 2014.

The Johnstons filed an answer and jury demand, indicating that Sterling had "unlawfully refused to participate in and allow the redemption of the subject premises." The answer mirrored Wilson's Affidavit of Interest and asked the district court to dismiss summary proceedings. At the same time, Connolly moved to intervene in the action, indicating that he had an interest in the property by virtue of the Purchase Agreement with the Johnstons.

A tenancy hearing was held on May 28, 2014. Appellees argued that, as set forth in the Affidavit of Purchaser, Appellants were required to use the designee—Sterling—to redeem the property. Appellees argued that there was never an actual attempt to pay funds; at most, Appellants expressed intention to redeem. Appellees also pointed out that Appellants could have simply redeemed the property by tendering funds to the Register of Deeds (ROD) in keeping with MCL 600.3240. Appellants' attorney indicated that the money was not simply submitted to the ROD because the Affidavit of Purchaser strictly forbade the ROD from accepting funds without a written computation from Sterling. The district court ruled:

> Well, I think the statute is clear and there was no redemption. And the fact that there's emails going back and forth saying, "Well, we want to redeem. What's the payoff?" is not a redemption and an intent is not a redemption. I think there has to be a tender of funds and that tender of funds should have been to the Register of Deeds or to Sterling Mortgage with proof that that was taking place. And if that didn't happen, it should have been posted at the Register of Deeds or the clerk's office for Oakland County. And if the clerk's office wasn't going to accept it then there should have been an action in the Circuit Court in order to force the redemption. None of which happened within the six months. I'm going to grant judgment for the plaintiff.

The district court also denied Connolly's motion to intervene: "I don't think there's any basis for the perspective [sic] purchaser to intervene in this case or . . . any standing."

Appellants filed their claims of appeal in the circuit court on June 3, 2014. The two appeals—Connolly's appeal from the order denying his motion to intervene and the Johnstons' appeal from the order of eviction—were consolidated.

On appeal in the circuit court, Appellants argued that *Lamb v Jeffrey*, 47 Mich 28; 10 NW 65 (1881), controlled. In that case, the issue was whether there had been a tender and a subsequent refusal to receive the tender. The Michigan Supreme Court held that even if there was no direct refusal to receive funds, the mortgagee "managed to *avoid* it for the purpose of obtaining the land on a foreclosure." *Id*. at 30 (emphasis added). Appellants claimed that, under *Lamb*, if the party entitled to the redemption funds refused or avoided tender of payment, it could not subsequently argue that the redemption period had expired. Appellants argued that the motive for refusing to accept the funds in this case was made clear when Appellees asked the district court to set a stay bond and indicated that the property was worth over $650,000, which was more than twice the sum to redeem.[3]

Appellants also cited *Karakas v Dost*, 67 Mich App 161; 240 NW2d 743 (1976). In that case, the plaintiffs on a land contract attempted to redeem the property by placing funds with their attorney to tender to the defendants, but the defendants' attorney made himself unavailable. This Court held that while the plaintiffs "failed to 'pay' defendants in accordance with the statute . . . valid tender is unnecessary where plaintiff is ready, willing and able to tender, but defendant, by his acts or words, shows that tender would not be accepted." *Id*. at 167. The Court concluded that summary disposition for the defendants was inappropriate where there were genuine issues of material fact regarding "whether defendants had manifested an intent to not accept tender of payment." *Id*. at 169. The

[3] In addition to posting a $1,000 bond, the Johnstons were ordered to pay monthly rent in the amount of $3,250.

Karakas Court also rejected the notion that the plaintiff could have simply deposited the funds with the court:

> We do not interpret that [State Court Administrative Office] form as requiring defendant either to seek to make payment to the court if he has been unable to tender payment to the plaintiff or attempt to pay the plaintiff if he has been unable to pay the court. Under such an interpretation, a defendant who at the end of the redemption period is willing and able to make payment might lose his opportunity to do so by unsuccessfully attempting to pay the plaintiff and then discovering he cannot reach the court in time to tender payment within the redemption period. We therefore read the statute and court form together as leaving defendant with the choice of making payment to either plaintiff or the court. [*Id*. at 169-170.]

Appellants argued that quibbling about the definition of "tender" was largely irrelevant: "[W]here an obligor stands ready, willing and able to effect redemption, announces as much to the obligee (i.e. makes an 'unconditional offer to perform coupled with manifest ability to carry out the offer'), but the obligee refuses, avoids or otherwise frustrates the delivery of the funds, it is the obligee who suffers the consequences, not the obligor who has attempted payment. In either event, the actual delivery of funds is not necessary." Appellants explained that by refusing to provide Appellants with the exact amount to redeem the property and the proper wiring information, Appellees showed an unwillingness to receive the funds. Appellants also argued that the district court's statement that Appellants should have redeemed through the ROD put them in a position of "having to try to win a last minute race to the courthouse (or the Register of Deeds office)" when it was Appellees' unlawful refusal to cooperate that put them in that position.

Appellants further argued that the district court erred when it denied Connolly's motion to intervene: Appellants contend that, in light of the parties' purchase agreement, Connolly had an interest in the property and should have been permitted to intervene pursuant to MCR 2.209(A)(3).

In response, Appellees maintained that there was no attempt to pay the redemption funds and that the trial court was obligated to enter judgment in their favor. Appellees argued that MCL 600.3240(1) clearly provides that one hoping to redeem property must *pay* the amount required to the purchaser, the purchaser's representative, or the ROD and that Appellants simply communicating that they were ready, willing, and able to redeem did not satisfy the statute. Appellees also noted that it was curious that Appellants insisted on attempting to communicate with Uralli, who was a member of Citi Investments, when neither Uralli nor Citi were appointed as the designee in the Affidavit of Purchaser. Appellees maintained that, unlike in *Lamb*, there was no refusal or avoidance because the funds were never proffered.

Appellees argued that, in any event, Appellants could have simply redeemed by submitting payment to the ROD. Again, unlike in *Lamb* or *Karakas*, Michigan's foreclosure by advertisement statutory scheme specifically permits a redeeming party to pay the ROD. Nothing prevented Appellants from physically delivering a cashier's check to the ROD.

Appellees also argued that Connolly had no right to intervene because his rights derived from Appellants. In failing to redeem the property, Appellants lost all interest in the property; Connolly had no independent interest in the property.

A hearing on the appeal was held on October 22, 2014. Appellants' attorney argued that the ROD in the present case was "the functional equivalent" of the courthouse in *Karakas*. Essentially, counsel argued that the party seeking to redeem had the privilege of electing between two alternatives and that Appellees obfuscated one of those alternatives. Counsel further noted the discrepancy of the amount needed to redeem, making it impossible for Appellants to confidently tender the proper amount. Counsel maintained that Appellants were entitled to a jury trial as to whether there was a frustration of tender.

In contrast, Appellees' attorney argued that the statute used the term "payment"—not the term "tender"—and that calculating payment was simply a "mechanical application," utilizing information contained directly in the Sheriff's Deed. When asked by the circuit court whether one who seeks to redeem has a unilateral right to determine whom to pay, counsel indicated: "I don't think you can manufacture the frustration by . . . unilaterally choosing." In response, Appellants' attorney indicated that Uralli led them to believe he would provide the relevant information.

The circuit court ruled: "The Court does not find that the conduct of the redeeming parties, the Appellants in this instance, amounted to payment, or ready, willing, and able does not equal payment, and the Court leaves it at that. The Court affirms."

On November 3, 2014, the circuit court entered an order affirming the district court's May 28, 2014 judgment. The circuit court denied Appellants' motion for reconsideration.

B. THE QUIET TITLE ACTION (OAKLAND CIRCUIT COURT CASE No. 2014-142153-CH)

On August 1, 2014, while Appellants' appeal from

the summary proceeding was still pending, Appellants filed a "petition to quiet title to real property and complaint for damages" against Sterling, Citi-FLA, Citi-MI, and Uralli.[4] Appellants indicated that they "attempted to raise issues of frustration of redemption efforts, but [the district court judge] decided to avoid litigation of those issues in his Court."

Appellants' complaint alleged six counts:

• Count I (against Sterling and Citi-FLA): Irregular Foreclosure Process—Joint Purchasers of Property. It was improper that multiple parties purchased the property at the sheriff's sale. And, if multiple purchasers are permitted, then the deed should have reflected as much.

• Count II (against Sterling, Citi-FLA, and Citi-MI): Irregular Foreclosure Process—Defective Purchaser's Affidavit Filed by Sterling and no Affidavit of Purchaser Filed By Citi-FLA or Citi-MI. The Affidavit of Purchaser illegally directed the ROD to refuse to accept redemption funds without a calculated final payoff from Sterling and further incorrectly stated a per diem interest at $28.58.

• Count III (against Sterling): Irregular Foreclosure Process—Demand for Excessive Redemption Funds. The Affidavit of Purchaser overstated the per diem interest. The February 14, 2014 letter overstated the amount to redeem. Sterling failed to file a proper claim for insurance premiums.

• Count IV (against Sterling and Citi-FLA): Fraud, Negligence, and Unconscionable Conduct. The Affida-

[4] Appellants explained that Citi-FLA was recently dissolved and conducted business in Farmington. It was being "wound down" by Uralli, its principal, who resided in Grosse Pointe. Appellants further explained that Citi-MI may claim title to an undefined share of the property through a Quit Claim Deed from Citi-FLA to Citi-MI.

vit of Purchaser was intended to mislead Appellants as to how to redeem the property. Even if not rising to the level of fraud, Sterling's actions were unconscionable, and Sterling abused the trust and authority given to it under the law to advise homeowners of their redemption rights. Aside from the Affidavit of Purchaser, Sterling was obligated to see to it that a correct redemption figure was provided to Wilson and the title company.

• Count V (against Uralli, Citi-MI, and Sterling): Clogging—Unlawful Interference with Petitioners' Redemption Efforts. Appellees' interference resulted in the "clogging of the Equity of redemption." Even after sheriff's sale, rules of equity prohibited the frustration of redemption. "The steadfast refusal of Uralli, Sterling, and Citi-MI to provide a final redemption figure to any of the agents of the Petitioners, *after Sterling claimed in its Purchaser's Affidavit the exclusive right to provide the final redemption figure*, unlawfully interfered and burdened the exercise of the Johnston's [sic] efforts to save their home."

• Count VI (against Uralli, Sterling, and Citi-MI): Violation of MCL 600.3248. MCL 600.3248 penalizes individuals for refusing to accept redemption funds.

Appellees filed an answer to the petition, indicating that they would "stand mute" in light of the fact that Appellants' claims were barred by res judicata and that Appellants were collaterally estopped from relitigating the summary proceeding.

Appellees filed a motion for summary disposition on September 11, 2014, arguing that the action was barred by MCR 2.116(C)(6), (7), and (8). Appellees pointed out that the matter was already pending in circuit court on appeal from district court and that

Appellants' new action unnecessarily repeated the litigation. Appellees argued that, instead of waiting for the outcome of their pending appeal, Appellants "escalate[d] the dispute" further by filing the instant action, which was a vexatious and malicious attempt to harass Appellees and drive up the cost of litigation. Appellees wrote that Appellants "and their counsel are keenly aware that this matter merely duplicates the previous action, and unnecessarily squanders judicial resources and causes needless litigation costs to [Appellees]."

Appellants responded that this was not a situation in which another action was initiated between the same parties involving the same claim; rather, the parties were different, the causes of action were different, and the issues to be decided were different. While Appellants "attempted to litigate the issue of obstruction of redemption efforts" at the summary proceeding, the district court never addressed the issue. Because the district court was without authority to quiet title, Appellants were compelled to file the instant action.

A hearing on the motion for summary disposition was held on November 12, 2014. By that time, the circuit court had already decided the appeal from the summary proceeding and had affirmed the district court's ruling. The district court questioned Appellees' attorney about whether the district court had the authority to consider the equitable issues raised by Appellants. Citing MCL 600.8302, counsel argued that the district court had supplemental jurisdiction in the summary proceeding to hear and decide *all* the claims.

In contrast, Appellants' counsel argued that it was possible to have two separate proceedings because the summary proceeding was only about right to *possession*, whereas a quiet title action involved deciding who holds legal *title*. Therefore, in counsel's view, it would

be possible for the circuit court to affirm the district court on direct appeal and then subsequently enter judgment for Appellants in a quiet title action. Appellants' counsel argued that there was no res judicata effect, citing MCL 600.5750, which provides that summary proceedings are in addition to, and not exclusive of, other actions.

The circuit court and Appellants' counsel had the following exchange:

> *The Court*: Now -- now answer me this question; . . . what is distinct in your voice in the district court case from your voice in this case? Aren't you not expressing the same complaints, maybe with different titles, maybe with different commas, but you're basically saying I was ready, willing, and able there, but for frustration, and you're saying the same thing, . . . I was ready, willing, and able there, but for frustration. . . . [H]ow is this complaint not consumed, eclipsed, super -- not superseded, but the . . . same exact thing that you voiced in the district court?
>
> *Mr. Mahl* [co-counsel for Appellants]: Judge, first of all, we have six counts in this -- in this --
>
> *The Court*: I know. I know. Just just give me an example of something that's pled here that is independent and distinct from what was claimed there?
>
> *Mr. Mahl*: Four of our counts. And let me call your attention, first of all, because it's [the] clearest one, to count number six. Count number six is not -- does not seek title. Count number six is for damages; it's a tort claim. It's a tort claim for refusal of tender.
>
> *The Court*: Now -- now answer me this question, counsel, because I appreciate you're citing to some particularly pled distinction, but I'm asking at the root what is distinct? The voice, the basis, the root of your tort claim is frustration by sheriff's deed grantee or agents, correct?
>
> *Mr. Mahl*: Yes, and --

> *The Court*: The voice of your landlord/tenant defense was frustration by sheriff's deed grantee or agent, correct?
>
> *Mr. Mahl*: Of the right to redeem.
>
> *The Court*: Yeah, the same -- at the bottom of the river is the same current, and it's the same argument; it might take different forms from the surface, but at the root, it's the same essence, isn't it?

The circuit court granted the motion for summary disposition, adopting "the reasons from the moving party in this case . . . . I'm not going to belabor the record with rationale. The Court will just leave it simple like that." On November 14, 2014, the circuit court entered an order granting Appellees summary disposition and denying Appellants' motion to amend the complaint.

II. ANALYSIS

A. DOCKET NO. 325238

Appellants argue that the lower courts erred in granting Appellees possession in the summary proceeding and denying Connolly's motion to intervene. We disagree.

Both parties concede that the district court found that Appellees were entitled to judgment as a matter of law, which was the equivalent of granting summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A (C)(10) motion tests the factual sufficiency of a complaint. "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).

This case involves a determination of whether Appellants "paid" the redemption funds under MCL 600.3240. Issues of statutory interpretation are reviewed de novo on appeal. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

> When interpreting a statute, the primary goal is to give effect to the intent of the Legislature by construing the language of the statute. When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted. When a statute does not expressly define a term, courts may consult dictionary definitions to ascertain its ordinary and generally accepted meaning. [*Pace v Edel-Harrelson*, 499 Mich 1, 6-7; 878 NW2d 784 (2016) (citations omitted).]

Contrary to Appellants' arguments, we hold that the lower courts did not err in granting Appellees possession in the summary proceeding and denying Connolly's motion to intervene.

MCL 600.3240 provides, in relevant part:

> (1) A purchaser's deed under section 3232 is void if the mortgagor, the mortgagor's heirs or personal representative, or any person that has a recorded interest in the property lawfully claiming under the mortgagor or the mortgagor's heirs or personal representative redeems the entire premises sold by *paying* the amount required under subsection (2) and any amount required under subsection (4), within the applicable time limit prescribed in subsections (7) to (12), to the purchaser or the purchaser's

> personal representative or assigns, or to the register of deeds in whose office the deed is deposited for the benefit of the purchaser.
>
> * * *
>
> (14) The register of deeds of a county with a population of more than 750,000 and less than 1,500,000, at the request of a person entitled to redeem the property under this section, shall determine the amount necessary for redemption. In determining the amount, the register of deeds shall consider only the affidavits recorded under subsections (2) and (4). A county, register of deeds, or employee of a county or register of deeds is not liable for damages proximately caused by an incorrect determination of an amount necessary for redemption under subsection (2). [Emphasis added.]

The statutory language is clear. In order to redeem the property, Appellants were required to *pay* the amount required to Appellees or the ROD. *Black's Law Dictionary* (9th ed) defines "payment" as: "**1.** Performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation. . . . **2.** The money or other valuable thing so delivered in satisfaction of an obligation."

Appellants acknowledge that there was no *payment* or *delivery* of funds, but they argue that payment is not actually required when a proper "tender" has been made. *Black's Law Dictionary* (9th ed) defines "tender" as:

> **1.** A valid and sufficient offer of performance; specif., an unconditional offer of money or performance to satisfy a debt or obligation <a tender of delivery>. . . . The tender may save the tendering party from a penalty for nonpayment or nonperformance or may, if the other party unjustifiably refuses the tender, place the other party in default.
>
> * * *

> ***tender of performance***. . . . An obligor's demonstration of readiness, willingness, and ability to perform the obligation . . .

However, nowhere in MCL 600.3240 is the term "tender" used. Appellants find the term in MCL 600.3248, which provides: "If any person entitled to receive such redemption moneys, shall, upon payment or tender thereof to him, refuse to make and acknowledge such certificate of payment, he shall be liable to the person aggrieved thereby, in the sum of $100.00 damages, over and above all the actual damages sustained, to be recovered in a civil action . . . ." Appellants focus on the wrong statute: MCL 600.3248 addresses a party's civil liability for refusing tender or payment, but it is MCL 600.3240 that specifically sets forth the process to be used in redeeming foreclosed property.

Appellants also cite *Lamb* and *Karakas*, both of which mention "tender." In *Lamb*, the issue was whether there had been a tender and a subsequent refusal to receive the tender:

> The substantial questions, then, are whether complainant made a tender as he claims, and if so, whether Mrs. Jeffrey refused to receive it. Upon this point the testimony is hopelessly in conflict. We are forced to the conclusion, however, that complainant did make a tender as he claims he did, and that Mrs. Jeffrey, if she did not directly refuse to comply, managed to avoid it for the purpose of obtaining the land on a foreclosure which should cut off the mortgage of complainant. The complainant is therefore entitled to the relief he prays. [*Lamb*, 47 Mich at 30.]

Lamb is distinguishable from the case at bar because it predated MCL 600.3240 and, therefore, did not involve the application or interpretation of specific statutory language.

In *Karakas*, this Court used the term "tender" when discussing a situation in which purchasers on a land contract were frustrated from redeeming property from foreclosure. This Court concluded that the lower court had erred in finding that the plaintiffs had failed to state a claim upon which relief could be granted:

> Although the trial judge in the instant case held that plaintiffs had failed to state a cause of action, we disagree. They stated a cause of action if the factual allegations contained in their complaint show that they are entitled to redemption. The statute governing redemption in this situation, MCLA 600.5744(6); MSA 27A.5744(6) reads:
>
> > When the judgment for possession is for nonpayment of money due under a tenancy or for nonpayment of moneys required to be paid under or any other material breach of an executory contract for purchase of the premises, the writ of restitution shall not issue if, within the time provided, the amount as stated in the judgment, together with the taxed costs, is paid to the plaintiff and other material breaches of an executory contract for purchase of the premises are cured.
>
> Although there is presently no case law interpreting the statutory language "is paid", case law interpreting similar statutory language indicates that actual transfer of the entire amount of money due is generally required for compliance with redemption statutes. A mere showing of ability and intent to pay is insufficient. Thus, plaintiffs, in the case at bar, failed to "pay" defendants in accordance with the statute. Nevertheless, case law involving other situations requiring tender of payment holds that valid tender is unnecessary where plaintiff is ready, willing and able to tender, but defendant, by his acts or words, shows that tender would not be accepted. Consequently, in the instant case, if plaintiffs' factual allegations indicate that tender was not made because defendants prevented it or indicated they would not accept it, plaintiffs' complaint states a cause of action.

> Because plaintiffs' complaint includes allegations that defendants did not accept payment and that such conduct was wrongful, we find that plaintiffs' pleadings do state a claim upon which relief can be granted. Therefore, we hold that the trial judge committed reversible error in ordering summary judgment under GCR 1963, 117.2(1) on the redemption issue. [*Karakas*, 67 Mich App at 166-168 (citations omitted).]

The Court also concluded that there were genuine issues of material fact that precluded summary disposition for lack of factual merit:

> We believe plaintiffs' affidavits in the case at bar raise a genuine issue of material fact regarding whether defendants had manifested an intent to not accept tender of payment. Plaintiffs' attorney's affidavit alleges he was unable to complete the redemption transaction because [defendants' attorney] had been purposely making himself unavailable. In addition, the affidavit alleges that [the attorney] had told plaintiffs' attorney that [defendants] wanted to retain the property and, consequently, [the attorney] was unauthorized to accept payment. The affidavit of plaintiffs' attorney's law partner alleges that [defendants' attorney] also had told the law partner that [defendants] wanted to keep the property, and [defendants' attorney], therefore, could not accept payment. Because these allegations, if proved, would entitle plaintiffs to relief under the earlier mentioned theory that tender of payment is not required where defendant has shown it would not be accepted, we reverse the trial court's order of summary judgment and remand for trial on the redemption issue. [*Id*. at 169.]

Karakas is distinguishable from the case at bar because it involved a land contract and did not involve the statutory right to redeem in MCL 600.3240. Additionally, and importantly, the Court used the terms "pay" and "tender" interchangeably. It did not distinguish between the two terms because it did not need to. The plaintiffs' attorney in *Karakas* actually went in

search of the defendants' attorney *with check in hand* to redeem the property. *Karakas*, 67 Mich App at 164. Appellants' attempt to distinguish "tender" and "payment" by citing *Karakas* is undercut by the facts of the case. Therefore, even assuming that the requisite money was assembled and placed in the hands of people tasked to deliver it and that offers of payment were communicated, the redemption funds were not "paid."

Appellants further argue that, if payment is required, their efforts were frustrated. Again, Appellants cite *Lamb* and *Karakas*. In *Lamb*, the Michigan Supreme Court held that even if there was no direct refusal to receive funds, the mortgagee "managed to *avoid* it for the purpose of obtaining the land on a foreclosure." *Lamb*, 47 Mich at 30 (emphasis added). And, as just discussed, in *Karakas*, the plaintiffs on a land contract attempted to redeem the property by placing funds with their attorney to tender to the defendants, but the defendants' attorney made himself unavailable after his clients told him they did not want the plaintiffs to redeem. This Court held that "valid tender is unnecessary where plaintiff is ready, willing and able to tender, but defendant, by his acts or words, shows that tender would not be accepted," *Karakas*, 67 Mich App at 167, and that summary disposition for the defendants was inappropriate when there were genuine issues of material fact regarding "whether defendants had manifested an intent to not accept tender of payment," *id*. at 169.

Once again, neither *Lamb* nor *Karakas* involved the application or interpretation of MCL 600.3240. That is a critical distinction, especially in the *Karakas* case, in which the statute explicitly required that the redemption payment be made "to the plaintiff." The *Karakas*

Court rejected the notion that the plaintiff could have simply deposited the funds with the court:

> At this juncture, we wish to explain that we disagree with defendants' contention that plaintiffs should have tendered payment to either [the defendants] or the court, and because they did neither, they are not entitled to redemption. Although we can find no case law interpreting the statutory phrase "is paid to the plaintiff" (MCLA 600.5744(6); MSA 27A.5744(6)), the judgment notice approved by the Michigan Supreme Court Administrator specifies that the amount of the judgment may be paid to either the district court or the plaintiff (in the summary proceedings). We do not interpret that *form* as requiring defendant either to seek to make payment to the court if he has been unable to tender payment to the plaintiff or attempt to pay the plaintiff if he has been unable to pay the court. Under such an interpretation, a defendant who at the end of the redemption period is willing and able to make payment might lose his opportunity to do so by unsuccessfully attempting to pay the plaintiff and then discovering he cannot reach the court in time to tender payment within the redemption period. We therefore read the statute and court form together as leaving defendant with the choice of making payment to either plaintiff or the court. [*Karakas*, 67 Mich App at 169-170.]

In contrast, MCL 600.3240(1) specifically provides that a sheriff's deed is void if the property is redeemed "by paying the amount required . . . within the applicable time limit prescribed . . . to the purchaser or the purchaser's personal representative or assigns, *or to the register of deeds* in whose office the deed is deposited for the benefit of the purchaser." (Emphasis added.) Thus, in contrast to the State Court Administrative Office form in *Karakas*, MCL 600.3240 specifically provides that payment may be made to the ROD.

Appellants argue that they did not feel secure in submitting payment to the ROD because Appellants

had received more than one payoff figure and because Appellees were not bound by the ROD's calculations. MCL 600.3240(2) and (14) provide:

> (2) The amount required to be paid under subsection (1) is the amount that was bid for the entire premises sold, interest from the date of the sale at the interest rate provided for by the mortgage, the amount of the sheriff's fee paid by the purchaser under section 2558(2)(q), and an additional $5.00 as a fee for the care and custody of the redemption money if the payment is made to the register of deeds. . . . The purchaser shall provide an affidavit with the deed to be recorded under this section that states the exact amount required to redeem the property under this subsection, including any daily per diem amounts, and the date by which the property must be redeemed shall be stated on the certificate of sale. *The purchaser may include in the affidavit the name of a designee responsible on behalf of the purchaser to assist the person redeeming the property in computing the exact amount required to redeem the property.* The designee may charge a fee as stated in the affidavit and may be authorized by the purchaser to receive redemption money. The purchaser shall accept the amount computed by the designee.
>
> * * *
>
> (14) The register of deeds of a county with a population of more than 750,000 and less than 1,500,000, at the request of a person entitled to redeem the property under this section, shall determine the amount necessary for redemption. In determining the amount, the register of deeds shall consider only the affidavits recorded under subsections (2) and (4). A county, register of deeds, or employee of a county or register of deeds is not liable for damages proximately caused by an incorrect determination of an amount necessary for redemption under subsection (2). [Emphasis added.]

Appellants point to the legislative history and note that the language "The purchaser shall accept the

amount calculated by the register of deeds under this section" was specifically excluded. Appellants write: "Thus, subsection (14) allows purchasers to challenge and defeat the ROD's determination and, if a prospective redeemer (Appellants, herein) had relied on an errant determination of the ROD, he may **not recover damages**." However, a plain reading of the statute does not support Appellants' claim that Appellees had the right to reject a payoff to the ROD; instead, it simply insulates the ROD from any incorrect calculation. Additionally, in response to Appellees' allegation that Appellants contacted the wrong individual, Appellants acknowledge the benefit of utilizing the ROD:

> In addition, it is ironic to note that MCLA 600.3240(14) was proposed and enacted, in part to remedy "The Apparent Problem" i.e. that " . . . lenders have not responded at all, or have responded inaccurately, when asked how much is owed." . . . In other words, one of the perceived shortcomings of MCLA 600.3240, in 2009, was that certain homes were being lost to foreclosure because lenders (and, by extension, purchasers at sheriffs' sales) were occasionally less than forthcoming when distressed homeowners sought to redeem their homes from foreclosure. As noted in the Legislative Analysis, this reticence was attributable to the financial interest of the lender in seeing homes foreclosed upon. . . . Thus, in effect, Appellees['] argument concerning communications with Appellees would turn this remedial legislative initiative on its head, creating a trap for homeowners struggling to timely redeem their homes, and allowing Appellees to benefit from withholding information, one of the specific problems the Legislature set out to remedy.

Therefore, Appellants recognize that payoff to the ROD is often a wise choice for one seeking to redeem because it obviates the need to contact the purchaser directly.

Appellants did not contact the individual listed on the Affidavit of Purchaser. In her affidavit, Flinchum

(the closing agent) averred that she directed her inquiries "to Emre Uralli, who I knew from prior dealings to be the member of Plaintiffs/Appellees." Therefore, in spite of the clear designation that Sterling—more specifically C. Switzer—was the contact person that would help in calculating the payoff amount, Appellants did not use the designated contact person. Appellants seem to argue that, absent an objection from Appellees, it was perfectly acceptable to use Uralli. In so doing, Appellants impose an affirmative duty on Appellees where none exists.

Finally, because Connolly's rights are derivative of Appellants' and because Appellants' substantive arguments fail, there was no error in denying Connolly's motion to intervene.

B. DOCKET NO. 324855

Appellants argue that the circuit court erred in granting summary disposition because the summary proceeding and appeal did not bar Appellants' subsequent quiet title action. We disagree.

Summary disposition is appropriate if a claim is barred by a prior judgment. MCR 2.116(C)(7); *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich at 119.

Appellants' quiet title action was barred by res judicata and collateral estoppel. "The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial re-

sources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009), overruled on other grounds by *Admire v Auto-Owners Ins Co*, 494 Mich 10 (2013).

> Consequently, res judicata . . . bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.
>
> Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (citations omitted).]

Similarly,

> [c]ollateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. The doctrine bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. A decision is final when all appeals have been exhausted or when the time available for an appeal has passed. [*Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006) (citations omitted).]

Here, the summary proceeding involved the same parties as the present case (or their privies), the case was decided on its merits, and Appellants raised the argument that Appellees frustrated their attempts to redeem the property; therefore, res judicata and collateral estoppel precluded Appellants from bringing the quiet title action.

Appellants argue that they were not required to litigate all issues relating to title because the district court proceeding was merely a holdover proceeding. MCL 600.5714(1)(g) provides: "[a] person entitled to possession of premises may recover possession by summary proceedings . . . [w]hen a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises." Appellants maintain that such an action does not bar future actions, citing MCL 600.5750, which provides, in relevant part:

> The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief . . . . The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be.

This provision does not help Appellants. The statute merely provides that possession is not a landlord's only remedy. See *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 530; 773 NW2d 57 (2009). "Nothing in the statute . . . stands for the proposition that, having litigated in the district court the issue who has the right to the premises, that question can be relitigated de novo in a subsequent suit. Such an approach would empty MCL 600.5701 *et seq*.; MSA 27A.5701 *et seq*. of all significance." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

Most of Appellants' arguments are based on the faulty reasoning that the district court did not have jurisdiction to decide the issues raised in the quiet title action. Appellants believe that only the circuit court

had jurisdiction to decide the issue of title. They cite MCL 600.2932(1), which provides, "Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not."

But Appellants overlook the district court's specific jurisdiction. MCL 600.8302(3) provides: "In an action under [MCL 600.5701 *et seq*.], the district court may hear and determine an equitable claim relating to or arising under chapter 31 [foreclosure], 33 [partition], or 38 [nuisance] or involving a right, interest, obligation, or title in land. The court may issue and enforce a judgment or order necessary to effectuate the court's equitable jurisdiction as provided in this subsection, including the establishment of escrow accounts and receiverships." This Court has explained:

> District courts in Michigan have exclusive jurisdiction over civil matters where the amount in controversy does not exceed $25,000. MCL 600.8301(1). In addition, district courts have "equitable jurisdiction and authority concurrent with that of the circuit court" with respect to equitable claims arising under chapter 57 of the Revised Judicature Act (RJA), MCL 600.5701 *et seq*., which concerns proceedings to recover possession of premises. See MCL 600.8302(1) and (3).
>
> . . . MCL 600.8302(3) is a "more specific" grant of jurisdictional authority than the "general grant of jurisdictional power" found in MCL 600.8301(1). Because [MCL 600.8302(3)] is specific, it takes precedence over [MCL 600.8301(1)]. When a district court's action flowed from its power arising under Chapter 57 of the RJA [MCL 600.5701 *et seq*.], its actions are within the scope of [MCL 600.8302(3)], and [MCL 600.8301(1)] is inapplicable.

> [*Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 560-561; 840 NW2d 375 (2013) (citations and quotation marks omitted).]

The Court further explained the difference between want of jurisdiction and errors in exercising jurisdiction:

> Even assuming arguendo that [the] monetary component of [a] stipulated consent judgment exceeded the district court's authority, defendants still could not properly collaterally attack the entry of that judgment. As the Michigan Supreme Court explained in *Bowie v Arder*, 441 Mich 23, 49; 490 NW2d 568 (1992), quoting *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 545; 260 NW 908 (1935) (citation omitted):
>
> > "Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked."
>
> In other words, "lack of subject matter jurisdiction can be collaterally attacked[, whereas] the exercise of that jurisdiction can be challenged only on direct appeal." [*Clohset*, 302 Mich App at 563-564.]

This issue was recently addressed in an unpublished decision. "Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1); *In re Application of Indiana Mich Power Co*, 275 Mich App 369, 380; 738 NW2d 289 (2007), they may, however, be considered instructive or persuasive." *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). In *Bank of America v 5-3*

Greenway Trust, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2015 (Docket No. 324043), pp 8-9, this Court dealt with the same challenge in a property dispute between a bank and a trust:

> The bank devotes a great deal of time to the argument that only a circuit court has jurisdiction to determine title to property in quiet-title actions, MCL 600.2932(1), and that a district court only has jurisdiction to determine the right to possession. And therefore, anything determined in the district court or encompassed by the district court possession judgment has no bearing whatsoever on the circuit court's determination of title, which must be independently assessed by the circuit court. This argument lacks merit. First, it fails to appreciate that some possession judgments are necessarily predicated on an underlying title determination, as is the case here; the right of possession by the trust was dependent on its equitable title becoming absolute or legal title on the basis of expiration of the redemption period absent redemption. Second, the bank's argument ignores MCL 600.8302(3), which, again, provides that "[i]n an action under chapter 57, the district court may hear and determine an equitable claim . . . involving a right, interest, obligation, or *title* in land." (Emphasis added.) Finally, the fact that a circuit court has jurisdiction over quiet-title actions to determine interests in land does not mean that previously-entered, unchallenged, and valid possession judgments are irrelevant and have no bearing on the proper determination of title by the circuit court. This is made exceptionally clear in the context of former MCL 600.3240(13), which specifically provided that title vests with entry of a possession judgment. The circuit court was not entitled to disregard this statutory mandate when resolving the quiet-title dispute, considering that there was no jurisdictional problem that would have allowed a collateral attack. Aside from former MCL 600.3240(13), given the unchallenged default possession judgment, it became established that the bank had wrongfully held over following the redemp-

> tion period. And the circuit court was required, considering the inability to mount a collateral attack, to accept that premise in rendering its quiet-title ruling. Of course, accepting that premise dictated a ruling quieting title in favor of the trust. [Citations omitted.]

Another unpublished opinion is analogous to the case at bar. *Katulski v CPCA Trust I*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2015 (Docket Nos. 313790 and 316360), pp 1-2, had the same appellate posture as this case:

> In Docket No. 316360, CPCA Trust I (CPCA) filed a complaint seeking to evict the Katulskis from their property following a foreclosure by advertisement. The district court entered a judgment awarding CPCA possession and the Katulskis appealed to the circuit court. The circuit court affirmed, and the Katulskis now appeal that ruling by leave granted. In Docket No. 313790, the Katulskis filed a separate action against CPCA in circuit court, alleging various deficiencies in the foreclosure process and the underlying mortgage. The circuit court granted CPCA's motion for summary disposition, and the Katulskis now appeal that ruling by right. [Citation omitted.]

This Court rejected the Katulskis' claim that the circuit court erred in finding that res judicata barred them from contesting the foreclosure in Docket No. 313790:

> We conclude that the circuit court correctly ruled that res judicata barred the Katulskis' attacks on the foreclosure in Docket No. 313790. When CPCA sought summary disposition on the basis of res judicata, the district court's August 8, 2011 judgment awarding it possession of the real property constituted a final decision on the merits. The district court action also involved the same parties who participated in LC Docket No. 313790, the subsequent and separate circuit court action. The Katulskis' separate circuit court action challenging the foreclosure process involved legal "issues . . . [that] were or could have

> been decided in the prior" district curt [sic] summary proceeding, specifically, CPCA's compliance with the statutes governing foreclosure by advertisement and its entitlement to possession of the real property. In the summary possession action, the Katulskis disputed that CPCA had complied "with the Michigan [s]tatutes regarding foreclosure by advertisement and thus are not entitled to possession of the property." In April 2012, the Katulskis filed their motion to set aside the judgment of possession on the basis of fraud, but the district court did not specifically rule on the merits of the motion. The summary possession action did address and decide whether CPCA properly pursued foreclosure by advertisement and was entitled to possession of the property, and the Katulskis attacked the foreclosure on the same grounds asserted in that prior action. [*Id*. at 17 (citations omitted).]

Similarly, here, Appellants' claim that Appellees frustrated their attempt to redeem the property was decided in the district court. Therefore, the circuit court properly determined that Appellants' quiet title action was barred by the doctrine of res judicata.

Affirmed.

K. F. KELLY, P.J., and FORT HOOD and BORRELLO, JJ., concurred.

BAZZI v SENTINEL INSURANCE COMPANY

Docket No. 320518. Submitted December 9, 2015, at Detroit. Decided June 14, 2016, at 9:20 a.m. Leave to appeal granted ___ Mich ___.

Ali Bazzi brought an action in the Wayne Circuit Court against Sentinel Insurance Company and Citizens Insurance Company, seeking to recover personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries he received while driving a vehicle owned by his mother, Hala Bazzi. Genex Physical Therapy, Inc., Elite Chiropractic Center, PC, and Transmedic, LLC, intervened in the action to recover payment for the medical services they individually provided to plaintiff for his injuries. Sentinel Insurance insured the automobile driven by plaintiff through a commercial automobile policy issued to Mimo Investments, LLC, whose resident agent was plaintiff's sister, Mariam Bazzi. Sentinel Insurance filed a third-party complaint against Hala and Mariam Bazzi, seeking to rescind the policy on the basis that Hala and Mariam had fraudulently procured it to obtain lower premiums for plaintiff, who had been involved in prior accidents. The court, Lita M. Popke, J., entered a default judgment against Hala and Mariam. Sentinel Insurance then moved for summary disposition of plaintiff's PIP benefits claim and the claims of the intervening medical providers on the basis that the policy had been rescinded for fraud. The court denied Sentinel Insurance's motion, concluding that plaintiff had a valid claim for PIP benefits under the innocent-third-party rule, which provides that an insurer may not rescind benefits for mandatory coverage under an insurance policy as to an innocent third party injured in the accident even though the insured procured the policy through fraud in the application. Sentinel Insurance appealed by leave granted.

The Court of Appeals *held*:

1. An insurance policy is a contract, and common-law defenses like fraud may be invoked to avoid enforcement of the policy unless the Legislature restricted those defenses by statute. An insurer may invoke traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for that insurance even when the fraud was

easily ascertainable and the claimant is a third party. The relevant statute controls the mandated insurance coverages when there is a valid policy. Statutorily required coverages are not relevant when the insurer is entitled because of fraud in the application to declare the policy void *ab initio*.

2. The Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547 (2012), is determinative of the outcome in this case. In *Titan*, without regard to whether the insurance policy benefits were required by statute, the Court held that because the insureds procured the policy through fraud in the application, the insurer had no duty to indemnify its insureds in a claim brought by third parties injured in an automobile accident with the insureds even though the fraudulent information in the application was easily ascertainable and the claimant was an innocent third party. In reaching that result, the *Titan* Court abrogated the easily-ascertainable-fraud rule—which provided that insurance companies may not rescind a policy on the basis of fraud when the fraud was easily ascertainable—and overruled prior Court of Appeals decisions, including *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568 (1976), and its progeny.

3. *Titan* impliedly abrogated the innocent-third-party rule because there is no difference between that rule and the easily-ascertainable-fraud rule; both rules originated in *Kurylowicz*, and that case was expressly abrogated by *Titan*. It would be nonsensical to conclude that an insurer would have no liability if the fraud was easily ascertainable, but would retain liability if the fraud was not easily ascertainable. Accordingly, the rules are two different labels for the same rule. The *Titan* Court's overruling of *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355 (1989)—which discussed the innocent-third-party rule—supported the conclusion that the *Titan* Court's decision also abrogated the innocent-third-party rule. Public policy also did not require retention of the innocent-third-party rule, and it is up to the Legislature, not the courts, to create an innocent-third-party rule through legislation if the Legislature decides it is necessary.

4. The fact that *Titan* involved liability coverage under the financial responsibility act (FRA), MCL 257.501 *et seq.*, specifically proof of financial responsibility under MCL 257.518 and MCL 257.519, as opposed to the mandatory no-fault PIP benefits involved in this case, was irrelevant to the applicability of the *Titan* holding. Rather, the fact that MCL 275.520(f)(1) of the FRA specifically limits the ability of an automobile insurer to avoid liability on the ground of fraud simply supports the conclusion that in order for an insurer to preclude coverage because of the

insured's fraud, a statute must not limit the insurer's right to rescind the policy on the basis of fraud (like in MCL 257.520(f)(1)). The no-fault act does not contain language that limits an insurer's right to rescind coverage when an insured procures the policy through fraud in the application.

5. When an insurer is entitled to rescind a no-fault insurance policy because of fraud by the insured, it is not required to pay any benefits under the policy, including PIP benefits to a third party who is innocent of the fraud. In this case, the trial court erred by denying Sentinel Insurance's motion for summary disposition on the basis of its erroneous conclusion that the innocent-third-party rule survived *Titan*.

Reversed and remanded.

BOONSTRA, J., concurring, wrote separately to elaborate on the reasoning of the majority opinion and to explain that although the earlier decision in *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) (by a panel of which he was a part), vacated 498 Mich 870 (2015), conflicted with the conclusions reached by the majority here, in this case the Court benefited from substantial additional briefing, argument, and analysis, which resulted in the conflicting opinion. The innocent-third-party rule is part of the easily-ascertainable-fraud rule that was abrogated by the Supreme Court in *Titan*; being a third party is a necessary predicate to applying the easily-ascertainable-fraud rule. Contrary to the panel's conclusion in *State Farm*, for purposes of applying *Titan*'s conclusion that an insurer may rescind a policy when the insured fraudulently procures the policy, it is irrelevant that *Titan* involved optional liability insurance, while this case involved no-fault PIP benefits, because the no-fault act does not prohibit the insured from asserting common-law contract defenses, like rescission on the basis of fraud. While MCL 257.520(f)(1) of the FRA statutorily disallows the fraud defense, it does so only in relation to the required liability coverage mandated by that act. The MCL 257.520(f)(1) disallowance does not apply to statutorily mandated PIP benefits, and the no-fault act does not contain a similar disallowance.

BECKERING, J., dissenting, disagreed with the majority's analysis of *Titan* and its application of the holding in that case to deny plaintiff coverage for PIP benefits. The *Kurylowicz* opinion did not create the innocent-third-party rule, and its holding was not outcome-determinative in this case. The easily-ascertainable-fraud rule and the innocent-third-party rule are distinct rules;

before *Titan*, the easily-ascertainable-fraud rule had been applied to prevent an insurer from avoiding optional (nonstatutory) coverage when the insured's fraud was easily ascertainable, while the innocent-third-party rule was consistently applied to prevent an insurer avoiding liability for mandatory coverage, like PIP benefits. Because *Titan* involved contractually based excess liability coverage, not the statutorily mandated PIP benefits at issue in this case, and because the two rules are not the same, its holding—which threw out the easily-ascertainable-fraud rule—should not be extended to apply to mandatory PIP benefits. The *Titan* Court did not mention the innocent-third-party rule and did not discuss whether fraud could be asserted as a basis to avoid liability in the context of statutorily mandated benefits. Accordingly, the Court did not impliedly abrogate the innocent-third-party rule. Under the innocent-third-party rule, an insurer may not void a policy *ab initio* when an innocent third party is affected and the type of coverage is mandatory. The *Titan* Court only overruled *Ohio Farmers*, 179 Mich App 355, to the extent it held that an insurer may not deny coverage on the basis of fraud when it could have easily ascertained the fraud; the limited holding does not support the majority's rejection of the innocent-third-party rule because *Ohio Farmers* did not mention or involve an insurer's attempt to rescind statutorily mandated coverage. The innocent-third-party rule and statutorily mandated benefits were not at issue in *Titan*; the insurer in *Titan* expressly acknowledged liability for statutory residual liability amounts. Judge BECKERING would have concluded that *Titan* did not abrogate the innocent-third-party rule in the context of statutorily required PIP benefits under the no-fault act and that the language of the no-fault act does not contain exceptions to, or limitations on, its requirement that an insurance carrier cover certain identified PIP benefits. Accordingly, Judge BECKERING would have affirmed the trial court's conclusion that the innocent-third-party rule applied, but contrary to its conclusion, she would have held that plaintiff, as an innocent third party, was not limited in his recovery of PIP benefits by MCL 257.520 because that limitation was not applicable to this case.

1. INSURANCE — NO-FAULT — FRAUD BY APPLICANT — INNOCENT THIRD PARTY — RECOVERY OF PERSONAL PROTECTION INSURANCE BENEFITS.

An insurance company may declare a no-fault policy void *ab initio* and rescind it when it is able to establish that the policy was obtained through fraud; an insurance company may deny an innocent third party coverage for personal protection insurance

benefits under the no-fault act, MCL 500.3101 *et seq*., when the insurance company establishes that the policy was obtained through fraud.

2. INSURANCE — FRAUD BY APPLICANT — RECOVERY OF PERSONAL PROTECTION INSURANCE BENEFITS — INNOCENT THIRD PARTY — DEFENSES — INNOCENT-THIRD-PARTY RULE AND EASILY-ASCERTAINABLE-FRAUD RULE.

The easily-ascertainable-fraud rule and the innocent-third-party rule, which prevent an insurance company from rescinding a policy obtained by fraud and denying coverage to innocent third parties, are not viable defenses to an insurance company's denial of coverage for personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*.; there is no distinction between the easily-ascertainable-fraud rule and the innocent-third-party rule.

Gary R. Blumberg, PC (by *Gary R. Blumberg* and *Stefania Gismondi*), for Ali Bazzi.

Plunkett Cooney (by *Mary Massaron*) for Sentinel Insurance Company.

Anselmi & Mierzejewski, PC (by *John D. Ruth* and *Michael D. Phillips*), for Citizens Insurance Company.

Amici Curiae:

Willingham & Coté, PC (by *John A. Yeager* and *Kimberlee A. Hillock*), for Insurance Institute of Michigan.

Donald M. Fulkerson for Michigan Association for Justice.

Before: SAWYER, P.J., and BECKERING and BOONSTRA, JJ.

SAWYER, P.J. We are asked in this case to determine whether the so-called "innocent third party" rule, which this Court established in *State Farm Mut Auto*

Ins Co v Kurylowicz,[1] survived our Supreme Court's decision in *Titan Ins Co v Hyten*.[2] We conclude that it did not.

Plaintiff, Ali Bazzi (plaintiff), is seeking to recover personal protection insurance (PIP) benefits for injuries he sustained in an automobile accident while driving a vehicle owned by third-party defendant Hala Bazzi (plaintiff's mother).[3] Intervening plaintiffs, Genex Physical Therapy, Inc., Elite Chiropractic Center, PC, and Transmedic, LLC, are healthcare providers who provided services to plaintiff as a result of those injuries and are seeking payment for those services. The vehicle driven by Bazzi was insured under a commercial automobile policy issued by defendant Sentinel Insurance to Mimo Investments, LLC.[4] Sentinel maintains that the policy was fraudulently procured by Hala Bazzi and third-party defendant Mariam Bazzi (plaintiff's sister and the resident agent for Mimo Investments) in order to obtain a lower premium because of plaintiff's involvement in a prior accident. Sentinel maintains that the vehicle was actually leased to Hala Bazzi for personal and family use, not for commercial use by Mimo, and, in fact, that Mimo was essentially a shell company, which had no assets or employees or was not otherwise engaged in actual business activity. Sentinel also alleges as fraud that the third-party defendants failed to disclose plaintiff would be a regular driver of the vehicle. In fact,

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[1] 67 Mich App 568; 242 NW2d 530 (1976).

[2] 491 Mich 547; 817 NW2d 562 (2012).

[3] Plaintiff is seeking PIP benefits under the no-fault act, MCL 500.3101 *et seq*. See MCL 500.3105 (insurer liability) and MCL 500.3107 (allowable expenses).

[4] Defendant Citizens Insurance Company's involvement and potential liability in this case is as the servicing insurer under the Michigan Assigned Claims Plan. See MCL 500.3172(1).

Sentinel pursued a third-party complaint against Hala and Mariam Bazzi, seeking to rescind the policy on the basis of fraud in the application.[5]

Sentinel thereafter moved for summary disposition of plaintiff's claim against Sentinel for PIP benefits, as well as the intervening plaintiffs' claims because the policy was rescinded on the basis of fraud. The trial court denied the motion, concluding that plaintiff had a claim because of the innocent-third-party rule.[6] Sentinel sought leave to appeal in this Court, which we denied.[7] Sentinel then sought leave to appeal in the Supreme Court, which, in lieu of granting leave, remanded the matter to this Court for consideration as on leave granted.[8] We now reverse the decision of the trial court and remand the matter for further proceedings consistent with this opinion.

The standard of review to be applied here was set forth, as follows, in *Titan*:[9]

> This Court reviews de novo a trial court's decision on a motion for summary disposition. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). In addition, the proper interpretation of a statute is a question of law that this Court reviews de novo. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The proper interpretation of a contract is also a question of law that this Court reviews de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

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[5] The trial court entered a default judgment against the third-party defendants in favor of Sentinel.

[6] At this point we assume, without deciding, that plaintiff is, in fact, innocent of the fraud.

[7] *Bazzi v Sentinel Ins Co*, unpublished order of the Court of Appeals, entered May 21, 2014 (Docket No. 320518).

[8] *Bazzi v Sentinel Ins Co*, 497 Mich 886 (2014).

[9] 491 Mich at 553.

Resolution of this case begins and ultimately ends with our Supreme Court's decision in *Titan*. Although *Titan* did not involve a no-fault insurance claim for PIP benefits, we nonetheless are convinced that *Titan* compels the conclusion that the innocent-third-party rule does not apply to a claim for those benefits. That is, if an insurer is entitled to rescind a no-fault insurance policy because of fraud, it is not obligated to pay any benefits under that policy, including PIP benefits to a third party innocent of the fraud.

In *Titan*, the insurer sought a declaratory judgment on the basis that, because of fraud in the application, it had no duty to indemnify its insureds in a claim brought by third parties injured in an automobile accident with Titan's insureds.[10] The injured parties and their insurer maintained that Titan could not avoid liability to the innocent third parties because the fraud was easily ascertainable. While this Court agreed because of our earlier decision in *Kurylowicz*, the Supreme Court disagreed and overruled *Kurylowicz* and its progeny.[11]

Plaintiff and defendant Citizens argue that the decision in *Titan* does not apply to this case for two reasons: *Titan* did not involve mandatory PIP benefits, and it only considered the "easily ascertainable fraud" rule and not the "innocent third party" rule. These are the essential arguments in this case because if *Titan* does not apply here, then there is binding precedent of this Court in which we applied the innocent-third-

[10] *Titan*, 491 Mich at 551-552. Titan acknowledged that it was obligated to indemnify its insureds for the minimum liability coverage of $20,000 per person/$40,000 per occurrence required under the financial responsibility act, MCL 257.501 *et seq*. *Id*. at 552 n 2.

[11] *Id*. at 550-551.

party rule to no-fault PIP cases.[12] On the other hand, if *Titan* does apply, then we are certainly obligated to follow a recent Supreme Court decision over an older decision of this Court. But, after careful analysis, we are not persuaded that either of these arguments provides a basis for distinguishing *Titan*, and therefore we conclude that Sentinel is not obligated to pay no-fault benefits to plaintiff if Sentinel establishes that the policy was procured by fraud.

We first consider whether there is a distinction between the easily-ascertainable-fraud rule discussed in *Titan* and the innocent-third-party rule advanced in this case. We conclude that they are one and the same.

While *Titan* consistently referred to the easily-ascertainable-fraud rule set forth in *Kurylowicz*, it and the so-called innocent-third-party rule are not separate and distinct rules. As stated by the *Titan* Court:

> The principal question presented in this case is whether an insurer may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, when the fraud was easily ascertainable and the claimant is a third party.[13]

Therefore, the focus of *Titan* was not merely on the ascertainability of the fraud; it was also relevant that the case involved a third-party claimant. Indeed, the substance of *Kurylowicz* was that both conditions had to apply before the insurer was prevented from raising a fraud defense. This point was recognized by the Supreme Court in *Titan* when it observed that "when it is the insured who seeks benefits under an insurance

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[12] See, e.g., *Lake States Ins Co v Wilson*, 231 Mich App 327; 586 NW2d 113 (1998).

[13] 491 Mich at 560.

policy procured through fraud, even an easily ascertainable fraud will not preclude an insurer from availing itself of traditional legal and equitable remedies to avoid liability."[14]

In sum, *Titan* recognized that the rule in *Kurylowicz* only applied if the fraud was easily ascertainable and involved an innocent third party. Moreover, it would make no sense to conclude that an insurer has no liability if the fraud is easily ascertainable, but would retain liability if the fraud was not easily ascertainable.[15] Accordingly, "easily ascertainable" and "innocent third party" are merely two different labels for the same rule, and we cannot dismiss the application of *Titan* merely by applying the "innocent third party" label to this case and then pointing out that *Titan* dealt with the "easily ascertainable fraud" rule. That is, in rejecting the easily-ascertainable-fraud rule, the Supreme Court of necessity also rejected the innocent-third-party rule because they are, in fact, the same rule.

Furthermore, even if the decision in *Kurylowicz* has evolved into two separate rules—the easily-ascertainable-fraud rule and the innocent-third-party rule—it is irrelevant. Both these rules have their roots in the *Kurylowicz* decision. And *Titan* clearly overruled *Kurylowicz* "and its progeny . . . ."[16] Moreover, this point is further supported by the fact that one of the cases explicitly overruled by *Titan* was this Court's decision

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[14] *Id*. at 564.

[15] Indeed, applying such a conclusion to this case would lead to the rather bizarre result that Sentinel could deny liability if it can demonstrate that the fraud committed by the Bazzis was easily ascertainable, but not if the fraud was more difficult to establish.

[16] *Titan*, 491 Mich at 551, 573.

in *Ohio Farmers Ins Co v Mich Mut Ins Co*.[17] While *Titan* did state that *Ohio Farmers* was overruled to the extent it held "that an insurer is estopped from denying coverage on the basis of fraud when it could have easily ascertained the fraud,"[18] the discussion in *Ohio Farmers* regarding its reliance on *Kurylowicz* focused on the claimant being an innocent third party.[19] In fact, *Titan* cited *Ohio Farmers* for the proposition that "it is contended that the 'easily ascertainable' rule is required for the protection of third parties."[20] Yet, the quotation from *Ohio Farmers* cited by *Titan* referred not to the fraud being easily ascertainable, but to an insurer being estopped from rescinding a policy when an innocent third party has been injured.[21] This then brings us back to our earlier point: that the easily-ascertainable-fraud rule and the innocent-third-party rule are one and the same. An overruling of *Ohio Farmers* of necessity overrules the innocent-third-party rule.

We now turn to the other question posed in this case, whether the holding in *Titan* extends to mandatory no-fault benefits. We conclude that it does. *Titan* involved optional benefits not mandated by statute. But that was not the basis of the Court's decision. And it made the rather unremarkable observation that when insurance benefits are mandated by statute, coverage is governed by that statute.[22] It is also true that "because insurance policies are contracts, common-law defenses may be invoked to avoid enforcement of an

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[17] 179 Mich App 355; 445 NW2d 228 (1989).

[18] *Titan*, 491 Mich at 551 n 1.

[19] *Ohio Farmers*, 179 Mich App at 363-365.

[20] *Titan*, 491 Mich at 568.

[21] *Id*. at 568 n 11.

[22] *Id*. at 554.

insurance policy, *unless those defenses are prohibited by statute*."[23] The Court ultimately held "that an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party."[24] And it did so without qualification regarding whether those benefits were mandated by statute. Therefore, if there is a valid policy in force, the statute controls the mandated coverages. But the coverages required by law are simply irrelevant when the insurer is entitled to declare the policy void *ab initio*. The situation would be akin to if the automobile owner had never obtained an insurance policy in the first place; the owner would have been obligated by law to obtain coverage, but failed to do so.

Thus, the question is not whether PIP benefits are mandated by statute, but whether that statute prohibits the insurer from availing itself of the defense of fraud. And the parties are unable to identify a provision in the no-fault act itself in which the Legislature statutorily restricts the use of the defense of fraud with respect to payment of PIP benefits. That is, the one argument under *Titan* that would carry the day for the appellees simply does not exist. And the Legislature was certainly aware that it could do so as it had already done so with respect to the financial responsibility act.[25]

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

[24] *Id*. at 571.

[25] See MCL 257.520(f)(1) (providing in part that "no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense as against such judgment creditor").

This leads us to a related argument raised by Citizens: that *Titan* is inapplicable because it dealt with the financial responsibility act, which is not at issue here. Citizens misconstrues the discussion in *Titan* regarding MCL 257.520. While MCL 257.520 was somewhat central to the Court's analysis in *Titan*, the Court carefully analyzed that statute to dismiss prior decisions that had concluded it applied to all liability insurance policies; the Court concluded that the MCL 257.520(f)(1) limitation on the fraud defense does not apply to all automobile insurance policies. *Titan*[26] analyzed this point as follows:

> Several appellate decisions of this state have suggested that MCL 257.520 applies to *all* liability insurance policies. For example, in *State Farm Mut Auto Ins Co v Sivey*, 404 Mich 51, 57; 272 NW2d 555 (1978), this Court indicated that MCL 257.520(b)(2) applies to "*all* policies of liability insurance[.]" (Emphasis added.) In addition, in *Farmers Ins Exch v Anderson*, 206 Mich App 214, 220; 520 NW2d 686 (1994), the Court of Appeals indicated that "when an accident occurs in this state, the scope of liability coverage is determined by the financial responsibility act." See also *League Gen Ins Co v Budget Rent-A-Car of Detroit*, 172 Mich App 802, 805; 432 NW2d 751 (1988) ("When an accident occurs in this state, the scope of the liability coverage required in an insurance policy is determined by Michigan's financial responsibility act[.]"). However, none of these decisions undertook a close analysis of this issue.
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> We have closely reviewed MCL 257.520(f)(1), and we believe that the statute does not *in every case* limit the ability of an automobile insurer to avoid liability on the ground of fraud; its reference to "motor vehicle liability policy" is not all encompassing. Rather, as used in MCL 257.520(f)(1), "motor vehicle liability policy" refers only to an "owner's or an operator's policy of liability insurance,

[26] 491 Mich at 558-560.

> certified as provided in [MCL 257.518] or [MCL 257.519] as proof of financial responsibility . . . .” MCL 257.520(a). Thus, *absent* this certification, MCL 257.520(f)(1) has no relevant application. Further, MCL 257.520(f)(1) refers only to “the insurance *required by this chapter*,” (emphasis added), and the only insurance required by chapter V of the Michigan Vehicle Code is insurance “certified as provided in [MCL 257.518] or [MCL 257.519] as proof of financial responsibility . . . .” MCL 257.520(a). Therefore, as we stated in *Burch v Wargo*, 378 Mich 200, 204; 144 NW2d 342 (1966), MCL 257.520 “applies only when ‘proof of financial responsibility for the future’ . . . is statutorily required . . . .” See also MCL 257.522 (“This chapter shall not be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by any other law of this state . . . .”); and *State Farm Mut Auto Ins Co v Ruuska*, 412 Mich 321, 336 n 7; 314 NW2d 184 (1982) (“[I]n discussing the requisites for an automobile liability policy issued as proof of future financial responsibility, the Legislature [in MCL 257.520(b)], after requiring an owner’s policy to designate by explicit description or appropriate reference all covered motor vehicles, limited the liability coverage to only those automobiles listed in the policy by speaking in terms of the use of ‘such’ vehicle(s).”). For these reasons, we now clarify that MCL 257.520(f)(1) does not apply to a motor vehicle liability insurance policy unless it has been certified under MCL 257.518 or MCL 257.519 and, to the extent that *Sivey, Anderson*, and *League* suggest otherwise, they are overruled.

This is an important point. *Titan* specifically established that MCL 257.520(f)(1) only restricts the fraud defense as to coverage required under Chapter V of the vehicle code.[27] It also explains why it is not relevant whether a coverage is mandatory because it is only relevant whether the Legislature has restricted the availability of the fraud defense with respect to a particular coverage.

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[27] MCL 257.501 through MCL 257.532.

Therefore, it is necessary to determine exactly to what coverage the restrictions of MCL 257.520(f)(1) apply. First, it only restricts application of the fraud defense to coverage required in Chapter V. As discussed in the above quotation from *Titan*, the only insurance coverage required in Chapter V is the proof of financial responsibility under MCL 257.518 and MCL 257.519. And that proof of financial responsibility is only required to prevent the suspension of the license, registration, and nonresident driving privileges of a person against whom there is an unsatisfied judgment as defined in Chapter V.[28] Therefore, unless the insured in this case had an outstanding, unsatisfied judgment—and there is no indication that this is the case—then the provisions of MCL 257.520 would simply not apply. This is in contrast to MCL 500.3101 of the no-fault act, which requires that the owner or registrant of a motor vehicle driven on a highway carry certain insurance coverages, including residual liability insurance. And under MCL 500.3131 and MCL 500.3009, the minimum limits are similar to that required under the financial responsibility act. But unlike the provisions of the financial responsibility act, those statutory sections do not restrict the availability of the fraud defense.[29]

Citizens argues that MCL 257.520(f)(1) "only provides authority for policy cancellation or annulment as to the 'insured' " and, therefore, the "statute has absolutely no application to the claim of Ali Bazzi in the instant action, and makes the *Titan v. Hyten* opinion, again, completely distinguishable." While Citizens is

[28] MCL 257.512 and MCL 257.513.

[29] This also rebuts the suggestion that the insurer would be liable for $20,000 per person/$40,000 per occurrence in PIP benefits. The provisions of the financial responsibility act are simply inapplicable to no-fault benefits or other coverages required under the no-fault act.

correct that MCL 257.520 is inapplicable to this case, it misses the point of the discussion of the statute in *Titan*. It is not, as Citizens' argument would suggest, that MCL 257.520 must apply for the insurer to deny coverage. Rather, it underscores that MCL 257.520(f)(1), or a similar statute, *must* apply in order to preclude the insurer from denying coverage because of fraud.

Next, Citizens argues that public policy requires us to retain the innocent-third-party rule. But this argument ignores the Supreme Court's criticism of this Court's reliance on public policy in *Kurylowicz* when justifying the easily-ascertainable-fraud rule. In *Titan*,[30] the Court had this to say on the topic:

> First, *Kurylowicz* justified the "easily ascertainable" rule on the basis of its understanding of the "public policy" of Michigan. In light of the Legislature's then recent passage of the no-fault act, MCL 500.3101 *et seq*., *Kurylowicz* reasoned that
>
> > the policy of the State of Michigan regarding automobile liability insurance and compensation for accident victims emerges crystal clear. It is the policy of this state that persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery. Given this policy, it is questionable whether a policy of automobile liability insurance can ever be held void *ab initio* after injury covered by the policy occurs. [*Kurylowicz*, 67 Mich App at 574.]
>
> This "public policy" rationale does not compel the adoption of the "easily ascertainable" rule. In reaching its conclusion, *Kurylowicz* effectively replaced the actual provisions of the no-fault act with a generalized summation of the act's "policy." Where, for example, in *Kurylowicz*'s state-

[30] 491 Mich at 564-566 (bracketed citation in original).

> ment of public policy is there any recognition of the Legislature's explicit mandate that, with respect to insurance required by the act, "no fraud, misrepresentation, . . . or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense" to the payment of benefits? MCL 257.520(f)(1). We believe that the policy of the no-fault act is better understood in terms of its actual provisions than in terms of a judicial effort to identify some overarching public policy and effectively subordinate the specific details, procedures, and requirements of the act to that public policy. In other words, it is the policy of this state that all the provisions of the no-fault act be respected, and *Kurylowicz*'s efforts to elevate *some* of its provisions and *some* of its goals above other provisions and other goals was simply a means of disregarding the stated intentions of the Legislature. The no-fault act, as with most legislative enactments of its breadth, was the product of compromise, negotiation, and give-and-take bargaining, and to allow a court of this state to undo those processes by identifying an all-purpose public policy that supposedly summarizes the act and into which every provision must be subsumed, is to allow the court to act beyond its authority by exercising what is tantamount to legislative power. Third-party victims of automobile accidents have a variety of means of recourse under the no-fault act, and it is to those means that such persons must look, not to a judicial articulation of policy that has no specific foundation in the act itself and was designed to modify and supplant the details of what was actually enacted into law by the Legislature.

The policy concerns raised by Citizens may well have merit. But it is for the Legislature, and not this Court, to determine whether there is merit to those concerns and, if so, the appropriate remedy. While the Legislature might conclude that the appropriate response is to create an innocent-third-party rule, it may choose to address the issue differently. While we can envision any number of policy issues, as well as solutions to those issues, we are judges, not legisla-

tors. It is for the Legislature, not this Court, to consider these issues and determine what response, if any, represents the best public policy. We decline the invitation to legislate into existence an innocent-third-party rule that, thus far, the Legislature has chosen not to adopt.

For these reasons, we conclude the trial court erred by denying summary disposition to Sentinel based on the trial court's erroneous conclusion that the innocent-third-party rule remained viable after our Supreme Court's decision in *Titan*. However, we must decide the appropriate disposition of this matter. Sentinel argues that it is entitled to have summary disposition entered in its favor because a default judgment was entered against Hala and Mariam Bazzi, which rescinded the insurance policy. Citizens argues that that default judgment only operates as a determination against those two parties and not against it or Ali Bazzi. It does not appear that the trial court ultimately resolved this question; therefore, we conclude that the trial court should first address this question on remand.

Accordingly, we remand the matter to the trial court. On remand, there are two questions before the trial court. First, it must determine whether the default judgment against Hala and Mariam Bazzi conclusively established fraud, which would provide a basis for Sentinel to rescind the policy as to all parties, or whether the remaining parties are entitled to litigate the issue of fraud. Next, the trial court must determine whether there is a genuine issue of material fact regarding the fraud issue. If the trial court determines either of those questions in favor of Sentinel, it shall enter summary disposition in favor of Sentinel. If the

trial court rules against Sentinel on both of those questions, then it shall deny summary disposition.[31]

In sum, regardless whether there is one rule or two, and whether we consider a case involving liability coverage or PIP benefits, it all leads back to *Kurylowicz*, and the Supreme Court in *Titan* overruled *Kurylowicz* because *Kurylowicz* ignored the Supreme Court's decision in *Keys v Pace*,[32] which had arguably itself involved easily ascertainable fraud and an innocent third party.[33] Accordingly, we conclude that: (1) there is no distinction between an easily-ascertainable-fraud rule and an innocent-third-party rule, (2) the Supreme Court in *Titan* clearly held that fraud is an available defense to an insurance contract except to the extent that the Legislature has restricted that defense by statute, (3) the Legislature has not done so with respect to PIP benefits under the no-fault act, and (4) the judicially created innocent-third-party rule has not survived the Supreme Court's decision in *Titan*. Therefore, if an insurer is able to establish that a no-fault

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[31] We acknowledge that, based on a statement made by the trial court at the motion hearing, it seems likely the trial court will rule in Sentinel's favor regarding whether there is a genuine issue of material fact on the issue of fraud. Specifically, the trial court stated as follows:

> So if the inquiry ended right there you would say that, *I've already made the determination that Hala Bazzi was fraud*, so you would say, you would agree, *we would all agree that the contract is rescinded*, you would say rescinded with a period right there. [Emphasis added.]

It can certainly be argued that the trial court has already resolved this point and merely went on to hold that the policy cannot be rescinded as to Ali Bazzi solely because of the innocent-third-party rule. Nonetheless, we are not quite prepared to determine that the trial court definitively resolved the issue; therefore, remand is necessary.

[32] 358 Mich 74; 99 NW2d 547 (1959).

[33] See *id*. at 84.

policy was obtained through fraud, it is entitled to declare the policy void *ab initio* and rescind it, including denying the payment of PIP benefits to innocent third parties.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Sentinel may tax costs.

BOONSTRA, J., concurred with SAWYER, P.J.

BOONSTRA, J. (*concurring*). I fully concur in the majority opinion. I write separately because, as a member of the panel that decided *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] I feel obliged to offer some elucidation for the conflicting conclusion that the majority reaches today and, in doing so, to elaborate somewhat on its reasoning.

In vacating both *State Farm* and another unpublished decision that had reached a contrary conclusion,[2] our Michigan Supreme Court directed that those matters be held in abeyance pending this Court's decision in this case. The panel in this case has now had the benefit of substantial additional briefing and argument both in this case and in the contemporaneously considered case of *AR Therapy Servs, Inc v Farm Bureau Mut Ins Co of Mich*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2016 (Docket No. 322339), and has had the opportunity to

[1] Our Supreme Court subsequently vacated that decision. *State Farm Mut Auto Ins Co v Mich Muni Risk Mgt Auth*, 498 Mich 870 (2015).

[2] See *Frost v Progressive Mich Ins Co*, unpublished opinion of the Court of Appeals, issued September 23, 2014 (Docket No. 316157), vacated sub nom *Frost v Citizens Ins Co*, 497 Mich 980 (2015).

develop and employ a level of analysis not reflected in either of the panels' earlier unpublished opinions.

Cogent arguments exist on both sides of the issue before us. At first blush, it may appear that we are being asked to disregard decades of published jurisprudence from this Court, in favor of abrogating it based on an interpretation of recent Supreme Court obiter dicta, and to hold that the Supreme Court has already implicitly abrogated it. Were that the case, I would be inclined to conclude that we are bound to follow the binding decisions of this Court[3] and to leave it to the Supreme Court to further develop the law in the current context, if it chooses to do so, by effecting that abrogation explicitly.

I am persuaded, however, as the majority recognizes, that the judicially created doctrine known as the "innocent-third-party rule" is indeed part and parcel of the "easily ascertainable rule" that the Supreme Court abrogated in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). In *Titan*, the Supreme Court noted that "the 'easily ascertainable' rule . . . only applies when a third-party claimant is involved." *Id*. at 563. Therefore, while its application has been described as denying insurers equitable remedies "when the fraud was easily ascertainable and the claimant is a third party," *id*. at 550, the latter reference (to the claimant being a third party, and presumably thus being innocent of the fraud) really is surplusage because being a third party is a necessary predicate to applying the

[3] MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis."); MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.").

easily-ascertainable-fraud rule in the first place. The Supreme Court further noted that "when it is the insured who seeks benefits under an insurance policy procured through fraud, even an easily ascertainable fraud will not preclude an insurer from availing itself of traditional legal and equitable remedies to avoid liability." *Id*. at 564. Again, that means the easily-ascertainable-fraud rule only applies when the claimant is a third party to the fraud. An insurer may rescind as to a defrauding insured without regard to whether the fraud was easily ascertainable.

I therefore conclude that by rejecting *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976), and its easily-ascertainable-fraud rule, the Supreme Court must have been rejecting the totality of the rule, whether we refer to it as the easily-ascertainable-fraud rule or the innocent-third-party rule. The reason is that if an insurer may rescind a policy even as to an innocent third party when the fraud was easily ascertainable to the insurer, then it must also be allowed to rescind when the fraud was not easily ascertainable. To conclude otherwise would simply make no sense. Why would an insurer remain accountable to an innocent third party in a situation in which the insurer could *not* have easily discovered the fraud, if it is not accountable to the third party in a situation in which the insurer *could* have easily discovered the fraud? For this reason, in abolishing the easily-ascertainable-fraud rule, the Supreme Court in *Titan* must also have rejected the innocent-third-party rule. This conclusion is bolstered by the fact that the Supreme Court overruled not only *Kurylowicz* but also its "progeny"—such as *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355; 445 NW2d 228 (1989). *Ohio Farmers* did not even address the easily-ascertainable-fraud aspect of the rule but only (insofar as it

is relevant to this case) the innocent-third-party aspect. Yet it was overturned by *Titan*. Therefore, it is inconceivable that in overturning *Kurylowicz* and *Ohio Farmers*, the Supreme Court overturned one aspect of the rule without also overturning the other. This explains the Supreme Court's broad statement in *Titan*, in response to the contention "that the 'easily ascertainable' rule is required for the protection of third parties," that "there is simply no basis in the law to support the proposition that public policy requires a private business in these circumstances to maintain a source of funds for the benefit of a third party with whom it has no contractual relationship." *Titan*, 491 Mich at 568.

Having concluded that the Supreme Court in *Titan* abolished the innocent-third-party rule, I must next address the distinction relied on by the panel in *State Farm*, unpub op at 9-10, i.e., that *Titan* involved optional liability insurance, while *State Farm* (like this case) involves statutory no-fault personal protection insurance (PIP) coverage. The question is: does the distinction matter? I conclude that it does not.

The Supreme Court in *Titan* indeed noted that "when a provision in an insurance policy is not mandated by statute, the rights and limitations of the coverage are *entirely* contractual and construed without reference to the statute." *Titan*, 491 Mich at 554 (emphasis added). This was contrasted with a situation in which "a provision in an insurance policy is mandated by statute," in which case "the rights and limitations of the coverage are governed by that statute." *Id*. The coverage at issue in *Titan* was nonstatutory, purely optional liability coverage. The coverage at issue in this case, by contrast, is PIP coverage that is required by the no-fault act.

However, I conclude that this does not take PIP coverage outside the reach of *Titan*'s conclusion that an insured's fraud makes the equitable remedy of rescission available to the insurer. The Supreme Court said that "because insurance policies are contracts, common-law defenses may be invoked to avoid enforcement of an insurance policy, unless those defenses are prohibited by statute." *Id*. It did not say that common-law defenses were only available if the coverage was "entirely" contractual; rather, it stated that common-law defenses are available to contractual insurance policies, but limited in the event that a statute "prohibits" the defense. *Id*.

In *Titan*, there was no statute requiring optional liability coverage, and no statutory prohibition on a contractual defense. Therefore, common-law contract defenses were allowed. Also in *Titan*, the insurer conceded liability (as the panel in *State Farm*, unpub op at 9, noted) for the basic liability coverage that is mandated by the financial responsibility act, MCL 257.501 *et seq*. *Titan*, 491 Mich at 552 n 2. And the Supreme Court clarified that MCL 257.520 does not apply to all liability policies, but only to those that are required by that act. *Id*. at 559-560. Moreover, the financial responsibility act provides that, as to the basic statutorily required liability coverage, fraud is not a defense. MCL 257.520(f)(1). The statutory disallowance of the fraud defense is therefore limited to the basic required liability coverage mandated by the financial responsibility act. As stated in *Titan*, "the rights and limitations of the coverage are governed" by the financial responsibility act, such that the limitation on the otherwise-available fraud defense applies only to the extent the statute dictates, i.e., only to the basic required liability insurance. *Titan*, 491 Mich at 554.

In this case, by contrast, the statutorily mandated coverage is PIP benefits, not liability coverage; therefore, the financial responsibility act does not apply. See *Titan*, 491 Mich at 595-560; MCL 257.520. Accordingly, the MCL 257.520(f)(1) provision that disallows a fraud defense also does not apply. Instead, we must look to the no-fault act, and it does not contain a similar provision that would disallow a fraud defense in this situation. So in applying *Titan*'s rule that "the rights and limitations of the coverage are governed by th[e] statute," *Titan*, 491 Mich at 554, the no-fault statute at issue does nothing to limit the availability of the otherwise-available fraud defense.

Further, *Titan* quotes from *Couch on Insurance* to the effect that "[the insurance] policy and the statutes relating thereto must be read and construed together as though the statutes were part of the contract . . . ." *Titan*, 491 Mich at 554, quoting 12A Couch, Insurance, 2d (rev ed), § 45:694, pp 331-332. And that would mean that if there were a statutory disallowance of a fraud defense (as there is in MCL 257.520(f)(1)), it would be part of the policy and thus contractually enforceable. If, however, there is no language in the statute (as is the case with the no-fault act) prohibiting a fraud defense, then there is no basis by which to disallow the otherwise-available fraud defense as to PIP coverage. Again, as *Titan* noted, "because insurance policies are contracts, common-law defenses may be invoked to avoid enforcement of an insurance policy, *unless those defenses are prohibited by statute*." *Id*. (emphasis added). There being no statutory prohibition of the fraud defense in this situation, there is nothing to preclude its invocation here.

Said differently, if, as *Titan* says, we must construe the insurance policy and the statute (here, the no-fault

statute) together as though the statute is part of the contract, *id*., and there is nothing in the statute to the contrary, the common-law fraud defense remains available to effect a rescission of the policy, and with it, the applicability of the statutory provisions that are otherwise incorporated into the contract. After all, if an insurer only has PIP obligations because it entered into a contract with its insured, and if it is entitled to rescind the contract because of the insured's fraud, then there is no basis for a third party to enforce against this contracting insurer the statutory PIP liabilities that only derive (as to that insurer) from the contract that has been rescinded.

Finally, I note that in prior opinions this Court has justified the innocent-third-party rule in various ways that have ranged from public policy[4] to reliance on our Supreme Court's decision in *Morgan v Cincinnati Ins Co*, 411 Mich 267; 307 NW2d 53 (1981), to the language in MCL 257.520(f) of the financial responsibility act. Of those justifications, two of them (i.e., public policy and MCL 257.520(f)) were expressly rejected by the Supreme Court in *Titan*. *Titan*, 491 Mich at 559-560, 564-565. Additionally, I note that *Morgan* arose in an entirely different context, a fire insurance policy that incorporated a (now-repealed)[5] statutory provision regarding the defense of fraud by the insured. *Morgan*, 411 Mich at 276. The issue in *Morgan* thus involved the interpretation of that statutorily mandated language

[4] As the majority notes, there are potentially meritorious public policy issues that the Legislature may wish to consider. However, it is properly the role of the Legislature, not this Court, to consider and address those issues. See *Myers v Portage*, 304 Mich App 637, 644; 848 NW2d 200 (2014). ("[M]aking public policy is the province of the Legislature, not the courts.").

[5] See 1990 PA 305, effective January 1, 1992.

in the policy, not the applicability of a common-law contract defense. *Id*. at 276-277.

In light of this analysis and that of the majority opinion, I simply see no way to continue to apply the innocent-third-party rule in the PIP context. I therefore concur in the majority's determination. Applying *Titan*, when an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void *ab initio* and rescind it, including denying the payment of benefits to innocent third parties.

BECKERING, J. (*dissenting*). At issue in this appeal is whether our Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), which threw out the "easily ascertainable rule," adversely impacted and necessarily abrogated the "innocent-third-party rule," which I maintain is a distinctly different rule and one to which this Court has adhered for decades without complaint or redirection from either our Supreme Court or our Legislature. With all due respect for my esteemed colleagues, I would conclude that the easily-ascertainable-fraud and innocent-third-party rules are not "one and the same," and caselaw bears out a clear distinction. Furthermore, because they are different rules and because the coverage at issue in *Titan*—contractually based excess liability coverage—is substantially different from the type of coverage at issue in this case—statutorily mandated benefits—I would decline to extend *Titan* and would instead adhere to 30 years of this Court's published decisions applying the innocent-third-party rule. In this respect, I would affirm the decision of the circuit court, save for the circuit court's decision to limit personal protection insurance (PIP) benefits to

the statutory minimums set forth in MCL 257.520, which does not apply to the coverage at issue.

I. THE INNOCENT-THIRD-PARTY RULE IS NOT THE SAME AS THE EASILY-ASCERTAINABLE-FRAUD RULE

Before diving into the effect of *Titan*, I would be remiss not to address the majority and concurring opinions' conclusion that the easily-ascertainable-fraud rule and the innocent-third-party rule are one and the same. They are not. My colleagues conclude that they are the same in part because they both necessarily involve an innocent third party. While this observation is accurate, any attempt to equate them disregards the context in which they have been used and overlooks pertinent caselaw. The innocent-third-party rule has consistently been applied to prevent an insurer from avoiding liability as to *mandatory* coverage—namely PIP benefits, while the easily-ascertainable-fraud rule had, before it was overruled in *Titan*, consistently been applied to prevent an insurer from avoiding *optional* coverage, i.e., nonstatutory coverage, when the insured's fraud was easily ascertainable. See, e.g., *Farmers Ins Exch v Anderson*, 206 Mich App 214; 520 NW2d 686 (1994), overruled by *Titan*, 491 Mich 547; *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530, overruled by *Titan*, 491 Mich 547.

The difference between the rules can be put simply: the innocent-third-party rule acts as a prohibition against rescinding a policy that was procured by fraud, *but only as to mandatory coverage*—specifically PIP coverage—for innocent third parties, while the now-overruled easily-ascertainable-fraud rule prevented a defrauded insurer from avoiding liability with respect to *optional coverage*. Stated differently, the innocent-third-party rule concerns statutory benefits, and the

easily-ascertainable-fraud rule pertains to benefits originating in the insurance policy. Thus, the rules serve distinct purposes and relate to different types of insurance coverage. This Court has recognized this very principle in the past. See *Manier v MIC Gen Ins Corp*, 281 Mich App 485, 489-492; 760 NW2d 293 (2008), overruled by *Titan*, 491 Mich 547; *Lake States Ins Co v Wilson*, 231 Mich App 327, 331-332; 586 NW2d 113 (1998); *Anderson*, 206 Mich App at 216-219. For instance, in *Anderson*, 206 Mich App at 217, a case that was overruled by *Titan* for its application of the easily-ascertainable-fraud rule, the insurer, much like the insurer in *Titan*, conceded liability for the statutorily mandated $20,000/$40,000 limits found in MCL 257.520(f)(1).[1] The issue before this Court was whether the insurer, "upon discovering that the insured has made fraudulent and material misrepresentations in procuring the policy, may assert rescission as a basis to limit its liability to the statutory minimum, even when innocent third parties have been injured." *Anderson*, 206 Mich App at 217. In resolving this issue, the panel noted the innocent-third-party rule and declared that, in light of the rule, the insurer conceded it could not rescind the policy as to *statutorily mandated coverage*, i.e., the $20,000 and $40,000 limits imposed by MCL 257.520(f)(1). *Id*. at 218. This, of course, was required, in large part, by MCL 257.520(f)(1).[2] Nevertheless, the insurer sought to limit its liability for *optional*, *nonstatutory coverage*. Optional liability coverage, which is addressed in MCL 257.520(g), does not include the same statutory limitation on obtaining rescission in

[1] This was the precise situation in *Titan*, 491 Mich at 552 n 2, as the insurer expressly acknowledged its liability for mandatory coverage and only sought to rescind the policy as to excess or optional liability coverage.

[2] MCL 257.520(f)(1) does not require *innocence*.

the case of fraud. *Anderson*, 206 Mich App at 218-219. Accordingly, "when fraud is used as a defense in situations such as these," the panel explained, "the critical issue necessarily becomes whether the fraud could have been ascertained easily by the insurer at the time the contract of insurance was entered into." *Id*. at 219. In other words, the easily-ascertainable-fraud rule was to be applied to determine whether the insurer could rescind the policy *as it pertained only to optional liability coverage*.[3] So long as the fraud was not easily ascertainable, the insurer could void the policy as to this optional liability coverage. *Id*. If the fraud was easily ascertainable, the burden was essentially on the insurer for not having discovered and dealt with it. A review of our caselaw reveals that the easily-ascertainable-fraud rule has a history of application to optional liability coverage. See, e.g., *Titan*, 491 Mich 547; *Manier*, 281 Mich App 485; *Kurylowicz*, 67 Mich App 568.

The panel in *Wilson*, 231 Mich App at 331-332, in a slightly different factual scenario involving PIP benefits, reinforced the idea that the rules are not the same, specifying that the innocent-third-party rule acted as a bar against rescinding a policy as it concerns statutorily mandated benefits, and that the easily-

[3] The panel in *Anderson* even went so far as to clarify that the easily-ascertainable-fraud rule applied only in situations where fraud was asserted as a means for avoiding optional liability coverage. *Anderson*, 206 Mich App at 219 ("Despite the holdings in *Ohio Farmers* [*Ins Co v Mich Mut Ins Co*, 179 Mich App 355, 358, 364-365; 445 NW2d 228 (1989)] and *Katinsky* [*v Auto Club Ins Ass'n*, 201 Mich App 167; 505 NW2d 895 (1993)], we do not go so far as to say that a validly imposed defense of fraud will absolutely void any optional excess insurance coverage in all cases. To the contrary, when fraud is used as a defense in situations such as these, the critical issue necessarily becomes whether the fraud could have been ascertained easily by the insurer at the time the contract of insurance was entered into.").

ascertainable-fraud rule pertained to an insurer's attempts to limit its liability as to optional coverage.[4] The panel in *Wilson* applied the same type of bar against rescission as found in MCL 257.520(f)(1) to PIP benefits based on their mandatory nature. The panel summarized the innocent-third-party rule and the easily-ascertainable-fraud rule and their respective applications as follows:

> Once an innocent third party is injured in an accident in which coverage was in effect with respect to the relevant vehicle, the insurer is estopped from asserting fraud to rescind the insurance contract. *However, an insurer is not precluded from rescinding the policy to void any 'optional' insurance coverage, unless the fraud or misrepresentation could have been 'ascertained easily' by the insurer*. [*Id*. at 331-332 (citations omitted; emphasis added).]

Thus, as is apparent from this Court's opinion in *Wilson*, the innocent-third-party rule and the easily-ascertainable-fraud rule are different. The innocent-third-party rule concerns mandatory coverage and arises from the fact that the coverage is mandatory, while the easily-ascertainable-fraud rule applies to optional coverage. Essentially, the innocent-third-party rule is a rule that applies to PIP benefits and protects entitlement to those benefits. Consistently with this rationale, this Court has applied the

[4] In *Wilson*, a case that involved PIP benefits, the insurer sought to reform the noncoordinated policy, on the basis of fraud, into a policy that was coordinated with the insured's health insurance, thereby relieving the insurer of the obligation to pay duplicative medical benefits to the insured. *Wilson*, 231 Mich App at 331-332. Concluding that noncoordinated coverage was optional under the no-fault act, the panel determined that the innocent-third-party rule did not preclude the reformation sought by the insurer. *Id*. at 332-333. And because the fraud at issue in that case was not easily ascertainable, the panel ruled that the insurer could reform the contract in the manner it sought. *Id*. at 333-334.

innocent-third-party rule in the context of PIP benefits. See, e.g., *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 360; 764 NW2d 304 (2009), overruled in part on other grounds *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012).

This distinction is of critical importance to the instant case, as the concern in this case is with mandatory PIP benefits, not optional excess liability coverage.[5] Moreover, this distinction explains away with relative ease the result that the majority opinion describes as "bizarre" and the concurring opinion says "simply make[s] no sense." That is, in concluding that the easily-ascertainable-fraud rule and the innocent-third-party rule are essentially the same, both the majority opinion and the concurring opinion postulate that the rules must be treated as the same, because if an insurer can avoid liability when fraud is easily ascertainable, it must logically be able to avoid liability when the fraud was not easily ascertainable. If we were truly dealing with rules that applied in the same context and to the same type of coverage, this concern would be a valid one. However, given that caselaw has clearly applied the innocent-third-party rule to mandatory coverage, whereas the easily-ascertainable-fraud rule has been applied to optional coverage, the rules can be reconciled, and the concerns of the majority and concurring opinions quickly dissipate. With regard to mandatory coverage, whether the fraud was easily ascertainable matters not; the insurer is not permitted to rescind once an innocent third party is injured. However, with regard to optional coverage, the insurer is only prevented from rescinding the policy as it concerns such optional coverage if the fraud was easily

[5] This distinction is discussed in more detail later in this opinion.

ascertainable. Our Supreme Court in *Titan* did away with the bar against an insurer rescinding optional coverage in the face of easily ascertainable fraud.

I take issue with the majority and concurring opinions' conclusions that our Supreme Court's decision in *Titan* necessarily recognized that the innocent-third-party rule and the easily-ascertainable-fraud rule are one and the same. In fact, our Supreme Court in *Titan* made no mention of the innocent-third-party rule, nor did it weigh in on whether fraud could be asserted as a basis to avoid liability in the context of statutorily mandated benefits. The subject of statutorily mandated coverage was simply not before the Court in *Titan*, as the insurer in that case expressly conceded its liability for mandatory coverage and only sought a declaration "that it was not obligated to indemnify [the insured] for any amounts *above* the minimum liability coverage limits required by the financial responsibility act . . . ." *Titan*, 491 Mich at 552 n 2. Hence, the issue before the *Titan* Court was the application of the easily-ascertainable-fraud rule, and *Titan* did not implicate the innocent-third-party rule.

Along similar lines, I note that the majority and concurring opinions observe that our Supreme Court in *Titan* overruled this Court's decision in *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355, 358, 364-365; 445 NW2d 228 (1989), and conclude that: (1) *Ohio Farmers* discussed the innocent-third-party rule and (2) therefore, the Supreme Court in *Titan* must have necessarily overruled the innocent-third-party rule. Assuming that the decision in *Ohio Farmers* implicated the innocent-third-party rule, I disagree with my colleagues' conclusions. First, our Supreme Court in *Titan*, 491 Mich at 551 n 1, did not make any

sweeping declarations about *Ohio Farmers*;[6] rather, it only overruled the case "[t]o the extent" that it "held or stated that an insurer is estopped from denying coverage on the basis of fraud when it could have easily ascertained the fraud . . . ." This language is in line with the easily-ascertainable-fraud rule, not the innocent-third-party rule. Noticeably absent from this qualified and narrow rejection of *Ohio Farmers* is any discussion about whether an insurer can deny *mandatory*, statutorily required coverage to an innocent third party on the basis of fraud. Thus, even assuming that *Ohio Farmers* only implicated the innocent-third-party rule, an assumption that is not entirely apparent from the text of the *Ohio Farmers* decision, the Court in *Titan* made no comment about the innocent-third-party rule. Second, contrary to what the majority and concurring opinions postulate—and regardless of what *Ohio Farmers* actually says—our Supreme Court in *Titan* seemed to think that *Ohio Farmers* concerned the easily-ascertainable-fraud rule. See *Titan*, 491 Mich at 563-564 ("[U]nder the *Kurylowicz* rule, an insurer may not avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud when the fraud was *easily ascertainable and the claimant is a third party*. See, e.g., *Ohio Farmers Ins Co v Mich Mut Ins Co*, 179 Mich App 355; 4[4]5 NW2d 228 (1989).") (emphasis added). Accordingly, any suggestion that *Titan* was overruling *Ohio Farmers* for some other reason—for

[6] *Ohio Farmers*, a somewhat curious decision that this Court later backed away from in *Anderson*, 206 Mich App at 219, cited *Kurylowicz*, but only for its "policy considerations." See *Ohio Farmers*, 179 Mich App at 363. Thus, as the majority and concurring opinions correctly note, *Ohio Farmers* does not appear to implicate the easily-ascertainable-fraud portion of the *Kurylowicz* decision, despite what our Supreme Court believed to be the case in *Titan*. See *Titan*, 491 Mich at 563-564.

instance, that it discussed the innocent-third-party rule—is not apparent from the Court's decision in *Titan*. Third, and on a somewhat related note, I disagree that *Titan*'s qualified overruling of *Ohio Farmers* can be construed to reject a rule that *Titan* itself never mentioned.[7]

Aside from taking issue with the conclusion that the rules are one and the same, I take issue with the majority opinion's conclusion that both the easily-ascertainable-fraud rule and the innocent-third-party rule "have their roots in the *Kurylowicz* decision." Examination of the case conclusively dispels the notion that the innocent-third-party rule was sired by *Kurylowicz*. Indeed, the sole concern in *Kurylowicz* was whether an insurer has a duty to investigate representations made by an insured, and the panel in *Kurylowicz* expressly rejected the opportunity to weigh in on the innocent-third-party rule. Also, there is no indication that *Kurylowicz* involved a claim for mandatory coverage.

In *Kurylowicz*, 67 Mich App at 569, the plaintiff, State Farm, appealed as of right a declaratory judgment that stated it was not allowed to rescind a policy for optional,[8] or nonstatutorily mandated, liability coverage *ab initio* when the policy was procured through fraud. In that case, the insured, defendant Robert J. Kurylowicz, made a material misrepresen-

[7] This is not to say, however, that there are no reasonable arguments as to whether portions of the *Titan* decision cast doubt on the innocent-third-party rule. Those arguments are discussed later in this opinion.

[8] Although not expressly stated in the *Kurylowicz* opinion, it is apparent that the liability coverage was *optional* liability coverage. Indeed, the policy at issue in *Kurylowicz* was issued before enactment of the no-fault act, see *Kurylowicz*, 67 Mich App at 573, and at that time, "motorists could choose whether or not to carry liability insurance," *Coburn v Fox*, 425 Mich 300, 308; 389 NW2d 424 (1986).

tation in his application for insurance when answering the question whether his driver's license had ever been revoked or suspended. *Id*. at 570. State Farm, which relied on our Supreme Court's decision in *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959), argued that an insurer was entitled to rescind a policy on the basis of a material misrepresentation and that there was no duty imposed on the insurer to investigate the subject of the alleged fraud.[9] *Kurylowicz*, 67 Mich App at 571.

This Court, in an effort to avoid the application of *Keys*, noted that our Legislature had amended various statutes since our Supreme Court issued *Keys*, including statutes regarding the cancellation of insurance policies, MCL 500.3220, and the motor vehicle accident claims act, MCL 257.1101 *et seq*., which the panel described as providing compensation for citizens injured by uninsured tortfeasors. *Kurylowicz*, 67 Mich App at 573. Further, this Court noted that although the case currently before it was not controlled by the no-fault act, the enactment of the no-fault act, MCL 500.3101 *et seq*., reflected a legislative policy of providing compensation to lessen "the tragic social and economic consequences that often accompany automobile

[9] The refusal to impose on insurers the burden of investigating representations by the insured was the premise of the holding in *Keys*:

> Moreover, if inquiry is to be demanded, is it enough to stop with the traffic court? Might not the accident suggest physical or psychiatric defects? Should investigations not also be made of the past hospitalizations of the insured? Where will we say this may stop within the existing economic framework? It is doubtful whether one who deliberately sets out to swindle an insurance company can be prevented from so doing by any such requirement, and it is even more doubtful that there is enough of this practice to warrant the placing upon the insurance business of a requirement so onerous. [*Keys*, 358 Mich at 84.]

mishaps." *Kurylowicz*, 67 Mich App at 573.[10] Reading the legislative enactments as a whole, this Court arrived at the idea that the statutes formulated a "policy" of providing "persons who suffer loss due to the tragedy of automobile accidents in this state . . . a source and a means of recovery." *Id*. at 574. "Given this policy," said the panel, "it is questionable whether a policy of automobile insurance can ever be held void *ab initio* after injury covered by the policy occurs." *Id*.[11]

With that "policy" as a backdrop, the panel cited a treatise for the proposition that an insurer's liability "*with respect to insurance required by the act*" becomes absolute "whenever injury or damage covered by such policy occurs . . . ." *Id*. (citation and quotation marks omitted). However, the panel was quick to observe that "[t]hat issue is not before us in this case"—whether liability *with respect to insurance required by law* became absolute upon the happening of an injury—"so we need not decide it." *Id*. Hence, the panel expressly declined to comment on the innocent-third-party rule—which is implicated in situations involving the "liability of the insurer with respect to insurance required by the [no-fault] act." *Id*. (quotation marks and citation omitted). Instead, stated the panel, "[w]e need only decide whether, under the facts of the case at bar, *State Farm reasonably relied on the representations of the insured* so as to justify a holding

[10] In fact, the panel, recognizing that the cause of action in that case accrued before the enactment of the no-fault act, expressly stated that because the cause of action did not concern the no-fault act, "our holding in this case cannot be precedent for actions arising after the effective date of no-fault . . . ." *Kurylowicz*, 67 Mich App at 573.

[11] Despite the Supreme Court's criticism in *Titan* about *Kurylowicz*'s policy arguments—discussed in more detail later in this opinion—I would be remiss not to note that in *Coburn*, 425 Mich at 310 n 3, our Supreme Court cited with approval this very same policy rationale from *Kurylowicz*.

that the policy was procured by fraud, thus warranting a judicial determination that the policy was void *ab initio*." *Id*. (first emphasis added).

The panel's framing of this issue is of particular significance and illustrates the fatal flaw in the majority opinion's conclusion that *Kurylowicz* created the innocent-third-party rule. The focus of the issue in that case was the insurer's reasonable reliance, or lack thereof, on the insured's representations. And when the panel mentioned the scenario that implicates the innocent-third-party rule—liability mandated by statute and an injured third party—it *expressly declined* to consider it in any detail. It cannot reasonably be argued that *Kurylowicz* created a rule it took special care to avoid.

Indeed, the only issue in *Kurylowicz* concerned whether the insurer should have accepted certain representations at face value, or whether the insurer should have discovered that the representations were false. The rest of the opinion in *Kurylowicz* was spent answering that question, and only that question, as evidenced by the panel citing caselaw from other jurisdictions that imposed on an insurer a duty to investigate representations made by insureds in insurance applications. *Id*. at 574-577, citing *Allstate Ins Co v Sullam*, 76 Misc 2d 87; 349 NYS2d 550 (1973); *State Farm Mut Ins Co v Wood*, 25 Utah 2d 427; 483 P2d 892 (1971); *Barrera v State Farm Mut Auto Ins Co*, 71 Cal 2d 659; 79 Cal Rptr 106; 456 P2d 674 (1969); *State Farm Mut Auto Ins Co v Wall*, 92 NJ Super 92; 222 A2d 282 (NJ Sup Ct, 1966). The panel then went on to impose a duty on the insurer in that case to make a reasonable investigation of an insured's representations in an application for insurance. This is precisely contrary to the tenets of *Keys*.

Because the instant case does not involve the imposition of a duty on an insurer to investigate representations made by a prospective insured, and given that *Titan* overruled *Kurylowicz* for failing to follow the precedent established in *Keys*, *Kurylowicz* is not dispositive in this case. Likewise, any assertion that the innocent-third-party rule is the same as the easily-ascertainable-fraud rule set forth in *Kurylowicz* is incorrect and does not resolve the issue in this case. However, that does not end the inquiry; it merely ferrets out a red herring proffered by the majority and concurring opinions. Indeed, although the Supreme Court in *Titan* overruled *Kurylowicz* for ignoring precedent established in *Keys*, the Court's opinion went beyond merely overruling this Court's decision for ignoring Supreme Court precedent. Notably, for purposes of this opinion, the Court in *Titan* went on to: (1) clarify the conditions under which a policy for insurance may be rescinded and (2) decry what it described as the "reasoning" employed by *Kurylowicz*. It is in those aspects of *Titan* that the parties argue the Court eroded the support on which the innocent-third-party rule rests and which require extensive discussion in this case. To resolve the more pertinent issue of whether the Court's analysis in *Titan* erodes support for the innocent-third-party rule, I find it necessary to examine *Titan*, as well as the origins and development of the innocent-third-party rule.

II. THE INNOCENT-THIRD-PARTY RULE

The innocent-third-party rule has been firmly entrenched in this Court's jurisprudence for the past three decades and has never been questioned by our Supreme Court, nor has it prompted the Legislature to revise the no-fault law. In general, an insurer may

rescind a policy *ab initio* because of fraud. *Roberts*, 282 Mich App at 359-360. However, under the innocent-third-party rule, "an insurer may not void a policy of insurance *ab initio* where an innocent third party is affected" and the type of coverage at issue is mandatory coverage. *Id*.[12] As stated in *Roberts*, "caselaw demonstrates that the innocent third party doctrine ensures coverage for any person who is innocent of participation in the alleged fraud." *Id*. at 361.

For decades, this Court has adhered to the innocent-third-party rule in cases in which the insured sought statutory, i.e., nonoptional, benefits and precluded insurers from denying coverage to injured third parties who were innocent of the insured's fraud. See, e.g., *Wilson*, 231 Mich App at 331; *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997); *Burton v Wolverine Mut Ins Co*, 213 Mich App 514, 517 n 2; 540 NW2d 480 (1995); *Auto-Owners Ins Co v Johnson*, 209 Mich App 61, 64; 530 NW2d 485 (1995); *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993); *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985); *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 477; 350 NW2d 283 (1984); *United Security Ins Co v Comm'r of Ins*, 133 Mich App 38, 43; 348 NW2d 34 (1984).[13] In fact, our Supreme Court has also protected innocent parties from the fraud of others in the context of insurance policies, albeit in a case dealing with a "statutory fire insurance policy." See

[12] Like other cases applying the innocent-third-party rule, *Roberts* was a case involving an insured's application for mandatory PIP benefits, not optional liability coverage. See *id*. at 346-347.

[13] In addition, we note that Michigan is not alone in applying the innocent-third-party rule in the context of automobile insurance. See 7 Am Jur 2d, Automobile Insurance, § 61, pp 566-568 (summarizing the law from various jurisdictions).

Morgan v Cincinnati Ins Co, 411 Mich 267, 277; 307 NW2d 53 (1981). ("[W]henever the statutory clause limiting the insurer's liability in case of fraud by the insured is used it will be read to bar only the claim of an insured who has committed the fraud and will not be read to bar the claim of any insured under the policy who is innocent of fraud."). Yet as the parties point out, although this Court's precedent with regard to the innocent-third-party rule is well established, the rationale and reasoning cited for the existence of the rule has varied. For instance, this Court's justifications for the innocent-third-party rule have ranged from public policy, *Katinsky*, 201 Mich App at 171, to reliance on our Supreme Court's decision in *Morgan*, *Darnell*, 142 Mich App at 10, to the language in MCL 257.520(f)[14] of the financial responsibility act, *Wilson*, 231 Mich App at 331. Despite the varying rationales employed in arriving at the innocent-third-party rule, its application has, until recently, been fundamental.

The challenges raised against the innocent-third-party rule come from claims by Sentinel and others that our Supreme Court's decision in *Titan*, 495 Mich 547, implicitly overruled the innocent-third-party rule. Accordingly, our Supreme Court's decision in *Titan* must be examined.

III. *TITAN v HYTEN*

While much is being made about what *Titan* says and implies, it is helpful to focus first on what *Titan* does not say. For example, and most notably, the innocent-third-party rule was *not* at issue in *Titan*, 491

[14] As will be explained in more detail later in this opinion, MCL 257.520(f)(1) prohibits an insurer from avoiding liability up to certain statutory minimums for liability coverage, and pursuant to *Titan*, it is not applicable to the PIP benefits at issue in this case.

Mich 547. In addition, *Titan* did not involve no-fault PIP benefits, nor did it involve any other statutorily required benefits. Rather, in *Titan*, our Supreme Court examined the so-called "easily ascertainable" fraud rule and addressed whether, in a case involving excess liability coverage, an insurer could rescind that coverage on the basis of fraud in the procurement of the policy when the fraud was easily ascertainable by the insurer. *Id*. at 550-551. In *Titan*, McKinley Hyten, whose mother, Anne Johnson, had made fraudulent misrepresentations in her application for no-fault insurance, was involved in a motor vehicle accident with Howard and Martha Holmes. *Id*. at 552. Anticipating that the Holmeses would file a third-party tort claim against Hyten for their injuries, Titan sought to rescind the excess liability coverage because of Johnson's material misrepresentations. *Id*. In particular, Titan requested declaratory relief stating that should the Holmeses prevail in an action against Hyten, Titan was not required to provide liability coverage under the policy in excess of the statutory minimums set forth in MCL 257.520 of the financial responsibility act.[15] The trial court held that the easily-ascertainable-fraud rule applied and prevented Titan from avoiding liability because the alleged fraud was easily ascertainable.[16] *Id*. This Court affirmed, relying on a line of decisions dating back to *Kurylowicz*, 67 Mich App 568, in which the insurer's attempt to rescind the particular insured's policy for optional coverage because of fraud by

[15] Titan expressly acknowledged its responsibility for the minimum liability coverage limits—$20,000 per person/$40,000 per occurrence—required under the financial responsibility act. *Titan*, 491 Mich at 552 n 2. For that reason, statutorily mandated benefits were not at issue in *Titan*.

[16] The alleged fraud was in regard to whether Hyten possessed a valid driver's license at the time of the application for insurance.

the insured in the policy application was rejected because the fraud was easily ascertainable by the insurer. *Titan Ins Co v Hyten*, 291 Mich App 445, 454-458, 461-462; 805 NW2d 503 (2011), rev'd 491 Mich 547.

In examining the viability of the easily-ascertainable-fraud rule, the Supreme Court in *Titan* began by recognizing that insurance policies are contracts, and that, "when a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute." *Titan*, 491 Mich at 554. *Titan*, *id*., cited *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW 2d 310 (1993), for the proposition that "because personal injury protection benefits are mandated by MCL 500.3105, that statute governs issues regarding an award of those benefits." *Titan* noted that conversely, "when a provision in an insurance policy is not mandated by statute, the rights and limitations of the coverage are entirely contractual and construed without reference to the statute." *Titan*, 491 Mich at 554. In addition, "because insurance policies are contracts, common-law defenses"—such as fraud—"may be invoked to avoid enforcement of an insurance policy, unless those defenses are prohibited by statute." *Id*.

The Court then looked at the various common-law doctrines of fraud that exist in Michigan and concluded that common-law fraud did not include as an element that the party asserting the fraud prove the fraud was not easily ascertainable. For this reason, the common-law doctrines of fraud did not support the existence of the easily-ascertainable-fraud rule. *Id*. at 555-557.

Next, the Court looked at the different remedies available in those instances in which a contract was procured by fraud. *Id*. at 557-558. Because contracts

must be construed in conjunction with the applicable law, the Court recognized that common-law remedies "may be limited or narrowed by statute." *Id*. at 558. For instance, MCL 257.520(f)(1) of the financial responsibility act "limits the ability of an insurer to avoid liability on the ground of fraud in obtaining a motor vehicle liability policy with respect to the insurance required by" the financial responsibility act—$20,000 for bodily injury or death to one person, and $40,000 for bodily injury or death to two or more persons—even in the face of fraud or misrepresentations. *Id*., citing MCL 257.520(f)(1). However, the *Titan* Court concluded that the limitation imposed by MCL 257.520(f)(1) was limited to a liability policy that was certified under the financial responsibility act. *Id*. at 559-560.[17] Therefore, the Court found no statutory limitations on the right to rescind a policy with regard to excess liability coverage, i.e., nonstatutory coverage. *Id*.

With this backdrop, the Court turned its attention to the easily-ascertainable-fraud rule, concluding that its earlier decision in *Keys*, 358 Mich 74, was outcome-determinative in that *Keys* had rejected the easily-ascertainable-fraud rule over 50 years ago. *Titan*, 491 Mich at 562 ("*Keys* answered the precise question presented in this case[,] . . . holding that an insurer may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud, notwithstanding that the fraud

[17] As recognized by the *Titan* Court, MCL 257.520(f)(1)—which is part of the financial responsibility act—does not apply to PIP benefits under the no-fault act. *Id*. at 559-560. Of note, the financial responsibility act was enacted 24 years before the no-fault act. Hence, our Supreme Court in *Titan* discerned the Legislature's intended scope and applicability of MCL 257.520(f)(1) with respect to an act that did not exist when MCL 257.520(f)(1) was enacted.

may have been easily ascertainable, and notwithstanding that the claimant is a third party.").

Our Supreme Court noted that despite the fact that *Keys* had rejected the easily-ascertainable-fraud rule, this Court later reached the opposite conclusion in *Kurylowicz*; for this reason, *Titan* overruled *Kurylowicz* because it had ignored Supreme Court precedent. *Titan*, 491 Mich at 572-573. In addition, the Court went on to decry the reasoning employed in *Kurylowicz*.[18] The Court first noted that *Kurylowicz* had justified the easily-ascertainable-fraud rule on the basis of what it determined to be the "public policy" of the no-fault act. *Titan*, 491 Mich at 564-565. However, our Supreme Court rejected the idea that public policy supported the rule, explaining that the public policy of the no-fault act should be understood in terms of the provisions of the act itself, and not "in terms of a judicial effort to identify some overarching public policy . . . ." *Id*. at 565. "In other words, it is the policy of this state that all the provisions of the no-fault act be respected, and *Kurylowicz*'s efforts to elevate *some* of its provisions and *some* of its goals above other provisions and other goals was simply a means of disregarding the stated intentions of the Legislature." *Id*.

Next, in rejecting the purported justifications for the easily-ascertainable-fraud rule, the Court rebuffed the idea that MCL 500.3220[19]—which concerns the cancel-

[18] The reasoning employed by the Court when it rejected the easily-ascertainable-fraud rule forms the basis of Sentinel's argument that the innocent-third-party rule did not survive *Titan*.

[19] MCL 500.3220 provides:

> Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of automobile liability insurance except for any 1 or more of the following reasons:

lation of automobile liability policies and restricts the ability of the insurer to cancel a policy—did not preclude an insurer from uncovering fraud and pursuing remedies aside from cancellation, such as rescission. *Id*. at 566-567. In this regard, the Court noted that rescission is a remedy that is distinct from cancellation. *Id*. at 567-568.

Finally, in concluding that there was no support in the law for the easily-ascertainable-fraud rule, the Court considered—and rejected—the idea that the rule was "required for the protection of third parties." *Id*. at 568. The Court explained that "there is simply no basis in the law to support the proposition that public policy requires a private business in these circumstances to maintain a source of funds for the benefit of a third party with whom it has no contractual relationship." *Id*. The no-fault act protects third parties "in a variety of ways," reasoned the Court—including allowing tort actions—"but it states nothing about altering the common law that enables insurers to obtain traditional forms of relief when they have been the victims of fraud." *Id*. at 568-569. The Court further explained that requiring an insurer to indemnify an insured in spite of fraud "relieves the insured of what would otherwise be the insured's personal obligation in the face of his or her own misconduct. As between the fraudulent insured and the insurer, there can be no question that the former should bear the burden of his

(a) That during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer.

(b) That the named insured or any other operator, either resident of the same household or who customarily operates an automobile insured under the policy has had his operator's license suspended during the policy period and the revocation or suspension has become final.

or her fraud." *Id*. at 569. In other words, an insured is not entitled to benefit from the protection of excess liability insurance coverage above the statutorily required minimum when he or she purchased that coverage through fraud.

IV. THE INNOCENT-THIRD-PARTY RULE AFTER *TITAN*

Before weighing in on the issue of whether *Titan* affects the validity of the innocent-third-party rule in the context of statutorily required PIP benefits, I note that this Court has already had occasion to examine this matter, albeit in unpublished opinions. See *Frost v Progressive Mich Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2014 (Docket No. 316157); *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). Those two cases, however, came to opposite conclusions. Rather than grant leave to appeal in one or both of those cases and resolve firsthand the breadth of its intentions in *Titan* and whether its rationale should be extended to the innocent-third-party rule and statutorily mandated PIP benefits, our Supreme Court came to the somewhat perplexing conclusion that it should vacate both of those decisions, remand the cases to this Court, order this Court to accept as on leave granted yet another case regarding this issue—the instant case—and hold in abeyance any further rulings in *Frost* and *State Farm* pending our resolution in this matter.[20] Hence, I will briefly address *Frost* and *State Farm* and

[20] See *Frost v Citizens Ins Co*, 497 Mich 980 (2015); *State Farm Mut Auto Ins Co v Mich Muni Risk Mgt Auth*, 498 Mich 870 (2015).

the reasoning provided by each panel in coming to its conclusion on the issue at hand.

A. *FROST v PROGRESSIVE*

The first case following *Titan* to examine the innocent-third-party rule in the context of PIP benefits was *Frost*. In *Frost*, Kenya Frost's minor daughter was injured in an accident while a passenger in an uninsured automobile. Citizens Insurance Company was assigned by the assigned claims plan to Frost's daughter's claim. Progressive had issued a policy of insurance to Frost on her own vehicle, which had been destroyed one month before Frost's daughter's accident. Citizens Insurance Company sought reimbursement from Progressive for the benefits it had paid on Frost's daughter's behalf.[21] *Frost*, unpub op at 1-2. Progressive claimed that it had rescinded Frost's policy *ab initio* because Frost had procured the policy through fraud. Citizens argued that the innocent-third-party rule barred Progressive's attempt to rescind as it pertained to Frost's daughter. In response, Progressive contended that *Titan* had effectively eliminated the innocent-third-party rule. The trial court concluded that because the accident involving Frost's daughter had occurred before Progressive attempted to rescind the policy, once the accident occurred Progressive lost its ability to rescind as to Frost's daughter. *Id*. at 2. In short, the trial court applied the innocent-third-party doctrine.

On appeal in this Court, the panel overturned the trial court and held that its ruling was "inconsistent with our Supreme Court's holding" in *Titan*. *Id*. The panel explained:

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[21] Citizens intervened in Frost's lawsuit against Progressive in which Frost sought to obtain reimbursement for losses incurred when her car was destroyed.

> In [*Titan*], our Supreme Court held that absent statutory provisions to the contrary, "an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party." [*Titan*, 491 Mich at 571.] Accordingly, the claim by Frost's daughter did not bar Progressive from rescinding the policy in this case. [*Frost*, unpub op at 2.]

B. *STATE FARM v MICH MUNI RISK MGT AUTH*

Five months after *Frost* was issued, this Court reached the opposite conclusion in *State Farm*.[22] Pertinent to the present matter, one of the insurers in that case sought to rescind a policy for no-fault PIP benefits *ab initio* because it alleged that the policy had been procured by fraud.[23] *State Farm*, unpub op at 4. The trial court disagreed, concluding that because coverage was required under the no-fault act, the policy could not be rescinded after an innocent third party sustained injuries that would have otherwise been covered under the policy. *Id*. at 5.

On appeal, a panel of this Court examined the innocent-third-party rule and recognized that "[t]his Court has generally denied an insurer's right to rescind a policy of insurance in order to avoid payment of no-fault benefits to an innocent third party[.]" *Id*. at 9, citing *Hammoud*, 222 Mich App at 488. "Thus," the panel explained, " '[o]nce an innocent third party is injured in an accident in which coverage was in effect with respect to the relevant vehicle, the insurer is

[22] As he acknowledges in his concurring opinion in this case, Judge BOONSTRA was on the panel in *State Farm*. As my dissenting opinion makes clear, I think he and his panel got it right in *State Farm*.

[23] QBE Insurance Corporation is the insurer that sought to rescind its policy.

estopped from asserting fraud to rescind the insurance contract.' " *State Farm*, unpub op at 9, quoting *Katinsky*, 201 Mich App at 170 (citation omitted; alteration in *State Farm*).

The relevant insurer in that case argued that the innocent-third-party rule was abrogated by our Supreme Court's decision in *Titan*, 491 Mich 547. The panel disagreed, explaining that *Titan* involved a different type of coverage—optional, excess liability coverage—rather than the mandatory PIP coverage at issue. In addition, the panel noted that *Titan* did not involve a claim for benefits by an innocent third party. In this regard, the panel explained:

> In *Titan*, our Supreme Court held that an excess insurance carrier may avail itself of the equitable remedy of reformation (of contract) to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even though the fraud was easily ascertainable and the claimant is a third party, so long as the remedies are not prohibited by statute.
>
> [The claimed] entitlement to PIP benefits is statutory, however, not contractual. The insurer in *Titan* did not seek to avoid payment of statutorily mandated no-fault benefits; in fact, that insurer acknowledged its liability for the minimum liability coverage limits. Nor did *Titan* address a claim for PIP benefits from an innocent third party. Thus, the holding of *Titan*, that an insurance carrier may seek reformation to avoid liability for *contractual* amounts in excess of statutory minimums, does not compel a finding that *Titan* overruled the many binding decisions of this Court applying the "innocent third-party rule" in the context of PIP benefits and an injured third party who is statutorily entitled to such benefits. [*State Farm*, unpub op at 9 (citations omitted).]

Because of the key differences between the issue in *Titan* and the issue involved in *State Farm*, the panel

held that *Titan* did not abrogate or overrule the innocent-third-party rule. *Id*. at 9-10.

V. THE INNOCENT-THIRD-PARTY RULE SURVIVES *TITAN*

I would hold that the panel in *State Farm* reached the correct result by concluding that the innocent-third-party rule survives *Titan* in the context of statutorily mandated no-fault benefits, and I would therefore hold that the rule has continuing validity and applies in this case. As the panel did in *State Farm*, I note that the coverage at issue in this case differs from that which was at issue in *Titan*. In *Titan*, contractual liability coverage, i.e., nonstatutory, optional liability coverage, was at issue. In fact, statutory coverage was expressly not at issue in *Titan*, as the insurer conceded liability for the statutory minimum coverage amounts under the financial responsibility act, despite alleging that the policy was void *ab initio* because of the insured's fraud. *Titan*, 491 Mich at 552 n 2. In other words, *Titan* involved a case in which the insurer sought to rescind the policy, but acknowledged it was nevertheless responsible for statutory benefits.

In contrast to *Titan*, the PIP benefits at issue in this case are mandated by statute. See, e.g., MCL 500.3101(1) (mandating that the owner or registrant of a motor vehicle required to be registered in this state "maintain security for payment of benefits under personal protection insurance," among other types of insurance); MCL 500.3105 (*requiring an insurer to pay PIP benefits*, subject to the provisions of the no-fault act, and providing *no other exceptions to or limitations on that requirement*); *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012); *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993) ("PIP benefits are mandated by statute under

the no-fault act."). See also *Husted v Auto-Owners Ins Co*, 459 Mich 500, 513; 591 NW2d 642 (1999) (explaining that the compulsory nature of statutory PIP benefits was meant to guarantee PIP coverage to accident victims in exchange for limitations on the injured person's ability to file a tort claim); *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978) (explaining that the no-fault act "was offered as an innovative social and legal response to the long payment delays" that existed in Michigan and was meant to assure "adequate, and prompt reparation for certain economic losses" through a system of compulsory insurance). As *Titan* itself states, "when a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute." *Titan*, 491 Mich at 554. The plain language of the no-fault act provides no exceptions to, or limitations on, its mandate that an insurance carrier cover certain statutorily identified no-fault PIP benefits. Cf., *id*. ("On the other hand, when a provision in an insurance policy is not mandated by statute, the rights and limitations of the coverage are entirely contractual and construed without reference to the statute.").

Like the panel in *State Farm*, I conclude that the difference between the benefits at issue in this case and the contractual benefits at issue in *Titan* is significant. Simply put, *Titan* did not address benefits that were required by statute; the insurer in that case expressly acknowledged liability for statutory residual liability amounts. To conclude that our Supreme Court's ruling as to purely contractual, excess liability benefits should apply and overrule approximately 30 years of this Court's precedent with regard to statutory PIP benefits is a leap I am not prepared to make. That is, I am disinclined to extend *Titan* and its reasoning to the innocent-third-party rule as that rule applies to

statutorily mandated PIP benefits. I see no support for doing so in the plain language of the no-fault act. Similarly, I conclude that the innocent-third-party rule is not inconsistent with the Supreme Court's decision in *Titan*. Accordingly, I would find that we are bound to follow this Court's precedent applying the innocent-third-party rule to PIP benefits. See MCR 7.215(J)(1); *Charles A Murray Trust v Futrell*, 303 Mich App 28, 49; 840 NW2d 775 (2013) (noting that this Court is bound to follow a prior published Court of Appeals decision issued on or after November 1, 1990, that has not been reversed or modified by our Supreme Court or a special panel of this Court).

Nonetheless, this conclusion warrants the discussion of two matters. First, the justifications posed for the innocent-third-party rule have been inconsistent over time, and in some cases those justifications were premised on incorrect legal principles.[24] Yet, the innocent-third-party rule has been consistently applied by this Court for over 30 years, and there is an absence of published authority criticizing the rule. Thus, the rule remains good law, and this Court is bound to follow it. MCR 7.215(J)(1). And although not serving as a basis for my decision, I would note that the innocent-third-party rule serves the purposes of the no-fault act. One of the chief purposes of the no-fault act, as has been consistently identified by our appellate Courts, is to ensure prompt and adequate payment for

[24] For instance, *Wilson*, 231 Mich App at 331, justified the innocent-third-party rule in a case involving PIP benefits by citing MCL 257.520(f) of the financial responsibility act. MCL 257.520(f) does not apply to PIP benefits under the no-fault act. See *Titan*, 491 Mich at 559-560. However, while MCL 257.520(f) does not apply, when the mandatory nature of PIP benefits is considered, it is not that far of a stretch to see the rationale in analogizing mandatory PIP benefits to mandatory minimum levels of liability coverage.

the types of injuries and losses encompassed under the category of PIP benefits. See, e.g., *Shavers*, 402 Mich at 578-579. Allowing retroactive rescission of a policy in a manner that removes coverage from an innocent individual who would ordinarily be covered under the policy thwarts the mandatory nature of these benefits and the purposes of the no-fault act.

Second, it could be argued that portions of the *Titan* opinion appear to undermine the innocent-third-party rule: notably, the portions of the opinion concluding that the remedy of rescission can only be limited by statute could be said to call the innocent-third-party rule into question. However, as noted earlier in this opinion, the instant case involves an entirely different type of benefits than was at issue in *Titan*. That is, the instant matter involves mandatory PIP benefits, while *Titan* involved voluntary liability coverage above the statutorily required minimum. And significantly, *Titan* expressly did not address mandatory benefits, because the insurer in that case acknowledged liability for certain statutory amounts. Further, and contrary to the majority opinion's suggestions, *Titan* contained no discussion about the innocent-third-party rule and instead addressed a rule arising from this Court's jurisprudence—*Kurylowicz*—that was directly contrary to a published Supreme Court decision regarding the easily-ascertainable-fraud rule. Given these significant differences between this case and *Titan*, I am not inclined to stretch *Titan*'s holding to fit a scenario that was simply not addressed or contemplated by the Court in *Titan*. Accordingly, as did the panel in *State Farm*, unpub op at 9-10, I conclude that *Titan* is inapplicable to the innocent- third-party rule in the context of statutorily required no-fault PIP benefits.

In declining to conclude that *Titan* affects the validity of the innocent-third-party rule in the context of this case, I also note that some of the concerns that were present in *Titan* are not present in the instant case. In *Titan*, 491 Mich at 569, the Court expressed concern that the easily-ascertainable-fraud rule "reduces disincentives for insurance fraud, and transfers legal responsibility from parties that have acted fraudulently to parties that have not." The Court reasoned that the insured, not the insurer, should bear the burden of his or her fraud by being on the hook financially for his or her third-party tort liability above the statutorily required minimum. *Id*. But first-party PIP benefits do not "indemnify an insured despite fraud in obtaining the insurance policy." See *id*. The no-fault system was created to *eliminate* the at-fault driver's legal responsibility for medical expenses and certain wage loss and loss of service expenses, and in doing so, it also took away the injured third party's right to sue for such expenses. Instead, the no-fault system baked into all insurance contracts mandatory coverage for these expenses. Forcing an innocent third party to seek recovery for his or her PIP benefits from the assigned claims facility does nothing to "transfer responsibility" away from those who have acted fraudulently. Moreover, as our Supreme Court has recognized, "an insured often has no control over the conduct of others," and it would be untenable to require an insured to undertake to prevent others from engaging in fraud. *Morgan*, 411 Mich at 277. If we were to accept the invitation to extend the rule from *Titan* addressing voluntary third-party liability excess contractual coverage and conclude that the innocent-third-party rule has been eliminated with respect to first-party statutory PIP benefits, we would essentially force passengers (who do not have a policy of their

own), including children, to either investigate whether the car owner's insurance policy was obtained by fraud before getting into the car or risk being thrown into a firestorm investigation after an accident to obtain that same information in time to make a claim to the right entity. And how would an innocent third party even go about investigating whether the policy procurer obtained the policy through fraud? That person would already have much on his or her mind following an accident, not the least of which is attempting to recover from his or her injuries. Put simply, *Titan* affects an insured's right to receive the protection of voluntary, excess liability coverage with respect to third-party tort claims. Its ruling and rationale do not translate to first-party PIP benefits; to do so would wreak havoc on the no-fault system and would surely lead to every injured person filing a claim with the assigned claims plan, "just in case," in addition to filing a claim with the insurance company whose policy was in effect and covered him or her at the time of the accident. I decline to extend the rationale in *Titan* to the uniquely different setting of statutorily required benefits and by doing so turn the no-fault system, as we have known it over the past 30 years, entirely on its head.

In addition, I note that in *Titan*, 491 Mich at 557, the Court rejected the easily-ascertainable-fraud rule in part because the various doctrines of fraud in Michigan "do not require the party asserting fraud to have performed an investigation of all assertions and representations made by its contracting partner as a prerequisite to establishing fraud." In short, the easily-ascertainable-fraud rule had no place in the common law of fraud, and thus it could not bar rescission of an insurance policy. This type of problem is not present in the instant case, as the innocent-third-party rule does

not impute any additional requirements on an insurer who pleads fraud in the procurement of a policy.

Moreover, turning to the remedy of rescission, it has generally been viewed as an equitable remedy. *Madugula v Taub*, 496 Mich 685, 712; 853 NW2d 75 (2014). It is not found in the plain language of the no-fault act, yet the Supreme Court deemed it appropriate to apply in the context of voluntary insurance coverage, which is rooted in contract rights. Similarly, the innocent-third-party rule is an equitable remedy that is not found in the plain language of the no-fault act; like rescission, it too should be deemed appropriate to apply in the proper, equitable context. It is well established that the equitable remedy of rescission is not granted as a matter of right and will not be granted when it would accomplish an inequitable result. See, e.g., *Schnitz v Grand River Avenue Dev Co*, 271 Mich 253, 257; 259 NW 900 (1935); *Johnson v QFD, Inc*, 292 Mich App 359, 375; 807 NW2d 719 (2011); *McMullen v Joldersma*, 174 Mich App 207, 219; 435 NW2d 428 (1988). Thus, the remedy of rescission carries with it the idea that the result achieved is to be an equitable one. In other words, there is room within the concept of rescission for balancing the equities, which ostensibly extends to considering the fact that an innocent third party is involved and mandatory PIP benefits are at issue. I am not convinced that it is equitable in this case to allow an insurer to avoid paying statutorily mandated PIP benefits when the innocent, injured third party, absent another's fraud, would have been entitled to coverage under the policy. See *Morgan*, 411 Mich at 276-277. This is especially true when the no-fault act itself discusses mandatory benefits with no mention of limitations on or exceptions to that mandatory coverage.

Furthermore, I am not convinced that it is equitable to require the innocent third party otherwise covered by a policy to seek PIP benefits through the assigned claims plan in the event the insurance carrier claims fraud by the procurer and seeks rescission, as Sentinel contends should occur in this case. As Sentinel impliedly concedes in its briefing, the payment of benefits through the assigned claims plan might be unavailable for certain innocent third parties. And I note that statutory deadlines for giving notice of claimed PIP benefits could prevent an innocent third party, through no fault of his or her own, from receiving mandatory PIP benefits. Notably, a person claiming benefits through the assigned claims plan "shall notify" the Michigan Automobile Insurance Placement Facility (MAIPF) of his or her claim within one year. See MCL 500.3174;[25] MCL 500.3145(1).[26] See also *Bronson Meth-*

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[25] MCL 500.3174, which refers to timing deadlines for PIP benefits (MCL 500.3145(1)), provides:

> A person claiming through the assigned claims plan shall notify the Michigan automobile insurance placement facility of his or her claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The Michigan automobile insurance placement facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned. An action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later.

[26] MCL 500.3145(1) sets forth certain deadlines for commencing an action for the recovery of PIP benefits as follows:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the

odist Hosp v Allstate Ins Co, 286 Mich App 219, 225-226; 779 NW2d 304 (2009) (examining MCL 500.3145(1) and MCL 500.3174). I pose the following question: what happens when an innocent third party tries to obtain PIP benefits through the insurer listed on the policy, only to have that insurer subsequently rescind the policy because of fraud in which the innocent third party did not participate, and the innocent third party then misses the one-year deadline for notifying the MAIPF? At least one panel of this Court has held that unless notice is given to the MAIPF within one year of the accident, the claim is barred, even when the injured person first sought benefits from the insurer he or she thought was the correct insurer. See *Visner v Harris*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2012 (Docket Nos. 307506 and 307507), pp 3-4.[27] This bolsters the position that permitting the remedy of rescission of an insurance policy under which PIP benefits payable to innocent third parties are sought has the potential to work an inequitable result. More-

> accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

[27] Although unpublished decisions such as *Visner* are not binding precedent, they may be viewed as instructive or persuasive authority. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

over, allowing insurance companies to rescind their contracts with respect to PIP benefits owed to innocent third parties could encourage gamesmanship and delay tactics on the part of an insurer; insurance companies are assigned claims by the MAIPF, and waiting to rescind an insurance policy until after that claim deadline passes means fewer claims will be assigned by the MAIPF. This also runs afoul of the no-fault act's purpose of ensuring prompt and adequate payment for the types of injuries and losses encompassed under the category of PIP benefits. *Shavers*, 402 Mich at 578-579. Put simply, I do not agree that the equitable remedy of rescission trumps the equitable remedy of the innocent-third-party rule such that it is appropriate to apply rescission to first-party statutorily mandated PIP benefits, and I decline to extend *Titan* in that fashion.

The majority opinion indicates that it "decline[s] the invitation to legislate into existence an innocent-third-party rule that, thus far, the Legislature has chosen not to adopt." I first note that the equitable remedy of the innocent-third-party rule has barred claims for the equitable remedy of rescission with respect to PIP benefits and innocent third parties for more than 30 years, yet the Legislature has felt no need to tweak the no-fault act to set this Court straight. I also note that the Legislature has never adopted the equitable remedy of rescission when it comes to the no-fault act and statutorily entitled PIP benefits. Rather, it expressly states that no-fault PIP benefits are *mandatory*. That should rule the day when it comes to statutorily mandated PIP benefits.

VI. CONCLUSION

The differences that exist between this case and *Titan* are significant. For the reasons stated in this

opinion, I would conclude that *Titan* does not abrogate the innocent-third-party rule with respect to statutory, first-party PIP benefits, and I would not cast aside 30 years of this Court's precedent on the matter.

Accordingly, I would affirm the trial court's ruling to the extent it held that the innocent-third-party rule applied. However, I would hold that the trial court erred by concluding that plaintiff, as an innocent third party, could only recover PIP benefits up to the amount mandated by MCL 257.520. As discussed, that limitation is not applicable to this case.

LYLE SCHMIDT FARMS, LLC v MENDON TOWNSHIP

EQUITY TRUST COMPANY v SHERWOOD TOWNSHIP

Docket Nos. 326609, 326611, 327909, and 327916. Submitted June 9, 2016, at Lansing. Decided June 14, 2016, at 9:25 a.m.

In 2014, Lyle Schmidt Farms, LLC, and Equity Trust Co petitioned the Tax Tribunal (the MTT) for review of Mendon Township's and Sherwood Township's respective determinations that five separate parcels of property (Equity Trust owned two and Lyle Schmidt Farms, LLC, owned three), each of which was purchased in 2006 from Tony and Amy Wiegel, should not be assessed according to the parcels' 2004 values because the affidavits the Wiegels had filed in 2007 under MCL 211.27a(7)(o) and (8), indicating that the parcels had remained qualified agricultural property, were filed after the Wiegels no longer had any interest in the parcels. The MTT denied petitioners' appeals. Petitioners appealed the MTT's decisions in the Court of Appeals. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

Under the Michigan Constitution, Const 1963, art 9, § 3, and the General Property Tax Act, MCL 211.1 *et seq.*, annual increases in property valuation are limited to the rate of inflation or five percent, whichever is less, unless there is a transfer of ownership, as defined in MCL 211.27a(6), in which case this cap is lifted and the property must be reassessed pursuant to MCL 211.27a(3). Under MCL 211.27a(7)(o), certain transfers and conveyances are specifically excluded from the definition of transfer of ownership, including the transfer of qualified agricultural property, as defined in MCL 211.7dd(d), when the person to whom the qualified agricultural property is transferred files an affidavit with both the assessor of the local tax collecting unit and the register of deeds for the county in which the property is located, attesting that the qualified agricultural property will remain qualified agricultural property. MCL 211.27a(8) provides for recapping the taxable value of qualified agricultural property when an affidavit under MCL 211.27a(7)(o) is not filed within the year of the transfer of title of

the qualified agricultural property. Two conditions must both be met. First, the qualified agricultural property must have been qualified agricultural property for taxes levied in 1999 and each year after 1999. Second, the owner of the qualified agricultural property must file an affidavit with the assessor of the local tax collecting unit under MCL 211.27a(7)(o). MCL 211.27a(8) does not provide a definition of owner. Consulting the dictionary, "owner" means someone who has the right to possess, use, or convey something, or a person in whom one or more interests are vested. Because the definition of owner uses verbs that are in the present tense, the term "owner" in MCL 211.27a(8)(b) refers to the person who currently holds ownership rights in the property; the term does not encompass former owners. Accordingly, the MTT did not err by upholding respondents' denials of petitioners' requests to recap the value of the five parcels.

Affirmed.

TAXATION — PROPERTY — AGRICULTURAL PROPERTY — TRANSFERS OF OWNERSHIP — RECAPPING OF TAXABLE VALUE OF REAL PROPERTY.

To be entitled to a recapping of taxable value under MCL 211.27a(8) on qualified agricultural property as defined in MCL 211.7dd(d), the owner filing an affidavit under MCL 211.27a(8)(b) must be the person who currently holds ownership rights in the property at the time the affidavit is filed; former owners do not satisfy the requirement.

Miller Johnson (by *Daniel P. Perk*) for petitioners.

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

BOONSTRA, J. In Docket Nos. 326609 and 326611, petitioner Lyle Schmidt Farms, LLC (Schmidt Farm), appeals by right the Final Opinion and Judgment[s] in Lower Court Nos. 14-005344-TT and 14-005347-TT, entered March 11, 2015, in favor of respondent Mendon Township. In Docket Nos. 327909 and 327916, petitioners Equity Trust Company (Equity Trust) and Schmidt Farm appeal by right the Final Opinion and Judgment[s] in Lower Court Nos. 14-007565-TT and 14-005340-TT, entered June 12, 2015, in favor of

respondent Sherwood Township. This Court granted Equity Trust's motion to consolidate the appeals.[1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case concerns the ad valorem tax valuation of five parcels of real property located in Michigan. Parcels 75-010-034-008-00 and 75-010-033-012-00 are located on Prairie Corners Road in Mendon Township, which is in St. Joseph County. They consist of 34.3 and 76.3 acres, respectively, of vacant agricultural land. Parcel 75-010-032-007-00 is located on Wakeman Road in Mendon Township. It consists of 40.65 acres of vacant agricultural land. Parcels 12-010-027-200-001-00 and 12-010-027-200-010-00 are located on Milligan Road in Sherwood Township. They consist of 37.3 and 33.6 acres, respectively, of vacant agricultural land.

In 2003, the First National Bank of Three Rivers (National Bank) purchased all five of the parcels from Rex and Ann Croster through a foreclosure sale. On July 23, 2004, Tony and Amy Wiegel purchased the five parcels from National Bank. There is no dispute that when the Wiegels purchased the five parcels, all of the parcels were qualified agricultural property under MCL 211.7dd(d). However, during the time the Wiegels owned the parcels, they did not submit an affidavit in accordance with MCL 211.27a(7)(o), and therefore the July 23, 2004 transfer of the parcels to the Wiegels was considered a transfer of ownership under MCL 211.27a(6). Because of this transfer of ownership, the parcels were "uncapped," and respondents therefore assessed the taxable values of the parcels for the year

[1] *Equity Trust Co v Sherwood Twp*, unpublished order of the Court of Appeals, entered August 27, 2015 (Docket Nos. 327909, 327916, 326609, and 326611).

2005 according to the state equalized values of those parcels as authorized by MCL 211.27a(3). As a result, the taxable values of the parcels increased in the tax year 2005 by substantially more than five percent or the rate of inflation. On June 29, 2006, Equity Trust purchased parcels 12-010-027-200-010-00 and 12-010-027-200-010-00 from the Wiegels, and Schmidt Farm purchased the other three parcels from the Wiegels.

In 2006, Schmidt Farm and Equity Trust executed affidavits and filed them with the appropriate registers of deeds, attesting that the parcels remained qualified agricultural property under MCL 211.27a(7)(o). The taxable values of the parcels were, therefore, not uncapped in 2006 as a result of petitioners having purchased the property from the Wiegels. In 2007, the Wiegels executed and filed affidavits indicating that the parcels had remained qualified agricultural property after the Wiegels purchased them in 2004. The Wiegels possessed no ownership interest in the parcels at the time they executed and filed these affidavits.

In 2008, Schmidt Farm protested the then-current assessments of its three parcels before the Mendon Township Board of Review, and, according to Equity Trust,[2] Equity Trust protested the assessments of its two parcels before the Sherwood Township Board of Review, requesting that the taxable values of those parcels be reassessed, i.e., "recapped," according to their 2004 values. The boards of review denied these protests. Petitioners did not appeal the denials in the Michigan Tax Tribunal (MTT).

In 2014, petitioners again petitioned their respective townships' boards of review for reassessment of their parcels for the tax year 2014. Petitioners argued that

[2] No evidence of Equity Trust's 2008 petition to the Sherwood Township Board of Review is contained in the lower court record.

the taxable values of the five parcels should be recapped according to their 2004 taxable values because the Wiegels had submitted affidavits in accordance with MCL 211.27a(7)(o) and (8) with regard to the parcels. Respondents again denied the petitions.

Petitioners appealed in the MTT, again arguing that the taxable values of the five parcels should be assessed using their 2004 values because the Wiegels had submitted affidavits in accordance with MCL 211.27a(7)(o) and (8). Respondents argued that the Wiegels' purchase of the parcels and failure to file the relevant affidavits concerning qualified agricultural property uncapped the parcels, and that the Wiegels' 2007 affidavits did not require the parcels to be recapped at their 2004 values because the Wiegels lacked an interest in the parcels at the time they filed the affidavits.

The MTT denied all of petitioners' appeals. See *Equity Trust Co v Sherwood Twp*, unpublished opinion of the MTT (Docket No. 14-005340), issued June 12, 2015; *Equity Trust Co v Sherwood Twp*, unpublished opinion of the MTT (Docket No. 14-007565-R), issued June 12, 2015; *Lyle Schmidt Farm, LLC v Mendon Twp*, unpublished opinion of the MTT (Docket No. 14-005347), issued March 11, 2015; *Lyle Schmidt Farm, LLC v Mendon Twp*, unpublished opinion of the MTT (Docket No. 14-005344), issued March 11, 2015. The MTT held that the Wiegels did not meet the requirements of MCL 211.27a(8) because they were not owners of the parcels at the time they filed the affidavits.

Following the MTT's denials, the MTT also denied Equity Trust's postjudgment motion to add the tax year 2015 to its appeal concerning its two parcels. These appeals followed and were consolidated as described earlier.

II. STANDARD OF REVIEW

The Michigan Constitution provides for judicial review of administrative agency decisions. Const 1963, art 6, § 28. However, this Court's review of MTT decisions "is limited." *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). The MTT's "factual findings are final if they are supported by competent, material, and substantial evidence on the whole record. If facts are not disputed and fraud is not alleged, our review is limited to whether the Tax 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) (citations omitted). " 'Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion.' " *Galuszka v State Employees Retirement Sys*, 265 Mich App 34, 45; 693 NW2d 403 (2005), quoting *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 63; 678 NW2d 444 (2003). With regard to determining whether the MTT's factual findings are supported by competent, material, and substantial evidence, "[m]ore than a scintilla of evidence is required, although a preponderance of the evidence is not necessary." *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 28; 558 NW2d 444 (1996). However, to the extent that an appeal from a decision of the MTT requires this Court to construe a statutory provision or question of law, this Court's review is de novo. *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007); *Schwass v Riverton Twp*, 290 Mich App 220, 222; 800 NW2d 758 (2010).

III. ANALYSIS

Petitioners argue that the MTT erred by determining that MCL 211.27a(8)(b) allows only a current, not a

former, owner of qualified agricultural property to file an affidavit pursuant to MCL 211.27a(7)(o) and that because the Wiegels were former owners of the five parcels when they filed their 2007 affidavits, the parcels should have been recapped at 2004 values. We disagree.

All real property in Michigan is subject to ad valorem tax under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. One classification under MCL 211.34c of assessable real property is "[a]gricultural real property[, which] includes parcels used partially or wholly for agricultural operations, with or without buildings." MCL 211.34c(2)(a). "On or before the first Monday in March in each year, the assessor shall make and complete an assessment roll," which contains information such as "a full description of all the real property liable to be taxed," the assessor's estimate of "the true cash value and assessed value of every parcel of real property," and the assessor's calculation of "the tentative taxable value of every parcel of real property." MCL 211.24(a) through (c). A property's "true cash value" is "the price that could be obtained for the property at private sale . . . ." MCL 211.27(1). This Court has explained the process by which real property's taxable value is assessed as follows:

> Pursuant to the Michigan Constitution and the GPTA, property may not be assessed at more than 50 percent of its "true cash value," or fair market value. Additionally, [Article 9, § 3 of Michigan's 1963 Constitution][3] limits

[3] Const 1963, art 9, § 3 states as follows:

> For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article [defining the "General Price Level" as "the Consumer Price Index for the

> annual increases in property valuation for taxation purposes until ownership of the property is transferred. An assessment, or "taxable value," may not be annually increased at more than the rate of inflation or five percent, whichever is less. Because this limitation undervalues property in relation to market factors, a "state equalized valuation" is calculated and maintained to more accurately reflect property value increases. The Michigan Constitution permits the property's taxable value to be reassessed according to the following year's state equalized value upon the sale or transfer of the property. [*Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 696-697; 714 NW2d 392 (2006) (citations omitted).]

In other words, before ownership of property is transferred, its taxable value may increase no more than the lesser of the rate of inflation or five percent. *Id*.; Const 1963, art 9, § 3. However, "[u]pon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer." MCL 211.27a(3). This assessment of a property's value according to the state equalized valuation after a transfer of ownership is commonly referred to as the property's taxable value becoming "uncapped." See, e.g., *Klooster v Charlevoix*, 488 Mich 289, 297; 795 NW2d 578 (2011) ("After certain 'transfer[s] of ownership' occur, however, property becomes uncapped and thus subject to reassessment based on actual property value."), quoting MCL 211.27a(3) (alteration in *Klooster*).

A "transfer of ownership" under the GPTA is "the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of

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United States as defined and officially reported by the United States Department of Labor"], or 5 percent, whichever is less until ownership of the parcel of property is transferred.

which is substantially equal to the value of the fee interest." MCL 211.27a(6). However, a transfer of ownership does not include

> [a] transfer of qualified agricultural property, if the person to whom the qualified agricultural property is transferred files an affidavit with the assessor of the local tax collecting unit in which the qualified agricultural property is located and with the register of deeds for the county in which the qualified agricultural property is located attesting that the qualified agricultural property will remain qualified agricultural property. [MCL 211.27a(7)(o).][4]

" 'Qualified agricultural property' means unoccupied property and related buildings classified as agricultural . . . ." MCL 211.7dd(d).

In other words, when title to qualified agricultural property is conveyed, there is no transfer of ownership of the property under the GPTA, and therefore no uncapping, if "the person to whom the qualified agricultural property is transferred files an affidavit . . . attesting that the qualified agricultural property will remain qualified agricultural property." MCL 211.27a(7)(o). Further, MCL 211.27a(8) provides for "recapping" the taxable value of qualified agricultural property when an affidavit under MCL 211.27a(7)(o) is not filed within the year of the transfer of title of the qualified agricultural property, but is filed later:

> If all of the following conditions are satisfied, the local tax collecting unit shall revise the taxable value of qualified agricultural property taxable on the tax roll in the possession of that local tax collecting unit to the taxable value that qualified agricultural property would have had if there had been no transfer of ownership of that qualified

[4] Before December 22, 2015, the passage from MCL 211.27a(7)(o) was contained in MCL 211.27a(7)(n). 2015 PA 243.

> agricultural property since December 31, 1999 and there had been no adjustment of that qualified agricultural property's taxable value under subsection (3) since December 31, 1999:
>
> (a) The qualified agricultural property was qualified agricultural property for taxes levied in 1999 and each year after 1999.
>
> (b) The owner of the qualified agricultural property files an affidavit with the assessor of the local tax collecting unit under subsection (7)(o).

However, even if qualified agricultural property becomes recapped, the owner of that property is not entitled to a refund of property taxes collected before the recapping occurred. MCL 211.27a(9).

At issue here is whether the Wiegels' affidavits satisfy MCL 211.27a(8). We conclude that the MTT did not err by determining that they did not. The primary goal of statutory construction is to determine the intent of the Legislature by reasonably considering 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 looks at the specific language of the statute. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 177; 617 NW2d 735 (2000). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State*, 489 Mich 194, 217-218; 801 NW2d 35 (2011) (quotation marks and citation omitted). "The words used by the Legislature are given their common and ordinary meaning." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012).

MCL 211.27a(8) provides that, as long as *all* of its enumerated conditions are satisfied, the taxable value of a parcel shall be recapped as if there had been no transfer of ownership of the parcel since December 31, 1999, and no consequent uncapping of the parcel's taxable value since that date. See *Gauntlett*, 242 Mich App at 177; see also *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994) ("[T]here is no broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions."). The parties do not dispute that the parcels are qualified agricultural property, nor is there a dispute that the Wiegels filed affidavits indicating that the parcels were qualified agricultural property. The only dispute is whether the Wiegels were "owners" of the parcels when they filed their affidavits, i.e., whether the term "owner" as used in the statute encompasses former as well as current owners.

MCL 211.27a(11) defines various terms used in MCL 211.27a, but the term "owner" is not among those statutorily defined terms. This Court may consult a dictionary to define terms that are undefined in the statute. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). *Black's Law Dictionary* (10th ed) defines an owner as "[s]omeone who has the right to possess, use, and convey something; a person in whom one or more interests are vested." See also *People v Beam*, 244 Mich App 103, 109; 624 NW2d 764 (2000), quoting *Black's Law Dictionary* (7th ed) ("An 'owner' is defined as '[o]ne who has the right to possess, use, and convey something.' "); *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 538 n 2; 676 NW2d 616 (2004) (CAVANAGH, J., concurring in part and dissenting in part) (quoting *Black's Law Dictionary* (7th ed) for the definition of "owner"). Therefore, an owner is "[s]omeone who *has* the right to possess, use, and convey

something; a person in whom one or more interests *are* vested." *Black's Law Dictionary* (10th ed) (emphasis added). The fact that the verbs in the definition of the word "owner" are in the present tense means that the term "owner" refers to a condition that is " 'being, existing, or occurring at this time or now[.]' " *Deschaine v St Germain*, 256 Mich App 665, 672; 671 NW2d 79 (2003), quoting *Random House Webster's College Dictionary* (2001) (defining the term "present tense"). Accordingly, contrary to petitioners' argument that MCL 211.27a(8)(b) encompasses owners who used to own property—i.e., former owners of property—the common and ordinary meaning of "[t]he owner of the qualified agricultural property," MCL 211.27a(8)(b), is the person who *currently* holds ownership rights in the property.

Therefore, we conclude that the MTT did not err by concluding that MCL 211.27a(8)(b) allows only a current, not a former, owner of qualified agricultural property to file an affidavit under MCL 211.27a(7)(o). See *Koontz*, 466 Mich at 312; *Black's Law Dictionary* (10th ed). There is no dispute that the Wiegels sold the five parcels to petitioners in 2006, and that after the Wiegels sold the parcels they no longer had "the right to possess, use, and convey" the parcels. *Black's Law Dictionary* (10th ed). Indeed, petitioners do not dispute that the Wiegels did not currently own the five parcels when they filed their 2007 affidavits. Therefore, the MTT's finding that the Wiegels did not own the parcels when they filed the affidavits is "supported by competent, material, and substantial evidence on the whole record." *Mich Props, LLC*, 491 Mich at 527. Because the Wiegels were not the owners of the parcels when they filed the affidavits, their affidavits did not satisfy MCL 211.27a(8)(b), see *Koontz*, 466 Mich at 312; *Black's Law Dictionary* (10th ed), and the MTT did not

err by upholding respondents' denials of petitioners' request to recap the parcels at issue, *Mich Props, LLC*, 491 Mich at 527-528.

Further, petitioners' reference to Revenue Administrative Bulletin 2006-7 does not dictate a different result. Pursuant to MCL 205.3(f), the Treasury Department "may periodically issue bulletins that index and explain current department interpretations of current state tax laws." MCL 205.3(f). Such a bulletin "is only an interpretation of a statute and does not have the force of law[.]" *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 100; 815 NW2d 811 (2012). Although "agency interpretations are entitled to respectful consideration, . . . they are not binding on courts and cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008). Bulletin 2006-7 refers to a "purchaser," rather than an "owner," filing an affidavit. We do not interpret the bulletin as dispensing with the ownership requirement of the statute, and, in any event, such an interpretation would conflict with the plain meaning of the statute. *Complaint of Rovas*, 482 Mich at 117-118.

Similarly, petitioners' reference to the legislative history of MCL 211.27a(8) is unpersuasive. Our Supreme Court has held that "in Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001). Further, nothing in Senate Legislative Analysis, SB 709, September 13, 2000, cited by petitioners, contradicts the conclusion that MCL 211.27a(8)(b) does not encompass former property owners.

Finally, the MTT's decision in *William White Trust v Mendon Twp*, unpublished proposed opinion and judgment of the MTT (Docket No. 347179), entered February 22, 2010, adopted by final judgment June 29, 2010, in addition to being not binding on this Court, see Const 1963, art 6, § 28, does not conflict with the MTT's decisions in this case. *William White Trust* did not concern a former owner of property filing an affidavit under MCL 211.27a(8)(b).

In sum, the MTT properly determined that MCL 211.27a(8)(b) allows only a current, not a former, owner of qualified agricultural property to file an affidavit under MCL 211.27a(7)(o). The MTT's finding that the Wiegels were former, not current, owners of the five parcels when they filed their 2007 affidavits was supported by competent, material, and substantial evidence. Therefore, the MTT properly upheld respondents' denials of petitioners' request to recap the five parcels at their 2004 taxable values. *Mich Props, LLC*, 491 Mich at 527-528.

Affirmed.

MARKEY, P.J., and OWENS, J., concurred with BOONSTRA, J.